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Chair's Column

HHJ Edward Hess

Chair of the Editorial Board of the FRJ, Deputy National Lead Judge of the Financial Remedies Court



The FRJ Financial Remedies Reform Corner

Along with many other individuals and organisations, I spent a chunk of the summer working on responses to the government's important consultation paper 'A Fairer End to Relationships', the deadline for responses being 14 August 2026. The huge interest in this topic is fully reflected in the FRJ's 'FR Reform Corner' on our website. Here we have gathered together a collection of excellent papers inspired by the consultation paper, and a wide range of views are expressed on the general principles and the finer details engaged by the proposals, including weighty contributions from Professor David Hodson, Baroness Deech and Dr Anna Heenan. I understand the government has received overall about 3,500 responses from interested parties and, with a change of responsible minister in the summer 2026 government re-shuffle, it is reasonable to expect a fairly long lead time to the announcement of concrete decisions. In my own paper I welcomed the introduction of long-awaited redistributive remedies for former cohabitants, but focused on the resource issues involved for the Financial Remedies Court (FRC) and, whatever decisions are made, it is important for the government to provide proper and adequate resources to fund the administrative and judicial resources to make sure they can work properly.

The late Sir James Munby and 'The Astonishing Fate of *Scott v Scott* (1911–1913)'

On 6 October 2026, a packed Temple Church celebrated the admirable life of Sir James Munby, who died on 1 January 2026. Among the eulogies was a powerful and funny contribution from Sir Nicholas Mostyn, and he drew attention to what may be the last work from the pen of the late and great former President on the subject of transparency in the FRC – 'The Astonishing Fate of *Scott v Scott* (1911–1913)'. The powerful 92-page treatise by Sir James Munby has been published posthumously with the assistance of Sir Nicholas Mostyn and now finds its public space on the FRJ Blog page for 1 October 2026. This is a timely intervention as the Court of Appeal will be considering the important and controversial issues of transparency and anonymity at a hearing in November 2026.

The ongoing problem of excessive costs spending

This column has previously raised the issue of excessive costs spending in financial remedies proceedings and I remain very conscious that we seem a long way away from finding an effective solution. The government's financial remedy reforms don't really address the issues. It is important, therefore, that the FRJ continues to provide a forum for lively discussion of this issue. In this issue we present two persuasive articles on the subject to contribute to the debate. First, 'Costs in Financial Remedy Proceedings: Time for Greater Discipline?' by District Judge Peter Hatvany. Second, 'The Case for *Calderbank*: A Procedural Reform Too Far?' by Tom Quinn and Francesca Skakel from Birketts Solicitors. They are both well worth a read.

The retirement of HHJ Stuart Farquhar

I was sad to receive the news early this year of the imminent retirement of Stuart Farquhar from the Circuit Bench and from his position as Lead Judge of the Kent, Surrey and Sussex FRC zone. Stuart has now departed and is (I trust) utilising his considerable judicial skills conducting private FDRs together with some sitting in retirement. I am pleased that in this issue's interview, we have been able to capture some of his retirement thoughts, with most of which I very much agree. Stuart (as Lead Judge and as Chair of the very impressive Farquhar Committee) has been a considerable success and a major FRC figure of substance and his presence on the bench will be much missed. I will miss his presence also at FRC judicial events where his keen wit and sense of humour have always been much in evidence.

FRJ essay competition prize winners

Earlier this year the FRJ was pleased to run another essay competition for law students aspiring to a career in the world of financial remedies. Entrants were required to write



1,500 words on the topical subject: 'To what extent should domestic abuse be taken into account in financial remedy proceedings?'. I was delighted to read the winning entries and to invite the two winners – Nia Brown and Molly Fay – to spend a court day with me in the summer in the Central Family Court. I was hugely impressed by their knowledge of and interest in the subject of financial remedies in general and wish them all the best for their future search for pupillage and beyond.

Farewell to HHJ Clive Million

The death of Clive Million in the summer at an all too young age was very rapid and shocking. He was a keen financial remedies specialist from his days as a District Judge at the Principal Registry of the Family Division (DJ PRFD) and an inspiring presence when I began my judicial days in that position (first as a deputy and later full-time). The rather unannounced disappearance of the PRFD in 2014 (a casualty of the invention of the single family court) caused a great deal of pain and sadness amongst those who worked in it and (it may not be widely known) the surviving individuals who held the position DJ PRFD meet to this day for an annual dinner, in part to lament the loss of this great institution. Clive's always ebullient and entertaining presence at these gatherings will be much missed. I am pleased that we have been able to carry in this issue of the FRJ a tribute to Clive by (former Senior DJ PRFD and later HHJ) Philip Waller.

A Fairer End to Relationships? What the Reform Debate Tells Us about Families, Fairness and the Future of Separation Law – A Personal Review of the Responses from a Part-time Judge and Hybrid Mediator

David Emmerson OBE

Partner, Anthony Gold Solicitors LLP



When relationships end, the law is often asked to do something very difficult. It must untangle money, property, pensions, children's needs, caring roles, vulnerability, and sometimes abuse, at precisely the moment when trust and communication may have broken down. The government's consultation, 'A Fairer End to Relationships', is therefore more than a technical review of family finance law. It is a test of how modern family law should respond to the reality of family life in England and Wales. The governing statute for finances on divorce was introduced some 56 years ago (originally introduced in 1970 and consolidated in 1973 and the only subsequent amendments in 1984). Is there need for reform and how has it stood the test of time? Has it adapted to modern relationships?

Published in June 2026 and closing on 14 August 2026, the consultation brought together three connected areas of reform: financial remedies on divorce and civil partnership dissolution, financial protection for separating cohabitants, and inheritance provision for cohabitants where one partner dies without a will. The government described its aim as making financial provision at the end of relationships clearer, more consistent and better aligned with modern family life. It also proposed a 'codification-plus' approach to divorce finance, being one of the four models that had been proposed by the Law Commission, introducing statutory principles of sharing and needs, alongside possible qualifying nuptial agreements and new rights for eligible cohabitants.[1]

One of the advantages of working both as a judge and as a mediator is seeing family disputes from different perspectives. As a judge, I see cases that have reached the point where agreement has become seemingly impossible. I see parties entrenched in positions that often bear the scars of years of conflict, mistrust and sometimes abuse. As a mediator, particularly in hybrid mediation where lawyers and other professionals can be involved within the process, I often see something different. Here, the parties can still be in conflict, but the process helps them find a way forward through assisted dialogue. I see people who may still be able to find solutions if the process is designed carefully enough to manage power imbalances and create a safe environment for discussion.

What both roles have taught me is that many of the consultation's most important questions cannot be answered solely by reference to legal doctrine. They must be tested against the reality of family life.

The law is often dealing with relationships in which one person earned while the other cared for children, relationships in which one partner controlled the finances, relationships in which one party had little knowledge of the family's assets, or relationships in which coercive control shaped almost every aspect of decision-making. Those realities should sit at the heart of any reform programme.

In this article, I focus on the responses of four well-respected organisations, each with an in-depth practical knowledge of family law, family relationships and the processes used to resolve disputes. They are Rights of Women (RoW); the Family Solutions Group (FSG) – a multi-disciplinary body comprising solicitors, barristers, mediators, psychologists, academics and judges; Resolution – the organisation for family professionals; and the Family Law Bar Association (FLBA) – the Bar association for specialist family advocates and fee-paid judges. Also included in the analysis is a series of contributions by different authors for the *Financial Remedies Journal* (FRJ) covering the consultation. Their respective responses can be found here:

- Rights of Women: www.rightsofwomen.org.uk/wp-content/uploads/2026/08/Rights-of-Women-response-to-FEtR-Consultation.pdf?swcfpc=1
- Family Solutions Group: www.familysolutionsgroup.co.uk/wp-content/uploads/2026/08/Family-Solutions-Group-Consultation-Submission-14.8.26.pdf
- Resolution: https://resolution.org.uk/wp-content/uploads/2026/08/A-fairer-end-to-relationships-Resolution-Response-FINAL.pdf

- Family Law Bar Association: www.flba.co.uk/flba-responds-to-fairer-end-to-relationships-consultation
- *Financial Remedies Journal*: https://financialremediesjournal.com/the-fairer-end-to-relationships-consultation-our-complete-coverage/

The responses and commentary from Resolution, RoW, FSG, FLBA and contributors to the FRJ show a striking degree of agreement that reform is needed. They also reveal important differences about how far codification should go, how much discretion judges should retain, how domestic abuse should affect outcomes, and whether preserving the distinct status of marriage and civil partnership risks undermining the protection of vulnerable cohabitants and children.

The first common theme: reform is needed, but clarity must not become rigidity

There is broad agreement that the present law is too difficult for ordinary people to understand. Resolution supports reform across the consultation's three areas and broadly supports the scheme proposed, subject to practical 'fine-tuning'. It emphasises that its members regularly see the consequences of legal uncertainty, particularly where people cannot afford advice or assume they have rights that do not exist.

RoW also welcomes reform, particularly where it improves clarity, safety and fairness for women, children and victim-survivors of domestic abuse. However, it cautions that codification must not become a rigid rule-book. In its view, clear statutory principles are helpful only if they preserve sufficient judicial discretion to respond to the facts of individual cases, especially where domestic abuse or economic abuse has distorted the financial picture.

The FSG broadly supports reform and the government's codification-plus approach. However, it argues strongly that any new framework should preserve judicial discretion while placing children's welfare at the centre of decision-making. The FSG supports greater clarity and accessibility but warns that artificial distinctions, particularly between 'essential' and 'discretionary' needs, risk increasing disagreement rather than reducing it. The Group's response consistently approaches reform through a child-centred lens and argues that legal reform should be judged by whether it improves outcomes for children experiencing family separation.

The FLBA reaches a similar conclusion. It says that fairness should be the guiding principle and the prism through which reform is viewed. There is no 'normal' family case, and an over-prescriptive statute may produce predictable outcomes for some families while causing serious injustice in others. It therefore supports codification-plus only if the court retains sufficient discretion to survey the overall result and correct an outcome that would otherwise be unfair. This places it close to Resolution, RoW and the FSG, although its emphasis is particularly forensic when considering matrimonial and non-matrimonial property (and the potential for 'matrimonialisation' of the latter) with a particular consideration of mixed assets, businesses, inheritances, post-separation accrual, different asset qualities, relationship-generated disadvantage and cases where neither party's needs can fully be met (FLBA, paras 7–11 and 26–83).

The most significant themes that occur to me from the FSG submission are:

- Child welfare should be the primary, not merely the first, consideration in financial remedy reform.
- Reform should remain a codification-plus model, preserving judicial discretion while providing greater structure and certainty.
- The proposed hierarchy of needs risks creating unnecessary disputes and should not distinguish between 'essential' and 'discretionary' needs.
- Children should not experience materially different outcomes because their parents were unmarried. This is a theme that RoW lead on too.
- Greater emphasis should be placed on early resolution, non-court dispute resolution (NCDR), mediation and child-focused processes.
- Public education is essential to dispel myths such as common law marriage.
- Financial reform should be assessed through the lens of the child's welfare, emotional well-being and long-term development, not solely adult financial entitlements.

The need for reform is also a major theme in the FRJ coverage. It has published a variety of articles on the reforms by practitioners from a variety of standpoints and experience. Its collected articles include commentary on the overall shape of the consultation, the hierarchy of needs, domestic abuse, children, cohabitation reform and qualifying nuptial agreements.

The shared message across all of these responses is therefore not 'leave the law alone' but reform it carefully. A statute that merely replaces flexible case law with hard-edged assumptions may make the law look clearer, while producing less fair outcomes in real life.

Equal sharing: a useful starting point, but not always a fair destination

The government's consultation identifies the sharing and needs principles as the foundation for financial remedies reform. One of the central proposals is to codify the sharing principle. In simple terms, this means recognising that matrimonial property should usually be shared equally. This is not as straightforward as it seems, as illustrated by the Supreme Court case of *Standish v Standish* [2025] UKSC 26.[2] Though the subject assets of the case were found to be non-matrimonialised and therefore not for sharing, if it had been established that they were 'matrimonial' is the division required to be equal, or the starting point equal and the section 25 factors applied? There needs to be clarity. This is discussed in more detail by Nicholas Allen KC in 'Standish One Year On – Is There Agreement As to What It Means?'[3]

Resolution broadly supports equal sharing as a starting point, but strongly resists any suggestion that equal sharing must always mean a 50:50 division of every matrimonial asset. It proposes wording that would make equality a starting point within an overall objective of fairness, rather than an inflexible rule. Resolution gives examples where

equality by value may not be fair, including cases involving businesses, partly matrimonial assets, post-separation endeavour, domestic abuse, or cases where needs require a different outcome.

RoW goes further in its critique of the government's formulation. It answers 'no' to the proposed objective if that objective is understood as dividing matrimonial assets equally. Its concern is that equal division of assets does not necessarily deliver equal benefit. A partner who has given up work or reduced earning capacity to care for children may receive half the capital but still face a much weaker financial future than the higher-earning partner.

This is an important public point. Fairness is not just about what is in the bank account on the day of separation. It is also about how the relationship shaped each person's future financial life. A parent who has stepped back from paid work may have lost career progression, pension growth and earning capacity. A survivor of economic abuse may have no assets in their own name, even after a long relationship. They may also have a weaker earning capacity because of the effects of the coercive and controlling behaviour and economic abuse, which are not easily quantified. But as the case of *Waggott v Waggott* [2018] EWCA Civ 727 confirms, earning capacity is not a matrimonial asset and is therefore not subject to the sharing principle.

An apparently equal division may therefore conceal a very unequal future, especially where responsibilities forged during the relationship continue after separation.

The likely consensus is that equal sharing should remain a powerful and comprehensible benchmark. The conflict lies in whether it should be expressed as the objective itself, or as one route to fairness. Resolution and RoW both prefer the latter.

The FLBA broadly agrees that wealth clearly generated by marital endeavour should normally be shared equally, but strongly rejects categorical language. It identifies businesses that straddle the marriage, homes introduced by one spouse, mingled assets, inheritances used for the family, deferred remuneration and cases in which one spouse retains risky or illiquid assets while the other receives cash or property. It also treats relationship-generated disadvantage as a reason why equal capital may not address an unequal future. The FLBA is therefore close to Resolution's position and overlaps with RoW's concern that equal division does not necessarily produce equal benefit. Its distinctive contribution is the detailed, asset-by-asset, explanation of why a mandatory 50:50 rule could fail (FLBA, paras 26–60).

In my experience as a judge, solutions-focused lawyer and mediator, the starting point may well be an equal share of the matrimonial assets. Once the statutory factors are taken into account, particularly needs, children, responsibilities and earning capacity, the outcome is often not an equal division, but it may nevertheless be a fair one.

Needs: the danger of creating a hierarchy that shrinks fairness

The government proposes that the court should consider needs in a structured way, starting with children's welfare, then capital and income needs including housing and pension needs, and then further discretionary needs where resources allow.[4]

At first glance, that may appear sensible. Most families do not have enough money to meet everyone's aspirations. Prioritising children, housing, income and retirement provision is intuitively attractive. But several responses and commentators identify a real risk: once needs are put into hierarchical categories, arguments may shift from 'What is fair?' to 'What is essential?'.

Resolution is particularly concerned that separating needs into different stages could make settlement harder and encourage financially stronger parties to argue that only basic needs should be met. It warns that this could be especially damaging in modest asset cases and could echo older approaches that limited awards to 'reasonable requirements', an approach heavily criticised in the modern law of financial remedies. Resolution instead suggests a two-stage approach: first, the welfare of children; second, capital and income needs, including housing, income and retirement, assessed in the context of all relevant factors.

RoW's concerns are related but framed through substantive fairness and safety. It argues that the law must expressly recognise relationship-generated economic disparity, including the long-term financial consequences of caring responsibilities, interrupted careers and economic abuse. It is wary of any model that leaves the economically weaker partner with only a narrow version of needs while the other partner retains the benefit of earning capacity built during the relationship.

The FSG also opposes the government's proposed three-stage hierarchy. It argues that attempts to distinguish between essential and discretionary needs are unlikely to work in practice because needs are highly contextual. What may appear discretionary for one family may be integral to a child's welfare in another. The FSG considers that dividing needs into categories risks generating further disputes and increasing parental conflict, contrary to the consultation's objective of improving certainty.

The FLBA is equally firm in opposing the proposed three-stage hierarchy. It agrees that children's welfare should receive first consideration, but says that separating 'basic' from 'discretionary' needs will generate argument, require evidence and increase cost. A need is contextual. Private education, suitable housing, retirement provision, disability-related expenditure or ordinary aspects of a child's life cannot sensibly be classified in the abstract. The label 'discretionary' may invite the financially stronger party to minimise the other's needs. In this respect there is unusually strong convergence between Resolution, the FSG and the FLBA, with RoW reaching a similar conclusion through its focus on substantive inequality (FLBA, paras 84–112).

The FRJ coverage also identifies the 'hierarchy of needs' as a major area of debate, including specific commentary questioning whether the distinction between different categories of need can be policed easily in practice.

For the public, the concern is this: a hierarchy designed to improve clarity may instead create new disputes. Is a child's stable home an essential need or a lifestyle need? Is pension provision a present need, a future need, or a discretionary one? Is a holiday with children a luxury in one family but part of ordinary life in another? Does a focus on the children's needs also mean private education costs are

put as greater priority rather than securing capital for the financially weaker party. It should not in my view.

The law may need structure, but it must avoid a vocabulary that invites people to minimise the other person's needs.

Children: everyone agrees they matter, but how much does the law really protect them?

There is strong agreement that children should be at the centre of reform. The government identifies fair outcomes for children as one of the consultation's underpinning principles.

If there is one issue on which the FSG response is particularly distinctive, it is its insistence that child welfare should become the primary organising principle of any reformed system. The FSG proposes that welfare should be given a broader statutory definition extending beyond financial needs to encompass emotional, psychological, environmental and safeguarding considerations. It further proposes restructuring the statutory checklist itself so that child-focused factors appear before adult-focused factors. In effect, the Group argues that family finance law should become far more explicitly child-centred than it currently is.

On page 9 of its report, the FSG proposes an amendment to s 25 Matrimonial Causes Act 1973 as follows:

> 'As stated above, we agree that children's welfare belongs at Stage 1 of the needs' hierarchy, ahead of the adults' capital, income and discretionary needs (which we recommend are not segregated). However, we are concerned that sequencing alone will not deliver the shift in practice that this reform is intended to achieve.
>
> There is a real risk that, under the proposed model, Stage 1 becomes a similarly brief "gateway" nominally first, but not subjected to the same rigorous, evidenced analysis that Stages 2 and 3 (or as revised) will attract for the adults' needs. This, we suggest, is what routinely happens under the current legislation.
>
> Sequencing addresses order; it does not by itself address depth of scrutiny.
>
> As referred to at 7 above, in current practice, the s25(3) child related factors are rarely referred to, and the court largely focuses on the children through the detailed s25(2) adult factors. Although there is reference to "first consideration … to the welfare" of a child in s25(1), this is interpreted in practice with reference to the child's housing and income needs, without there being wider considerations of other critical elements of their overall welfare.
>
> We therefore recommend an amendment to Section 25 itself rather than relying on procedural ordering alone:
>
> We propose merging the adult and children's factors of s25(2) and s25(3) into a single, unified, child-first checklist, rather than treating stage 1 as a standalone preliminary step ahead of a separately detailed adult analysis.
>
> We believe the checklist should begin with s25(3) child-focussed factors before including the existing s25(2) factors. It does not make sense that they are reversed given that s25(1) is primarily about the children and then adult factors are listed before the child-focussed factors are listed thereafter.
>
> We propose adding extra factors to those in the current law in s25(3) as set out below.
>
> A worked illustration could be:
>
> > ".. primary consideration being given to the welfare while a minor of any child of the family who has not attained the age of eighteen… [CURRENT LAW SAVE FOR 'PRIMARY' RATHER THAN 'FIRST' CONSIDERATION].
> >
> > Then as regards the exercise of the court's powers under the Act: The court shall in particular have regard to the following matters, with primary consideration being given to (a)–(f) [child factors]: [wording mirrors the existing s25(3), but with additional wording in CAPITALS]
> >
> > (a) the financial needs of the child
> >
> > (b) The income, earning capacity (if any), property and other financial resources of the child
> >
> > (c) Any physical or mental disability OR OTHER SPECIAL NEED of the child
> >
> > (d) The manner in which he was being and which the parties to the marriage expected him to be educated or trained
> >
> > (e) THE LIKELY EFFECT OF ANY CHANGE IN CIRCUMSTANCES ON THE CHILDREN;
> >
> > (f) THE PHYSICAL, EDUCATIONAL AND EMOTIONAL NEEDS OF THE CHILDREN;
> >
> > …. Then continue with adult factors as set out in current s25(2)(a)–(h). We also recommend an addition to the existing s 25(2)(b), so that after 'responsibilities' it should be: 'INCLUDING THE PARENTAL RESPONSIBILITY TO THEIR CHILDREN'."
>
> In addition, we propose one further factor, as raised in the consultation dealing with compensation/the economic disadvantage of the parties e.g.
>
> > "ANY ECONOMIC OR FINANCIAL DISADVANTAGE SUFFERED AS A RESULT OF THE RELATIONSHIP, INCLUDING THE IMPACT OF CHILDCARE AND CARING RESPONSIBILITIES ON EARNING CAPACITY AND FUTURE CAREER."
>
> Without this structural integration, we are concerned that the first stage risks becoming a box-ticking exercise in practice, even where the policy intention is sound. Bringing up the child-focused factors before the adult factors would also bring the consideration to child welfare more to the fore.'

RoW makes a sharper equality point: children should not experience different financial outcomes because their parents were married, in a civil partnership, cohabiting, or had opted out of a statutory framework. This is a significant challenge to the government's desire to preserve the distinct status of marriage. If children's welfare is genuinely the first principle, it is difficult to justify children being less financially protected because of their parents' legal status.

Resolution also warns that any needs framework must be careful not to produce outcomes that discriminate against children by creating a marked disparity between the child's standard of living in each parent's home. The availability of sports channels, Netflix and Amazon Prime in one household and not the other can be an influencing factor

for children in child arrangement decisions, even if it should not be.

This is one of the most important tensions in the consultation. The government wants to protect children and vulnerable people, but also to preserve marriage as legally distinct. Those aims may be compatible in many cases, but not all. Where a child has lived in a financially interdependent cohabiting family for many years, the child's need for housing, stability and continuity may look very similar to that of a child whose parents were married.

The FLBA agrees that children's welfare should have hierarchical prominence and supports removing any minimum cohabitation period where there is a child. It highlights the limits and complexity of the present Schedule 1 jurisdiction, including reversionary housing provision, parallel Trusts of Land and Appointment of Trustees Act 1996 (TLATA) litigation and tax complications. It does not go as far as the FSG's proposal to make child welfare the primary organising principle of the entire statute, or RoW's proposition that children should never experience weaker outcomes because their parents were unmarried. It nevertheless repeatedly warns against reform that harms children in practice (FLBA, paras 95–108 and 226–229).

I cannot think of many financial remedy cases where, at the conclusion, there was a strong feeling that the judge lacked the range of powers to act in the best interests of the children. There have, however, been many cases involving child arrangements under s 8 Children Act 1989 that have been dependent on outcomes of financial remedy proceedings and, indeed, vice versa. For example, a housing need cannot be defined until child arrangements are settled or a relocation determination made until the finances are sorted.

Child arrangements under CA 1989, s 8 and financial remedy under the MCA 1973 are always separate proceedings with their own timetable, outcomes and often a different judge. There is a compelling case in many instances for these decisions to be made at the same time by the same judge dealing with one set of facts even if in practice welfare decisions are made first in the judge's thought processes. Fact-findings and the role of Cafcass reports would remain essential and come before final decisions are made.

Resolution's famous Code of Practice, which aims to reduce conflict in separation cases, requires its members to send separate letters dealing with children and financial issues. The reasoning being that one should not be seen to be bargaining finances at the expense of what is in the children's welfare. Yet the NCDR community, ever evolving and fast growing, has dealt with both together for many years. This happens in mediation, collaborative practice, early neutral evaluations and in arbitration where the arbitrator is dual qualified. It works very well.

Whilst not suitable in every case by any means, the FPR could provide for a judge to make a decision at a directions hearing, after hearing representations, that section 8 and financial remedy issues are heard together by the same judge and directions timetabled accordingly. Such a move of course gives the court no new factors but could save court resources and well as litigant resources, but the main benefit would be better and quicker outcomes.

Whilst there is common ground that the focus on children in financial cases should be more prominent, it carries a risk that the financially dominant party is reluctant to settle a case with reasonable income and capital going to the weaker party but instead argues that such capital and income should go to the children. I have often been involved in cases where the husband is proposing that 'his share' of the family home should be transferred to the children rather than the wife. The focus on the children should not be at the expense of the weaker financial party receiving a fair and secure settlement.

Domestic abuse and economic abuse: a common priority, but with different emphases

Domestic abuse is one of the clearest common themes across the responses. The government itself identifies domestic abuse, including economic abuse, as a key issue in both divorce and cohabitation reform.

Resolution refers to domestic abuse repeatedly in its response. It warns that equal sharing, matrimonialisation and needs cannot be considered in isolation from coercive control or economic abuse. For example, a perpetrator may preserve assets in their own name, spend matrimonial money, or use the litigation process to continue control. Resolution also refers to its October 2024 report,[5] which found that around 80% of professionals believed domestic abuse, and specifically economic abuse, was not sufficiently taken into account in financial remedy proceedings.

RoW places domestic abuse at the heart of its response. It argues that family law cannot be understood without understanding domestic abuse, and that legislative reform must be accompanied by specialist training in domestic abuse and trauma-informed practice for judges, practitioners and professionals across the family justice system. It also stresses intersectional barriers faced by Black and minoritised women, migrant women and survivors experiencing forms of abuse such as immigration abuse, 'honour'-based abuse and dowry-related abuse.

The common ground is strong: domestic abuse must be expressly addressed. The difference is in emphasis. RoW calls for a framework built around safety, trauma-informed practice and substantive protection. Resolution focuses on ensuring that abuse is properly reflected within financial principles and case management. The FSG highlights practical workability and the need to avoid process-driven harm.

Over the past few years, all family law judges have had intensive training on understanding and recognising domestic abuse and its effects. Decisions the judges make now should be better informed. If there is a change in the law about the emphasis of domestic abuse and how it is taken into account, then there will need to be some forceful judgments from the higher courts as to how this change will affect outcomes, particularly as it might be argued that there is not wholesale consensus amongst the higher judiciary at present in relation to (for example) the need (or not) for measurable economic consequences (a point I consider further below). Without these judicial leading judgments, and hopefully greater consensus as to the correct approach, those working in the NCDR arena will not have an easy job improving outcomes where there is domestic abuse.

While much of the consultation is framed around finan-

cial principles, domestic abuse is arguably the thread that runs through almost every proposal.

In my own practice, both as a judge and as a mediator, some of the most challenging cases involve coercive and controlling behaviour. Frequently, this does not resemble the stereotype many members of the public associate with domestic abuse. Instead, it takes the form of economic control. One party may have controlled all bank accounts, restricted access to information, accumulated assets in their sole name, withheld funds for household expenditure, built up debts in the other person's name or insisted upon complete financial dependency throughout the relationship.

By the time separation occurs, the economically weaker partner may not simply have fewer assets. They may have little understanding of the family's true financial position and very limited confidence in their ability to negotiate on an equal footing.

Domestic abuse through the litigation process itself is also damaging and often not sufficiently taken into account by the courts.

This is why I find one of the strongest themes emerging from both the Resolution and RoW responses to be the recognition that financial remedies cannot be divorced from domestic abuse realities.

Any future statutory framework therefore needs sufficient flexibility to recognise how abuse may have distorted financial outcomes long before a case reaches a courtroom. But where the responses are silent is just how the existence of coercive and controlling behaviour or economic abuse should be factored into the outcomes of these cases. More income or capital to the victim, but how much and how far should we be concerned, if at all, about the net effect upon the perpetrator? Cost penalties are an easy option, but they do not work where the victim is unrepresented and does not have significant costs to pay. Should there be a tariff, like sentencing guidelines, for there to be a 10% shift in the asset allocation for a certain grade of domestic abuse or 20% for the more serious?

The FLBA response offers a particularly useful answer to the difficult question of how established domestic abuse should affect financial outcomes. A substantial body of its members considers the present 'obvious and gross' or 'gasp factor' threshold too high and supports abuse becoming a standalone factor and a lens through which sharing, needs and the structure of an award are assessed. Possible responses include an enhanced needs award, transfer of a home or vehicle, a different allocation of secure and risky assets, capitalisation, or arrangements designed to end continuing financial control. The FLBA is not unanimous. Some members fear increased allegations, fact-finding, cost and delay, and oppose turning financial proceedings into a punitive jurisdiction. The collective position is therefore more qualified than RoW's, but it agrees that the present language is imprecise and insists upon proportionality, resources to meet the anticipated increase in court time and judicial discretion. It opposes an automatic financial penalty in every case (FLBA, paras 124–177).

Peel J in *Tsvetkov v Khayrova* [2023] EWFC 130 said that there is a two-stage test for parties who seek to argue conduct:

- *Stage 1*: a party asserting conduct has to prove: (i) the facts relied upon; (ii) if established, that those facts met the conduct threshold, which had consistently been set at a high or exceptional level; and (iii) an identifiable (even if not always easily measurable) negative financial impact generated by the alleged wrongdoing. A causative link between the act/omission and financial loss is required.
- *Stage 2*: if stage 1 was established, the court will consider how the misconduct and financial impact should impact the outcome of the proceedings, undertaking the section 25 exercise, which requires balancing all the relevant factors, including section 25(2)(g) conduct.

Since that case there were two decisions by Cusworth J in relation to conduct and domestic abuse where he focused on the wording in the statute, namely conduct that would be 'inequitable to disregard'. In *LP v MP* [2025] EWFC 473 the judge explained that whilst the impact of coercive and controlling behaviour may be hard to measure, that does not mean the impact will not be present, considering that there is a real risk of unfairness to victims of such behaviour if it is ignored as a result. Further in *Loh v Loh-Gronager* [2025] EWFC 483 Cusworth J considered that in the context of personal conduct, the court held that 'inequitable' means no more and no less than 'unfair' or 'unjust'.

Interestingly, the FSG chose not to respond to the questions about domestic abuse.

Cohabitation: the broadest agreement and the deepest conflict

The most publicly significant part of the consultation may be cohabitation reform. More than 3.5 million couples live together without being married or in a civil partnership, and the government recognises that current protections are very limited and can leave cohabitants, especially women, children and victim-survivors of abuse, facing serious financial difficulty when relationships end.

There is widespread agreement that reform is needed. Resolution has long campaigned for rights for unmarried couples and says that rights for unmarried couples were at the top of its policy asks in its *Vision for Family Justice*. RoW welcomes stronger protections for women in cohabiting relationships and argues that the law should reflect lived reality, financial interdependence, caring responsibilities and vulnerability, rather than assumptions about whether a relationship was formalised. The FSG also identifies cohabitation reform as a key area where clarity is needed, because many couples mistakenly believe that they already have legal rights as 'common law' spouses.

But cohabitation is also where responses diverge most sharply. The government proposes that protection for cohabitants should be narrower than the protection available on divorce. It suggests eligibility criteria, a starting point that each person keeps what they legally own, and remedies based on more limited needs, with clean break outcomes wherever possible and maintenance only in exceptional, time-limited cases.

RoW does not support treating the preservation of marriage as a reason to restrict protection for cohabitants or limit the court's ability to achieve fair outcomes. It argues that the framework for qualifying cohabitants should

broadly align with the principles that apply on divorce, while retaining flexibility for different circumstances.

The FSG goes further than the government's proposals in one significant respect. It argues that where parents have children together, financial protection should potentially extend even where they have never cohabited. The Group considers that the presence of children fundamentally changes the policy considerations and that a child's financial security should not depend upon whether the parents shared a household. This places the FSG somewhat closer to RoW's emphasis on the realities of family life than to the government's more formal distinction between cohabiting and non-cohabiting relationships.

Some FRJ commentary is more critical in the opposite direction. One article argues that the proposed cohabitation regime 'casts the net far too wide' and risks imposing an unfair regime on millions of couples. Another critiques the proposed framework from a different angle, arguing that although statutory reform is compelling, the government's model may still permit or cause injustice by making cohabitants' remedies less generous and harder to access than divorce remedies.

Some critics think the proposals go too far because they may impose financial obligations on people who deliberately chose not to marry. Others think they do not go far enough because they preserve a hierarchy that leaves vulnerable cohabitants and their children insufficiently protected.

On death, the FLBA supports, on balance, spouse-equivalent intestacy rights and equal priority to apply for a grant of administration for qualifying cohabitants. It nevertheless identifies difficult questions concerning blended families, sideways disinheritance, the burden on children to bring 1975 Act claims, disputed relationship status and the inconsistency between narrower rights on separation and marriage-equivalent rights on death. It proposes a 5-year qualification period where there is no shared child and 2 years where there is a child. It also identifies a potential 'death gap' for a former cohabitant who dies during the limitation period for a separation claim and proposes a cohabitation cross-check so that provision on death can be tested against what might have been ordered on separation (FLBA, paras 261–302).

The FLBA supports a new framework for couples living together in an 'enduring family relationship', a 3-year qualification period for couples without children, no minimum period where there is a child, and a 2-year limitation period extendable in exceptional circumstances. It broadly supports a needs-based model and a wide remedial jurisdiction. One of the issues that such reform will need to deal with is the definition and evidential aspects of determining the commencement of cohabitation and the extent to which it is seamless. However, it opposes excluding discretionary needs, because the basic/discretionary distinction will be difficult, expensive and potentially unfair, particularly after a long relationship, where the family enjoyed a high standard of living, or where refusal to marry formed part of an abusive dynamic. It also rejects a statutory ceiling requiring a hypothetical divorce comparison, because that would compel a parallel 'What if they had married?' exercise. These positions place the FLBA closer to RoW than to commentators who fear that reform already goes too far, while still accepting that the government may preserve a principled distinction between marriage and cohabitation (FLBA, paras 213–257).

Qualifying nuptial agreements and opt-outs: autonomy, but only with safeguards

The government also proposes qualifying nuptial agreements, allowing couples to make binding financial arrangements in advance, subject to safeguards.

There is likely to be significant support for greater certainty and autonomy. Many couples want to make their own arrangements and avoid future litigation. But the responses suggest that agreements must be treated with caution where there is inequality of bargaining power, lack of disclosure, lack of advice and/or domestic abuse or pressure.

RoW's general approach is especially relevant here: any framework must prevent perpetrators from exploiting legal mechanisms to continue coercive control or obtain financial advantage. The FSG's emphasis on accessible support and early informed decision-making also matters, because agreements are only meaningful if people understand what they are signing and have access to advice.

The same issue arises with cohabitation opt-outs. Allowing couples to opt out of a statutory cohabitation scheme may respect autonomy. But if one partner is financially dependent, pregnant, caring for children, subject to abuse, or simply unaware of the consequences, opt-out agreements could become a route to injustice. The key question is not whether agreements should exist, but what safeguards make them legitimate.

The FLBA broadly supports qualifying nuptial agreements and cohabitation opt-outs, provided there is contractual validity, execution as a deed, full material disclosure and independent legal advice for both parties. Disclosure and advice should not be waivable. Importantly, it warns that formal legal advice does not conclusively disprove coercion: a person may appear informed while acting under sustained psychological, emotional or economic pressure. The court must retain an effective power to investigate duress, undue influence, coercive control and economic abuse. This is consistent with RoW's emphasis on safety, Resolution's support for autonomy with safeguards, and the FSG's focus on informed decision-making (FLBA, paras 188–208 and 258–260).

Access to justice: the reform that sits behind every other reform

Perhaps the most important shared theme is that legal reform will fail unless people can access advice and support. Resolution highlights the impact of legal aid cuts, the outdated means test and low legal aid fees, and says funding for initial legal advice and signposting is one of its main policy asks.

RoW is equally clear. It argues that new rights and statutory principles will not improve outcomes if people cannot understand, assert or enforce them. Early legal advice is particularly important for survivors of domestic abuse, who may be negotiating from a position of fear, trauma, financial dependence or coercive control.

This is where law reform and family justice reform meet.

A beautifully drafted statute is of limited use if people cannot get advice, cannot afford representation, cannot safely negotiate, or cannot access a court when they need one. Public legal education, early legal advice, triage, mediation, safeguarding and specialist domestic abuse support are not add-ons. They are the infrastructure that makes rights real.

The FLBA goes further than the other responses in proposing institutional reform. It recommends that the Financial Remedies Court become the specialist forum for all financial disputes arising from family relationships, including divorce finance, new cohabitation claims, TLATA disputes, Schedule 1 claims and relevant 1975 Act claims. Its 'one family, one court' proposal would require jurisdictional amendments, transfer powers, consolidation and joint case management. The intended benefits are lower cost, less duplication, judicial continuity and fewer inconsistent findings. This complements the FSG's whole-family approach and would provide a more coherent legal backdrop for mediation, hybrid mediation and other non-court processes (FLBA, paras 12–25).

Why hybrid mediation and other forms of non-court dispute resolution matter to this debate

One area that receives less attention in the consultation than it deserves is process. The public discussion often focuses on what the law should be. Equally important is how families reach outcomes. Much of my work now involves mediation, often hybrid or shuttle mediation. This allows parties to remain within a mediation framework while their lawyers and, where appropriate, other professionals participate constructively in the process. Hybrid mediation can mean that the parties are not in the same room or on the same screen via Zoom.

In cases involving allegations of coercive control, economic abuse or significant power imbalance, traditional mediation may not always be appropriate. Equally, immediate resort to adversarial court proceedings may significantly increase conflict and cost.

Hybrid mediation can sometimes offer a middle path. The ability to use separate rooms, different arrival and departure arrangements, legal support throughout the process and carefully managed information-sharing enables some couples to engage in discussions that might otherwise be impossible.

That is why I would have welcomed stronger recognition within the consultation of the role that mediation, hybrid mediation, lawyer-supported dispute resolution and arbitration can play alongside substantive legal reform.

Better legal rules are important. Better ways of helping people resolve disputes are equally important.

Gathering outcomes and future case law for guidance

As NCDR increases, and it appears on an upward curve, there is a risk that we lose data about the type of cases that are being resolved and what the outcomes are. Also, there are fewer reported cases with more and more people heading for the privacy that mediation, collaborative, Private FDRs and arbitration offer. Whilst the FRJ has a number of contributors who sit as judges, mainly fee-paid, and who publish judgments, we lack authoritative decisions that give guidance to practitioners and, indeed, the public too in an increasingly AI world. Bearing in mind the vast majority of financial cases involving separating couples are low or modest value cases and therefore 'needs'-based, there are a lack of Court of Appeal and even High Court cases that deal with such circumstances. It would be invaluable to have our most senior judges giving judgments in such cases.

Where the responses conflict

The main conflicts can be summarised as follows.

First, there is disagreement about how far codification should go. Resolution and RoW support clarity, but both resist rigidity and argue that fairness must remain central.

Second, there is disagreement about equal sharing. Resolution accepts equal sharing as a starting point but wants the objective framed as fairness in relation to matrimonial property. RoW is more directly opposed to a formulation that treats equal division as equal benefit.

Third, there is disagreement about the hierarchy of needs. The government seeks structure, but Resolution and FRJ commentators warn that a hierarchy may encourage arguments about 'basic' needs and produce unfairness or additional litigation.

Fourth, cohabitation reform divides opinion most sharply. RoW argues against limiting protection simply to preserve the distinct status of marriage, while some FRJ commentary warns that the proposed cohabitation regime may already go too far and impose obligations on people who chose not to marry.

Fifth, there is a tension between autonomy and protection. Qualifying nuptial agreements and cohabitation opt-outs may give people certainty, but without strong safeguards they may disadvantage the very people reform is intended to protect.

Sixth, the FLBA exposes a genuine division over domestic abuse. Many members favour a lower threshold and a standalone statutory factor; others fear tactical allegations, additional fact-finding and a punitive jurisdiction. The area of agreement is that established abuse must be considered more coherently, with the court retaining discretion over the financial response.

Seventh, the FLBA proposes structural reform that is less prominent in the other responses: a specialist 'one family, one court' jurisdiction for connected family financial disputes, supported by transfer, consolidation, disclosure and case-management powers.

Other observations that could be added to the proposals

Several further points deserve attention.

- **First, public education must be central.** Cohabitation reform will not work unless people understand both the current law and any new law. The myth of the 'common law spouse' remains powerful. The FSG rightly emphasises that reforms should reduce confusion rather than create new uncertainty.
- **Second, the law should be tested against ordinary**

cases, not just exceptional ones. Many families have modest assets, limited pensions and high housing costs. A reform that works well for high-net-worth cases may fail families where the main issue is how to house two households from the net equity in one family home. Far too many of the influential reported cases deal with high net worth families. There is a lack of judicial authoritative cases for the type of incomes and assets bases there are in the vast majority of cases. Those are the most difficult to resolve or decide upon because there is often too little to go round.

- **Third, pensions need particular attention.** Resolution's response highlights the importance of retirement income and warns against treating pension needs too narrowly. In many relationships, particularly where one person has undertaken more unpaid caring work, pensions are one of the clearest places where long-term inequality appears. Pensions do not form part of the cohabitation law reforms either.
- **Fourth, domestic abuse must be addressed procedurally as well as substantively.** It is not enough to say that abuse is a factor. The system must prevent abusive litigation tactics, ensure safe negotiation, provide specialist support, and make sure judges and professionals are trained to recognise economic abuse and coercive control. RoW is particularly strong on this point.
- **Fifth, children's welfare should not be diluted by adult status distinctions.** If the law puts children first, it must confront the question of whether children of cohabiting parents should receive weaker protection than children of married parents. RoW expressly argues that children should not experience different financial outcomes because of their parents' marital status.
- **Sixth, there is disagreement about the role of children within the statutory framework itself.** The FSG argues that child welfare should not merely be the first consideration but the primary consideration throughout the legislation, with child-focused factors moved to the forefront of the statutory checklist. While Resolution and RoW strongly support child-focused reform, neither places as much emphasis on restructuring the legal framework around the child's welfare as the FSG does.
- **Seventh, reform should become more overtly child-centred.** One of the most thought-provoking aspects of the FSG response is its argument that financial remedy law has often paid lip service to the welfare principle without fully embedding it in decision-making. The proposal that child welfare should become the primary consideration, supported by an expanded definition encompassing emotional and psychological well-being as well as financial provision, deserves careful consideration. Whether or not all practitioners agree with the detail, it is difficult to disagree that children are often affected as much by parental conflict and instability as by the level of financial provision itself.
- **Eighth, where will we get our case law from?**

Conclusion: fairness needs both rules and judgment

The government's consultation is a major opportunity. Few would argue that the current law is clear enough, accessible enough, or sufficiently responsive to modern family life. Cohabitants need better protection. Survivors of abuse need a system that recognises coercive control and economic harm. Children need stability. Divorcing couples need clearer principles. The public needs a law it can understand.

But the responses also show that reform must be handled with care. Certainty is valuable, but not if it produces injustice. Autonomy is important, but not if agreements are signed under pressure or without understanding. Marriage and civil partnership may remain legally distinct, but that distinction should not leave children or vulnerable partners exposed to hardship.

The strongest theme running through the responses is that fairness cannot be reduced to a formula. The law needs clearer principles, but it also needs humanity, discretion and practical support. A fairer end to relationships will not come from legislation alone. It will require early advice, public education, non-court options, trauma-informed practice, proper legal aid and a family justice system that sees the whole family, not just the legal status of the adults. We should stop organising litigation according to historical legal categories and start organising it around the family itself.

That is the real challenge for reform. Not simply to decide who gets what when a relationship ends, but to build a system that helps families separate with dignity, safety and fairness.

Notes

1 See www.gov.uk/government/consultations/a-fairer-end-to-relationships
2 See https://caselaw.nationalarchives.gov.uk/uksc/2025/26
3 See https://financialremediesjournal.com/standish-one-year-on-is-there-agreement-as-to-what-it-means/
4 See https://financialremediesjournal.com/summary-of-governments-consultation-on-fairer-end-to-relationships/
5 See https://resolution.org.uk/wp-content/uploads/2024/10/Resolution_DAFRP_Report_ONLINE.pdf

Selling the Goose: Orders for Sale of the Family Company

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36 Family

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In financial remedy proceedings, the family home is routinely subject to an order for sale, whether to meet needs or in satisfaction of a spouse's sharing claims. By contrast, orders for sale of the family company have hitherto been almost unheard of, certainly where such an order is forced upon the business owner in the teeth of their opposition.

However, is the traditional judicial reluctance to order a sale of the family company changing? In this article, we consider recent authorities which suggest that forcing a sale of the family company may increasingly be contemplated by the court. They include what is understood to be the first published case in which the court has ordered a sale over the business-owning party's opposition, without giving that party the option of paying a lump sum to avoid it.

Introduction

Practitioners advising on a case with a substantial private company will usually start from a settled assumption that the spouse who runs the business will retain it, and the other spouse will receive their entitlement in the form of a transfer of a greater share of the non-business assets, often combined with a lump sum or series of lump sums.

Three questions follow:

(1) Will the court ever order the sale of a family company?
(2) If so, in what circumstances?
(3) Why are such orders so much rarer than orders for sale of the family home, and is that difference discriminatory?

The traditional approach

The courts have traditionally been reluctant to order the sale of a wealth-generating business. They have preferred to leave it with the party actively involved in running it or, far more occasionally, to divide the shares in the business, in specie, between the parties so as to provide a fair division of the copper-bottomed assets and risk-laden assets (so-called *Wells* sharing: *Wells v Wells* [2002] EWCA Civ 476).

The focus in such cases has therefore tended to revolve around business valuation issues, judicial discounts and departures from equality. The question has been how to achieve fairness where one party takes cash and the other keeps a risk-laden, illiquid asset.

The classic statement is that of Coleridge J in *N v N (Financial Provision: Sale of the Company)* [2001] 2 FLR 69, in which the court held that the practicalities involved in valuing, dividing up and/or realising certain species of assets justified a departure from the *White v White* [2000] UKHL 54 'broad objective' of seeking to achieve equality, as that outcome was sometimes either impossible or only achievable at a cost which might not overall be in the family's best interests. Coleridge J held:

> 'I think it must now be taken that those old taboos against selling the goose that lays the golden egg have largely been laid to rest; some would say not before time. Nowadays the goose may well have to go to market for sale, but if it is necessary to sell her it is essential that her condition be such that her egg laying abilities are damaged as little as possible in the process. Otherwise there is a danger that the full value of the goose will not be achieved and the underlying basis of any order will turn out to be flawed.'

Coleridge J applied that reasoning in his later decision in *R v R (Financial Relief: Company Valuation)* [2005] 2 FLR 365, deciding that 'the wife should be paid out in full but in an orderly way so as not to destroy the goose, as it is sometimes described, that lays the golden egg'. A forced sale, he observed, rarely produces the best price, particularly where the market knows that the seller has to sell.

Is there change in the wind?

HO v TL

In *HO v TL* [2023] EWFC 215, [2024] 2 FLR 175, Peel J restated the court's options, following Moylan LJ in *Martin v Martin* [2018] EWCA Civ 2866 at [93]. The court may '(i) "fix" a value; (ii) order the asset to be sold; and (iii) divide the asset in specie'.

On the facts, Peel J declined to apply an accountancy discount on the basis, inter alia, that:

> 'Although a substantial asset, the business is only part of the overall wealth. It is not the only significant resource. This is not a case such as *Wells v Wells* where it was far and away the biggest asset … It is H's choice to retain it. It is open to him to sell it.'

Anecdotally, this decision has been relied upon extensively since it was handed down as the basis of an argument against any discounting whatsoever, whether accountancy or judicial, of a party's shareholding in a private limited company where that party prefers to retain rather than sell their interest in a family business (with no departure from

equality, either, to reflect the different nature of a shareholding in a private limited company as against an award comprising cash and property).

The argument we have encountered since *HO v TL* (which, in some instances, has been accepted by the court) is that if the business-owning party chooses to retain the business, whereas the other party wishes it to be sold, why should the other party suffer any reduction whatsoever in their award as a result of the business owner's preference? If they prefer to keep it, they must pay out precisely 50% of the value of the shareholding (net only of notional tax) to the other party.

Thus, it appeared for a time following *HO v TL* that we had returned to having to argue against the proposition that 'the only difference between it (i.e. the company) and its cash proceeds is … the sound of the auctioneer's hammer', which appeared to most of us to have already been firmly rejected by Moylan LJ in *Martin v Martin*.

Fortunately, that point has now been put to bed (again) by Moylan LJ in *Culligan v Rosemin-Culligan* [2026] EWCA Civ 948. In that case, the parties had at first instance received mathematically equal 50/50 outcomes, with the husband receiving a far greater proportion of his award in the form of risk-laden, illiquid company shareholding, and the wife a far greater proportion of the cash, property and other copper-bottomed assets. In July 2026 the Court of Appeal overturned the first instance award on the basis that it did not achieve 'a fair balance of risk and illiquidity in the division of the assets between the parties'.

More interesting for the purposes of this article is whether, since *HO v TL*, the court will now be more likely to order a forced sale of the business so as to achieve a fair sharing outcome, despite opposition to that course from the business owner. Both the decision of HHJ Hess in *GO v YA* [2024] EWFC 411 and a recently published decision of HHJ Rowland in *LE v EL* [2024] EWFC 481 (B) suggest that may be the case.



GO v YA

In *GO v YA* [2024] EWFC 411, HHJ Hess raised the possibility of a sale with counsel during the hearing, although neither party had sought one. A sale of all the company's stock would have triggered a 'flooding the market' discount of 70%–75%, as identified by the single joint expert. A sale of the company as a going concern might not.

The judge considered whether the case fell into the category identified by Coleridge J in *N v N* [2001] 2 FLR 69, where 'the goose may have to go to market'. He noted that the husband's age and health were against him. He also thought the husband's insistence on continuing to work showed a lack of sensible judgement, however understandable in human terms. If the husband wished to continue, that could not fairly be at the cost of placing the wife in a potentially very difficult position.

Drawing on *HO v TL*, HHJ Hess observed that if fixing a fair value with a realistic structure is difficult or impossible, and *Wells* sharing is undesirable, 'selling the asset must be a real possibility, even if neither party has asked for it'.

The order was structured to give the husband a chance to avoid a sale. He was given until a fixed date to raise a lump sum, for example by borrowing, selling some shares or bringing in a younger partner. If he failed, the company shares would be sold and the net proceeds divided equally.

LE v EL

In this decision of HHJ Rowland in Birmingham, recently published as *LE v EL* [2024] EWFC 481 (B), the court ordered a sale of an owner-managed family business despite strong opposition from the husband. This is believed to be the first published case where a court has ordered the sale of a trading business, rather than presenting the owner with an alternative outcome, for example, payment of a lump sum to meet the financial settlement.

The parties had been married for more than 20 years. The husband was the CEO and majority shareholder of a successful private company worth £7.8m. He held 75% of the shares, with the wife holding the remaining 25%. She did not actively work within the business.

The wife sought the sale of the business and an equal division of the proceeds, whereas the husband proposed to acquire the wife's shares and pay her a total of £1.8m over several years.

HHJ Rowland rejected the husband's proposal on the basis that it represented just 28% of the net value of the business, as well as uncertainty over how he would be able to fund such payments on the basis of his own evidence, which had emphasised the liquidity and cash flow challenges within the business.

The court therefore ordered the sale of the business and its subsidiaries, with the proceeds to be divided equally after settling relevant costs and a director's loan account.

Interestingly, HHJ Rowland said as follows when considering the lack of any reported cases concerning orders for sale of private companies:

> 'That may be so, but it does not mean that such orders have not been made in the 24 years since *White v White* [2001] 1 All ER 1 was decided, or that it should not happen in an appropriate case. One may observe that there have been orders for the sale of farms in order to achieve fairness, and what difference should there be between a farm which provides an income and a place for a farmer to live, and a business which provides income for its owner?'

HHJ Rowland went on, in the subsequent costs judgment, *LE v EL (Costs)* [2025] EWFC 534 (B), to make a costs order in favour of the wife in the sum of £150,000, noting that her early proposal to sell the businesses and divide the proceeds equally was particularly significant when compared with the husband's unrealistic open position, which he had maintained throughout the final hearing.

When might a court order a sale?

Peel J's list in *HO v TL* at [25] is the natural starting point. Whether a business should be retained, sold or divided in specie 'will depend on the facts of each case'. Relevant features include:

- whether the business was founded during the marriage or pre-owned;
- whether it has its origins in one party's non-marital wealth;
- whether both parties were involved in its strategy and operation;
- the ownership structure; and
- whether *Wells* sharing is practical or realistic, given that it usually keeps the parties tied together to some extent.

The cases suggest further considerations that tend to push towards a sale:

- Large corporate or personal debt.
- Illiquidity or insufficient sustainable income to enable the retaining party to fund a fair payment to the other party via extraction from the company.
- No realistic plan. The retaining party may have no credible proposal for funding the payment out.
- Unrealistic timescales. Extraction from the business via a series of payments spread over an unrealistically long period may not represent a fair outcome in a sharing case.

Other matters appear less settled, but may potentially still be taken into account:

- Risk to the recipient spouse. Is there evidence that the retaining party would run down the business, or divert it, to frustrate the claim?
- Age and succession. Does proximity to retirement make a difference? Are exit or succession plans relevant to whether a sale should be ordered?
- Last resort. Is a sale always a last resort? The direction of these authorities would support a conclusion that a sale should be considered as a genuine option at a much earlier stage than has traditionally been assumed. See also the reasoning of the Court of Appeal in *Culligan v Rosemin-Culligan* in rejecting the proposition that *Wells* sharing was always a 'last resort', which might apply by analogy to orders for sale as well.

Why are sales of companies still unusual?

First, a sale is often unnecessary. It often suits both parties for one to keep the risk-laden business and the other to be bought out via transfer of non-business assets, often combined with payment of a series of lump sums via extraction from the business over time.

Second, a sale forced on an unwilling managing director or shareholder is often extremely difficult to implement and costly, and will in most instances realise less than true market value, defined by the International Valuation Standards 2022 as the amount for which an asset would exchange between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and without compulsion (as cited by HHJ Hess in *CG v SG* [2023] EWHC 942 (Fam)).

The scale of the potential loss was illustrated in *BR v BR* [2025] EWFC 88. Peel J considered the different valuation bases for a sale of a business on the open market both with and without management/shareholder consent and concluded that, unless all shares were sold with consent, the parties' holdings would be reduced by up to:

- 35% in C Ltd;
- 45% in D Ltd; and
- 12.5% in E Ltd.

In the worst case that meant reductions of about £44m, £25m and £700,000, respectively, or about £70m overall. The best case, with no further discount, applied only if all shareholdings were sold with full consent.

Third, there is a fairness argument. If one party 'lives for work' and has built the business over decades, is it fair for the other to force a sale and take that away, when their sharing entitlement can be met in another way?



Is the difference in approach unprincipled?

The short answer is that the two assets differ in kind. The family home has a special place in every marriage, as recognised in *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24. A family business is fundamentally different. Often, only one spouse has been actively involved in it (although it is not at all unusual, where only one spouse is active within the business, for the other spouse to be a shareholder and/or on the payroll).

Where one party has built the business through 'blood, sweat and tears' and the other has not been involved, a forced sale may often 'feel' unfair. Plainly, in some cases the business may have been brought into the marriage by one spouse, in which case they may be entitled to a departure. We know that sharing does not always have to mean equal sharing.

Even in a case where a non-involved spouse is entitled to a full equal sharing award, in financial remedies that will mean balance-sheet equality, subject to any discount for risk or illiquidity so as to create a fair sharing outcome on a net effect schedule. It does not necessarily mean a sale of all resources with an equal division of the net proceeds.

However, the arguments against a sale of the business are harder to sustain in the exceptional case where the evidence shows that both parties work in the business to an equal extent and both wish to retain it for themselves. If one party is allowed to retain it and the other is bought out through a series of lump sums, often heavily discounted for

risk and illiquidity, it is difficult to see how that is not discriminatory.

Conclusion

The court's traditional reluctance to sell the goose remains well founded. Forced sales are costly, difficult to implement, and will often result in a substantial overall diminution in value. However, the direction of travel from these authorities suggests that the court will now consider a sale where valuation is particularly uncertain, the retaining party's plans are unrealistic, or the recipient would bear disproportionate risk, and it may do so of its own motion.

A conditional order, giving the retaining party a fixed period to fund a payment out before a sale takes effect, remains the practical middle course, but *LE v EL* serves as a cautionary tale to any litigant who goes into proceedings assuming that they will be given such an opportunity.

Practitioners must now be prepared, in the right case, for the court, having weighed all the relevant factors, to exercise its discretion to make an order for the goose to go to market.

Xydhias and Its Limits: *HA v EN* and *THR v WAT*

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Every day, financial remedy practitioners aim to settle their cases without involving the court. All of us are encouraged to compromise cases without incurring the costs, stress to families and delay that a contested final hearing necessitates.

To do that we have to reach negotiated settlements. And in the financial remedy context, the case of *Xydhias v Xydhias*[1] looms large as providing the only real mechanism available to compromise financial remedy claims in advance of court determination and the making of a final financial remedy order.

There are already excellent articles on the case of *Xydhias* which analyse the case itself and the contractual (or not) status of such agreements.[2] This article aims to go further and highlight some of the inherent issues presented by the concept of *Xydhias* agreements, namely the residual discretion that is left to the court to approve or alter those agreements, and the practical problems that result from this.

Two recent decisions, in which the authors appeared, of *HA v EN*[3] and *THR v WAT*,[4] where compromises were reached at door of the court of a final hearing, but where there were substantially different levels of variation to the final agreement, show the extent to which the outcome of any variation to a *Xydhias* agreement can be determined by whether a judge has a pro-fairness or pro-finality outlook.

The fundamental differences between civil and financial remedy settlements

In a typical civil dispute, the parties are free to agree any compromise that they wish and on whatever terms. There is no need for any approval of a compromise by the court, and a settlement can be made by way of binding contract between the parties.

This is true even if court proceedings have been commenced in respect of a dispute. When there is a settlement of proceedings it will commonly be reached in the form of a Tomlin order,[5] where the proceedings are stayed on agreed terms attached as a confidential schedule to the order. The schedule, which contains the settlement, is a binding contract between the parties and is not approved by the court as it does not form part of the body of the order. The net result of this is that:[6]

> 'In general once the parties have entered into an agreement the ability to set aside or vary that agreement depends on there being a remedy in relation to that contract.'

There is no ability for the court to alter the terms of the agreement embodied in the schedule, which has contractual force with its own independent legal status. A party can sue for specific performance and/or breach of contract if the terms of the schedule are not performed. What has been agreed is enforceable and what was not agreed in the schedule does not form part of the agreement, and so is not. The terms of settlement, including the precise wording, is in the hands of the parties and they must live with the consequences of their agreements.

That is not the position for agreements to compromise financial remedy proceedings. No agreement can oust the jurisdiction of the court and *Xydhias* itself sets out that agreements to settle financial remedy claims are not contractual in nature and so cannot be enforced as such.[7] Any agreement to settle financial claims between spouses is subject to the approval of the court, which may, in applying its discretion, vary both the terms of the agreement and the final order in the proceedings. This can go well beyond simply resolving ambiguities in drafting and can include substantial variations to the terms of any agreement as the court fixes any final award.[8]

The court is entitled to find the existence of an agreement, including a *Xydhias* agreement, dispositive of the final financial remedy award.[9] But the court does not *have* to make an order in the terms of the agreement, and still has to conduct the s 25 Matrimonial Causes Act 1973 (MCA 1973) exercise to ensure the agreement is fair. If the court wishes to vary the terms of the parties' agreement, it has the power to do so.

The powers of the court to alter *Xydhias* agreements

The nature of *Xydhias* agreements therefore provides the court in financial remedy proceedings with powers in respect of settlements that civil courts do not have. These fall broadly into two categories.

First, *Xydhias* gives the court the power to determine there is a binding agreement as to 'essential' mainframe matters in an overall package of settlement where other

'residual' matters have not been resolved. These residual issues are then within the court's discretion to determine.

Second, even if there is an agreement on 'essential' matters it is then open to the court to vary its terms when making its final order.[10] This is very distinct from civil proceedings where the court has no power to vary the terms of settlement. The discretion to vary the terms of the agreement is broad and can include: (1) altering the particular wording of a term of an agreement; (2) inserting what it considers to be essential terms that were omitted from the agreement; or (3) actually amending the substantive terms of the agreement itself.

The exercise of this discretion will be informed by the broad financial remedy legal principles, but there is little case law on how that discretion should be specifically exercised in the context of enforcing *Xydhias* agreements. There is almost no specific guidance setting out the extent to which a court should interfere to add or amend substantive terms. There is no case law that suggests that the court's discretion is limited and cannot consider certain issues because of the existence of a *Xydhias* agreement, even if the agreement contains a specific agreement on those issues. The discretion is there, but it is up to the judge hearing the case to exercise that discretion and different judges can legitimately take very different approaches to changing the terms of agreements reached by parties, as was the case in the following two cases in which the authors appeared.

Pro-fairness: the decision in *HA v EN*

In *HA v EN*, the parties were negotiating to reach an agreement shortly before the start of a final hearing. On the eve of that final hearing, the parties accepted that they had reached a *Xydhias* agreement, which was, among other things, that a 'family fund' would be set up to receive: (1) the net proceeds of sale of the former matrimonial home; and (2) the realisation of other assets, including the husband's illiquid assets.

Though the parties agreed that there was a *Xydhias* agreement, there remained disputes about the drafting of the order. It was agreed some points of disagreement around the interpretation of the terms of the agreement could be determined using the *Xydhias* jurisdiction. But the husband then sought, in advance of the hearing listed to perfect the final order, for the court to alter the substantive terms of the parties' agreement, on grounds that legal costs he had agreed would be discharged from that family fund were of a greater sum than he had expected, and the family home may sell for a lower sum than the parties had agreed for its value.

Richard Todd KC (sitting as a deputy High Court Judge) determined that all the arguments justifying a variation of the agreement using the *Xydhias* jurisdiction were known of at the time of the agreement and that was not good reason to allow the husband to resile from the substantive terms agreed (at [38]). But though he held that the substantive capital portions of the agreement should not therefore be varied, he did go on to vary other substantive terms of the parties' agreement on grounds that they were 'maintenance agreements' susceptible to variation under ss 34–35 MCA 1973 and there had been a change in circumstances that justified a variation (at [44]–[45]). The judge went on to vary three substantive provisions that had been agreed, effectively for child maintenance, to provide for a variation downwards by 50% in the event the home sold for a lower gross sale price.

The conclusion that there was a change of circumstances which justified a variation under ss 34–35 MCA 1973 does not sit easily with his earlier determination that these facts were 'known to' the husband and so did not justify a variation to the other terms of the *Xydhias* agreement (at [38]). If the change of circumstances was reasonably foreseeable, such that there were no grounds for variation to the capital portions of the agreement, why did those same change of circumstances amount to a valid reason for the undermining of agreed maintenance provisions?[11]

It seems to us that the judge in reality was assessing the fairness of the terms of the overall agreement to ensure that, notwithstanding the parties' *Xydhias* agreement, the terms of the agreement were fair to both parties. The court has the power, under s 25 MCA 1973, to refuse to approve an order that it considers to be unfair and amend its terms. It can go beyond resolving remaining issues, or resolving terms of drafting, as it did here, to alter the substantive terms of an agreement without the use of ss 34–35 MCA 1973.

Pro finality: *THR v WHT*

The decision in *THR v WAT* has a very similar factual matrix, but with a very different result in respect of the enforcement of an agreement. Again, the parties had settled at the door of the court in advance of a contested final hearing. Again, they had an agreement and considered they were *Xydhias* bound but did not have a finalised order, and they were content to put the remaining outstanding issues between them to HHJ Hess (sitting as a deputy High Court Judge) for determination. When counsel for the wife presented the agreement orally to the court, it was made clear that there were some outstanding issues which needed to be resolved which had not yet been raised and that either they would be agreed or the court would have to decide them.

There were five outstanding issues raised by the parties, of which two: (1) interest on lump sums; and (2) security for payment, had not been expressly reserved during negotiations for determination by the judge. They were sought by the wife after the conclusion of the agreement at the stage of the agreement of the order, as set out above. The husband also tried to reduce the 'agreed' *Xydhias* lump sum he was to pay for two spurious reasons.

In respect of those issues, HHJ Hess determined that as the parties had 'not raised at all' in the negotiations stage those issues they should be held to the agreement, which did not feature their inclusion. This is despite the fact that *Xydhias* itself was a case where a binding agreement was found to have been reached even though the issue of security had not been agreed, and it was held that 'in ancillary relief litigation a clear distinction has always been drawn between the determination of the liability and the determination of the security for the performance of the obligation' and so agreement as to security is not necessary for a binding agreement.[12]

HHJ Hess, who himself appeared in *Xydhias* as junior counsel for the husband, determined that there is a distinc-

tion between a case in which the principle of security is agreed but not the form, such as *Xydhias*, and a case where the issue of security had not been raised (at [18]). As security had not been raised at all during negotiations, HHJ Hess determined it would not be right to impose something that formed no part of the agreement.

HHJ Hess declined to use his powers under s 25 MCA 1973 to impose new elements in the order which did not feature as part of the parties' deal. He resolved only points that had been expressly reserved to him in negotiations.

Analysis: the differing approaches to the discretion under *Xydhias* to vary agreements

We see from these two cases two very different approaches to the discretion given to the court in respect of *Xydhias* agreements.

Richard Todd KC's approach in *HA v EN* was highly interventionist and flexible, permitting the reopening of already agreed substantive terms of the agreement in the process of converting the agreement into an order. In this context, the certainty provided by a *Xydhias* agreement was reduced; he varied the substantive terms of an agreement that had been reached days before the hearing. That variation was not really, in our analysis, due to any change in circumstances. It was a variation to the terms of the final order by the judge to better reflect what he considered to be a fair outcome in the case, which required, in his view, variations to the (previously agreed) maintenance terms of the *Xydhias* agreement.

HHJ Hess's approach to the exercise of discretion was much more restrictive, starting from the principle that parties should be held to the bargains that they enter into. HHJ Hess would not allow for the necessity for the parties' agreement to be converted into an order to allow the wife to introduce new matters that had been omitted from negotiations and the husband to reduce his lump sum liability. His reasoning as to why the terms sought by the parties were excluded did not engage with the arguments as to whether the proposed terms were 'fair' or not, but instead only whether or not these issues had formed part of the negotiations between the parties. Having determined that they did not, for HHJ Hess that was the end of the matter. His view was that the wife (and husband) needed to be 'held' to her acceptance that the financial remedy settlement would not include the omitted terms.

The discretion set out in *Xydhias* allows for both approaches. The fact that there is a concluded agreement is not the end of the argument, even if (as in *HA v EN*) a court concludes that the factors relied on to justify a variation to an agreement were either known or reasonably foreseeable at the time. The court is not limited from still stepping in to deal with what it considers to be potential unfairness. But it also can determine that if unfairness was a free choice by the parties, that does not mean they should not be held to the terms of their bargain.

Practical considerations

Given the *Xydhias* jurisdiction can be applied in both a pro-fairness and a pro-finality manner, the approach by the court to the enforcement of an agreement will depend entirely on: (1) the particular facts of each case, when applied to the particular agreement; and (2) the judge who hears the case. This is problematic when, typically, the advantage of an agreement is pitched to clients as providing: (1) certainty, avoiding the inherent uncertainty of the discretionary nature of contested court proceedings; and (2) control over the outcome. These benefits only exist up to a point (as shown by the above).

Beyond this general warning that practitioners must bear in mind, we would highlight two further specific realities that make the broad discretion in *Xydhias* even more problematic.

First, an offer for settlement is made for acceptance as a whole not in part, but the court can consider each term of a settlement individually. Both parties may make concessions on the basis they are assured that some other more important demand to them, which is part of their offer, is agreed. But if an agreement is reached the court can then, under the *Xydhias* jurisdiction, hold a client to part of their offer where they have made a concession but alter or remove the *quid pro quo* which was their reason for making that concession (as Richard Todd KC did in *HA v EN*).

Second, what the court considers to be the 'essential' terms for an agreement may not be the same as the parties. The court can determine the parties are *Xydhias* agreed even if one party's position is that the remaining issues are not residual issues that the court should have free reign to determine.

In both of the above scenarios, one (or both) parties could end up with something that they could well say they would never have agreed to, or would never have let the court determine, had they known that was a possible outcome. But under the *Xydhias* jurisdiction, there is no way that either of these scenarios can be ruled out.

We must therefore be careful to advise our clients about the limits of *Xydhias* as a tool of reaching a binding agreement, and also the dangers of being *Xydhias* agreed objectively (whatever the client's subjective view on whether there is a concluded agreement). These agreements are not binding like civil settlements; they are always only subject to the court's discretion to approve them. They can be unpicked depending on the facts of the case and the leanings of the judge approving the final order. Clients must be made aware that although the law suggests that parties should be held to the terms of their agreements to compromise, until the order is agreed, approved and sealed there is no true finality as to the terms of the settlement.

Notes

1 *Xydhias v Xydhias* [1999] 2 All ER 386.
2 We wholeheartedly recommend two previous articles in the *Financial Remedies Journal* on these issues by Daniel Mutton and Shannon Knight, '*Xydhias*, 25 Years On – What Exactly IS a *Xydhias* Agreement?' [2024] 1 FRJ 51 and Andrzej Bojarski KC, 'Section 35: Dead Letter or Living Instrument? The Contractual Status of Agreements, and the Scope of the Court's Power to Vary Them' [2026] 1 FRJ 5.
3 *HA v EN* [2025] EWHC 2436 (Fam).
4 *THR v WAT* [2025] EWHC 1125 (Fam).
5 See the White Book commentary at para 40.6.2 for discussion of the origins of the Tomlin order from Tomlin J in *Practice Note* [1927] WN 290, following the decision in *Dashwood v Dashwood* (1927) 71 SJ 911.

6 *Community Care North East v Durham County Council* [2010] EWHC 959 (QB) at [24], cited with approval in *Watson v Sadiq & Anor* [2013] EWCA Civ 822 at [44] and [49]–[50].

7 Though the decision of the Court of Appeal in *Soulsbury v Soulsbury* [2007] EWCA Civ 969 suggested that this statement of principle in *Xydhias* was 'too wide' and that an enforceable contract could arise (at [45]), to our knowledge the approach in *Soulsbury* has not been followed in any subsequent reported decision. In *HA v EN*, Richard Todd KC suggested that the approach in *Soulsbury* was that after a final financial remedy order there could be an enforceable binding contract but there could not be in advance of a final financial remedy order (at [37]).

8 *Pierburg v Pierburg (No 2)* [2022] EWHC 2701 (Fam) at [43].

9 *Radmacher v Granatino* [2010] UKSC 42.

10 The court is 'not a rubber stamp': *Kelley v Corston* [1997] 4 All ER 466. Per *Xydhias* at 396: 'Finally, in every case, the court must exercise its independent discretionary review applying the s 25 criteria to the circumstances of the case and to the terms of the accord.'

11 Particularly when the definition of 'financial arrangements' that constitute a 'maintenance agreement' which is susceptible to variation using terms of MCA 1973, ss 34–35 are so widely drawn that all the underlying terms of the agreement, including the provision of capital, would potentially be susceptible to variation under MCA 1973, s 35 in principle. See Andrzej Bojarski KC's article, 'Section 35: Dead Letter or Living Instrument? The Contractual Status of Agreements, and the Scope of the Court's Power to Vary Them' [2026] 1 FRJ 5 for further discussion of this issue, where he states, 'The wording of s 34 is sufficiently broad as to capture most forms of formal agreement which parties are likely to make dealing with their matrimonial financial provision including separation agreements and agreements compromising their financial remedy claims (in the *Edgar v Edgar* and *Xydhias v Xydhias* sense)' (at 7).

12 *Xydhias* at 397.

'On and Off', 'Off and On', 'On and On' or 'It Depends'? The Duration of the Duty of Disclosure

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The duty

In *NG v SG (Appeal: Non-Disclosure)* [2011] EWHC 3270 (Fam), [2012] 1 FLR 1211 at [1], Mostyn J stated that the greatest of the many commandments of the law on financial remedies 'is the absolute bounden duty imposed on the parties to give, not merely to each other, but, first and foremost *to the court* full frank and clear disclosure of their present and likely future financial resources' (original emphasis).

Unsurprisingly, this fundamental duty has been considered in numerous cases. As was noted by Thorpe LJ in *Bokor-Ingram v Bokor-Ingram* [2009] EWCA Civ 412, [2009] 2 FLR 922 at [12], it was 'well stated' by Sachs J (as he then was) in *J v J* [1955] P 215 at p 228/229, and 'has never varied': no matter what form the disclosure may take, 'the obligation … is to be full, frank and clear in that disclosure'.

In *Walkden v Walkden* [2009] EWCA Civ 627, [2010] 1 FLR 174, Wall LJ (as he then was) stated, at [75], that 'there is no reason … to reinvent the wheel' and, at [76], that that edict 'continues to govern the duty of disclosure, and the words, "full, frank and clear" … say everything that it is necessary to say about the duty'.

As Thorpe LJ made clear in *Bokor-Ingram v Bokor-Ingram*, at [11], the duty is such that '[a]ny information that is relevant to the outcome must be disclosed'.

The reason for the duty's existence is readily apparent – as was made clear in *Livesey (formerly Jenkins) v Jenkins* [1985] FLR 813 per Lord Brandon of Oakbrook at p 822:

> '… unless a court is provided with correct, complete and up-to-date information on the matters to which, under section 25(1), it is required to have regard, it cannot lawfully or properly exercise its discretion in the manner ordained by that subsection. It follows necessarily from this that each party concerned in claims for financial provision and property adjustment (or other forms of ancillary relief not material in the present case) owes a duty to the court to make full and frank disclosure of all material facts to the other party and the court. This principle of full and frank disclosure in proceedings of this kind has long been recognized and enforced as a matter of practice. The legal basis of that principle, and the justification for it, are to be found in the statutory provisions to which I have referred. My Lords, once it is accepted that this principle of full and frank disclosure exists, it is obvious that it must apply not only to contested proceedings heard with full evidence adduced before the court, but also to exchanges of information between parties and their solicitors leading to the making of consent orders without further inquiry by the court. If that were not so, it would be impossible for a court to have any assurance that the requirements of section 25(1) were complied with before it made such consent orders.'

Of course, in light of the amendments to Matrimonial Causes Act 1973 brought about by Matrimonial and Family Proceedings Act 1984, Lord Brandon's references to s 25(1) must now be construed as references to s 25(1) and (2).

Much the same point was made by Mostyn J in *NG v SG (Appeal: Non-Disclosure)* at [1], 'without full disclosure the court cannot render a true certain and just verdict' as without it (to quote Lord Brandon) 'the court cannot *lawfully* exercise its powers' (original emphasis).

The consequences of the breach of the duty of disclosure has been considered in numerous cases but perhaps never more vividly than in *Gohil v Gohil & Ors* [2025] EWHC 3646 (Fam), per Williams J, where financial remedy proceedings which were issued in June 2002 did not conclude until May 2025 (with the Court of Appeal thereafter refusing both the husband's and the Crown Prosecution Service's applications for permission to appeal).

The beginning

As a matter of law, the duty is certainly engaged by no later than the point at which an application for financial remedies is issued. In *Clibbery v Allan* [2002] EWCA Civ 45, [2002] 1 FLR 565 at [104], Thorpe LJ observed that:

> '… the duty that Parliament has cast upon the court must be matched by a duty on the parties to supply the court with the fullest relevant information. Once the statutory duty is engaged by the issue of an application for relief under sections 22A – 24A then both parties are under the duty of full, frank and clear disclosure.'

In practice, however, it is necessary for parties to observe the duty long before Form A is issued or an application for a consent order is uploaded to the portal. As the Pre-

Application Protocol for Financial Remedy Proceedings annexed to FPR PD 9A, makes clear:

- From the summary, at [7]:

> 'Before starting court proceedings, the parties should attempt, where possible, voluntary financial disclosure and negotiation. Any disclosure must be full, honest and open. Parties must be advised of this duty by their legal advisers, including the ongoing duty to disclose any material changes.'

- From the Protocol, at [32] and [33]:

> 'If the parties give pre-application financial disclosure, they must provide full and honest disclosure to the other party of facts, information and documents which are material and sufficiently accurate and up-to-date to enable proper negotiations then to take place. Openness in all dealings is essential.
>
> Legal representatives must tell their clients in clear terms of this duty and of the possible consequences of providing false information without an honest belief in its truth.'

The end

A more vexing question arises as to when the duty of disclosure ends.

In *Livesey (formerly Jenkins) v Jenkins*, at p 816, Lord Brandon framed the broad question of principle in the following way:

> '… Where a compromise in respect of claims for financial provision and property adjustment made by either or both of the former spouses has been reached by two firms of solicitors acting on their respective behalf, with the intention that the terms of such compromise shall subsequently be given effect to by a consent order of the court, is each of the former spouses under a remaining duty to disclose to the other, or to the other's solicitors, the occurrence of a material change in his or her situation, which has taken place after the compromise has been reached, but before effect has been given to it by the making of a consent order by the court?'

At p 822, he held that (emphasis added):

> '… Any changes in the situation of either party occurring between the filing of the original affidavits and *the final disposition of the claims by the court* must be brought to the notice of the other party and the court by further affidavits or otherwise …'

In *Lykiardopulo v Lykiardopulo* [2010] EWCA Civ 1315, [2011] 1 FLR 1427 at [36], Thorpe LJ noted that (emphasis added):

> '… ancillary relief proceedings are marked by features absent in other civil proceedings … The proceedings are quasi-inquisitorial. The judge must be satisfied that he has, or at least that he has sought, all the information he needs *to discharge the duty imposed on him to find the fairest solution* … The parties owe the court a duty, a duty of full, frank and clear disclosure. The duty is absolute.'

As noted above, in *NG v SG (Appeal: Non-Disclosure)* Mostyn J stated at [1] (emphasis added) that 'without full disclosure *the court cannot render a true certain and just verdict*'.

In *LIN v PAR* [2025] EWFC 401, [2026] 1 FLR 712 at [94], Peel J stated (emphasis added):

> 'Counsel for both parties accepted that the duty of disclosure extended not just to the date of the *Xydhias* agreement, but *to the date of the draft order being agreed* …; *Livesey v Jenkins* [1985] FLR 813 at page 823D.'

In *Bokor-Ingram v Bokor-Ingram* at [18], Thorpe LJ made the following observations regarding the *scope* of the duty, evidently included in which was a view as to its *duration* (emphasis added):

> 'The duty to disclose extends beyond what is certain *on the date that the order is made* to any fact relevant to the court's review of the foreseeable future.'

In *S v S (No 2) (Ancillary Relief: Application to Set Aside Order)* [2009] EWHC 2377 (Fam), [2010] 1 FLR 993 at [20], Singer J stated that it was 'trite law' that the duty of full and frank disclosure 'extends until *judgment is given*' (emphasis added).

In *Walkden v Walkden* at [72], Wall LJ described the proposition that the duty endured up until 'the date on which the district judge *made the final consent order*' (emphasis added) as 'unexceptional'.

In *N v N (Periodical Payments: Non-Disclosure)* [2014] EWCA Civ 314, [2015] 1 FLR 241, McFarlane LJ (as he then was) referred, at [45]–[49], to *Vernon v Bosley (No 2)* (a personal injury claim) as setting out the common law position, which 'plainly does apply to family proceedings', as follows (emphasis added):

> 'The authorities establish a clear and continuing duty upon all parties to ongoing family proceedings for financial relief to provide full and frank disclosure of all relevant material *up until the conclusion of the proceedings*. Thus, in the present case, the husband is correct to concede that there was a duty to disclose the limited information relating to his email exchange with the head-hunter which took place *before the court order was made*.'

Judicial decision making concludes when a final order is made or approved. This is why an approved consent order is final and binding once 'made' by the court. This includes unperfected (or so-called *Rose*) orders, as was confirmed in *Kicinski v Pardi* [2021] EWHC 499 (Fam), [2022] 1 FLR 474 per Lieven J at [17] and [18].

The Pre-Application Protocol states (emphasis added):

> '[34] The duty of disclosure is an ongoing obligation *until a final financial remedies order has been made*.'

The references in the authorities thus far referred to the 'discharge [of] the duty imposed on [the judge] to find the fairest solution', to the duty enduring until 'final disposition' by the court, extending to when 'judgment is given' or until the court 'render[s] a … verdict', to when an order is 'agreed' in draft and 'made' by the court, and to the proceedings thus reaching their 'conclusion', might suggest that the moment up to and including which the duty of disclosure continues is that at which the court exercises its statutory powers and discharges its decision-making function. The Pre-Application Protocol suggests likewise.

However, a number of authorities suggest that the duty

extends further, to the date on which the court's final order is sealed.

In *AB v CD (Financial Remedy Consent Order: Non-Disclosure)* [2016] EWHC 10 (Fam), [2017] 1 FLR 13 at [153], Roberts J observed (emphasis added):

> '… In *Livesey*, the House of Lords had made it clear that the parties' duty of full and frank disclosure continued after they had reached agreement on their financial arrangements ... The wife in *Livesey (formerly Jenkins) v Jenkins* [1985] AC 424, [1985] 2 WLR 47, [1985] FLR 813 had failed to disclose her engagement to another man before the agreement was put into effect by means of a *sealed court order*.'

In *Goddard-Watts v Goddard-Watts* [2019] EWHC 3367 (Fam), [2020] 1 FLR 885 at [20], Holman J stated (emphasis added):

> 'It is not in issue between both legal teams that the husband remained under a continuing duty to give full and frank disclosure to the wife, and to the court, not only until the conclusion of the evidence and submissions … but until Moylan J had formally handed down his judgment … and indeed until the drafted terms of the resulting order had been settled and agreed by both parties and the judge and *perfected by the seal of the court* …'

Likewise, in *Mostyn-Williams v Mostyn-Williams* [2021] EWFC 123 at [9], HHJ Gibbons stated that (emphasis added):

> 'The duty of disclosure continues until *the proceedings are concluded*. This must be *no earlier than when the order is sealed*.'

It might be argued that the notion that the duty of disclosure should continue beyond the operative date of the court's decision, and until the order is sealed, is counter-intuitive given that the sealing of an order is an administrative act by a court officer (or now an essentially automated function of the software powering the portal the moment an approved order is uploaded thereto or approved thereon) rather than a judicial one.

Such a conclusion could be said to be fortified by the fact that pursuant to FPR 30.4(2) and (3), the default time for filing an appellant's notice seeking permission to appeal is within 21 days 'after the date of the decision of the lower court against which the appellant wishes to appeal'. This mirrors the wording in the CPR, which likewise states at CPR 52.12(2)(b) that an appellant must file the appellant's notice within 21 days 'after the date of the decision of the lower court which the appellant wishes to appeal'. As was observed in *Sayers v Clarke Walker (A Firm)* [2002] EWCA Civ 645, per Brooke LJ, this language – the use of the word 'decision' – marked a change of practice from the former Rules of the Supreme Court 1965, Ord 59, r 4(1), which provided that every notice of appeal was to be served 'not later than 4 weeks after the date on which the judgment or order of the court below was sealed or otherwise perfected'. In other words, under the CPR time runs from the date of the decision and *not* the date of the seal on the order – and the FPR is in identical terms. This makes sense as any appeal is against the decision.

However, as Baroness Hale of Richmond observed in *Re L-B (Reversal of Judgment)* [2013] UKSC 8, [2013] 2 FLR 859 at [16] and [19] (emphasis added):

> 'It has long been the law that a judge is entitled to reverse his decision at any time before his order is *drawn up and perfected*.'
>
> 'Thus there is jurisdiction to change one's mind up until the order is *drawn up and perfected*. Under the Civil Procedure Rules 1998 (CPR) (r40.2(2)(b)), an order is now perfected *by being sealed by the court*.'

A judge may therefore change their mind until the order has been 'drawn up and perfected … by being sealed by the court'. That does not mean, however, that the original order had not, in fact, been made by the judge. Thus it might equally be argued that the duty to disclose was discharged on the making of that original order.

An ongoing duty?

In *Burns v Burns* [2004] EWCA Civ 1258 at [22], Thorpe LJ stated (emphasis added):

> 'My present view is that *in certain circumstances the duty of candour must clearly continue beyond the making of the substantive order*. It is very undesirable for these rare cases, where the court must reopen to do justice, to be deferred or delayed a day longer than absolutely essential. Accordingly, the recognition of a duty to disclose a supervening event known only to one side, or any other circumstance that might arguably ground an appeal, would at least bring the process of reassessment to the court, or should bring it to the court, at an earlier date.'

This paragraph has been the subject of some (arguably adverse) comment and in *N v N (Periodical Payments: Non-Disclosure)* at [51], McFarlane LJ stated that 'Thorpe LJ's words were plainly not intended to be more than an indication of the then current direction of his thoughts'. Further, at [52], he stated that:

> 'Although Thorpe LJ identifies positive factors in favour of extending the duty to provide full and frank disclosure in family finance cases beyond the close of the first instance proceedings, observations by Coleridge J in another case [i.e. *Gordon (formerly Stefanou) v Stefanou* [2011] 1 FLR 1582] indicate just how burdensome the responsibility of providing disclosure can be where the spouse concerned may have complicated and volatile financial arrangements.'

This led McFarlane LJ to conclude, at [53], as follows:

> 'My preliminary view would be against such a duty on the ground that it would be unnecessarily burdensome, and a potential source of unwarranted satellite litigation to establish a formal requirement that the parties should keep all of their previous financial disclosure up to date in the lead up to an appeal hearing and before the appellate court has determined whether there has been any material error in the first instance decision.'

Arbitration cases: awards, orders and delay

The duration of the duty of disclosure in the context of court proceedings following the delivery of an arbitrator's award was specifically considered by HHJ Booth (sitting as a deputy High Court Judge) in *ON v ON* [2024] EWFC 379.

It was the wife's case that the duty of disclosure was owed by the parties until a court order, giving effect to the arbitrator's award, was sealed. It was the husband's

contention that that duty ended at the final arbitration hearing, or with the delivery of the arbitrator's award, on the basis that the award was analogous to a judgment of the court.

The judge stated, at [22], that the duty would continue 'until the conclusion of the proceedings' which 'would normally be when the judgment is pronounced' and that '[t]he latest moment would be when the final order is sealed', although he also noted, at [23], that in different cases 'different language has been used'.

Thereafter, at [28], HHJ Booth stated that although when made an arbitral award is in principle effective and binding as between the parties, it was not a court order and needs to be turned into a court order to be enforceable. Given it can only be turned into a court order made by a judge, he observed, 'an arbitral award cannot have the same status as a judgment by a judge for the purposes of ending the duty of full and frank disclosure'.

At [34]–[38], HHJ Booth stated his conclusion as follows:

> 'Against that background, can the award be treated as if it were a judgment, so that the duty of full and frank disclosure ends with the award? The answer to that question, may very well be, "*It depends.*"
>
> If the award is followed by an immediate application to the court, with the court asked to make an order in terms of the arbitral award, I see no reason why the duty should not, for all practical purposes, end with the award. However, that is not what happened here …
>
> Once the proceedings were before the court, then in my judgment, the duty continued again until this court has decided what should happen. There has been no "*final disposition of the claims*" as contemplated by Lord Brandon and no "*conclusion of the proceedings*" per MacFarlane LJ in *N v N* (above).
>
> My conclusion is, on the facts of this case, the duty of full, frank, and clear disclosure has continued throughout, and continues until an order is endorsed by the court, following my judgment.'

On one reading of the decision, the duty ends, in arbitration cases, on the delivery of the award unless there is a significant delay in converting that award into an order. If that is the law then it might be considered to be problematic, practically speaking. How long a delay, it might be asked, must there be before a duty that was discharged on the delivery of the award is then revived?

An alternative reading might be that there is a duty to provide full and frank disclosure for the purposes of the arbitration that applies throughout the arbitration and a separate duty to provide full and frank disclosure for the purposes of the subsequent proceedings before the court that applies throughout those proceedings. But what then, it might be asked, of any intervening period and what would be the precise date from when the second separate duty applies?

Perhaps the preferable interpretation is that, come what may, the duty ends at the conclusion of the court proceedings that convert the award into an order, but that provided the award is converted into an order with the alacrity expected, so little time will pass between the delivery of the award and the making of an order that the two end dates will be so close together in time as to be much the same, 'for all practical purposes', in the normal run of cases.

While the orthodox view surely remains that, in principle, the duty of disclosure continues at least until a final order has been approved by a judge, pending any further decision on the specific end point, the pragmatic answer to any question as to precisely when the duty of disclosure ends both in cases before the court and those proceeding via arbitration may, in the words of HHJ Booth, be 'it depends'.

Costs in Financial Remedy Proceedings: Time for Greater Discipline?

District Judge Peter Hatvany



The cost of litigating financial remedy proceedings is one of the most serious and largely unaddressed problems facing the Financial Remedies Court. Too often, parties emerge from proceedings financially damaged not merely by the breakdown of the marriage itself, but also by the scale of legal costs incurred in the process of resolving the dispute. Costs erode the matrimonial pot with devastating consequences. Sometimes one of the parties cannot re-house.

The parties are emotionally vulnerable, anxious about their future, and fearful of making a mistake in litigation that may determine where they live or how they support themselves and their children.

The structure of financial remedy proceedings can also encourage unreasonable litigation. An angry or entrenched party can effectively force a matter to trial with relatively little fear of adverse costs consequences. Whilst FPR 28.3 and PD 28A permit the court to depart from the general rule of no order as to costs where litigation conduct justifies it, the practical reality is that substantial costs orders remain comparatively rare. This creates a culture in which disproportionate litigation can flourish.

The contrast with civil litigation is striking. In the civil jurisdiction, costs are central to case management and settlement strategy. A party who fails to beat a properly pitched Part 36 offer will ordinarily face severe financial consequences, including liability for the other party's costs after the expiry of the 21-day period up to and including trial. The regime creates meaningful costs discipline and exerts pressure upon parties to negotiate realistically and proportionately.

Financial remedy proceedings are, however, more nuanced. A strict transplantation of the civil costs model into financial remedy litigation would risk injustice. A judge may carefully structure an order to enable both parties to re-house, only for a substantial costs order to undermine the fairness of the outcome entirely. A needs-based case may leave little room for punitive costs shifting without causing real hardship. Financial remedy judges are therefore understandably cautious about making costs orders that would materially damage one party's ability to rebuild their life following separation.

Financial remedy proceedings frequently involve dependent children whose housing and welfare needs will inevitably take priority over any punitive approach to costs. Where limited assets are available, the court cannot realistically impose substantial costs penalties if doing so would undermine the ability of a primary carer to provide suitable accommodation for the children. In that sense, some departure from the strict civil costs regime is both inevitable and justified. The Financial Remedies Court jurisdiction must always retain sufficient flexibility to ensure that the welfare consequences of any costs order are properly considered.

Nevertheless, some of the discipline and proportionality found within civil proceedings should find its way into the financial remedy arena. FPR PD 28A already emphasises that the court should take a broad view of litigation conduct and may regard a failure to negotiate reasonably as conduct justifying an adverse costs order. *The Financial Remedies Court of England & Wales: Financial Remedies Guide 2026*,[1] issued under the leadership of Mr Justice Peel and His Honour Judge Hess, also places significant emphasis upon efficiency, proportionality, and sensible case management within the Financial Remedies Court. Paragraph 30 states:

> 'At all hearings the court will require to be informed of the parties' compliance with the duty to negotiate openly and reasonably pursuant to FPR 2010 PD 28A para 4.4. To enable the court to examine the attempts at achieving a negotiated settlement, position statements for each hearing must contain short details of what efforts the parties have made to negotiate openly and reasonably. The parties will be warned that, whatever the size of the case and whether it is being decided by reference to needs or sharing, a failure to make reasonable attempts to compromise cases in open negotiation once the financial landscape is clear may be met by an order for costs.'

This guidance contemplates adverse costs orders being made even in needs cases.

However, we need to go much further. This could be achieved at the first appointment. The court would allocate the case to a complexity band with set recoverable costs in each band. Such an approach would draw a parallel with

the intermediate track in civil proceedings and its four graduated complexity bands.

For example, Band 1 cases might involve disputes where the only significant asset is modest equity in the former matrimonial home together with equally modest pensions and savings. Recoverable costs in such matters could be capped at, say, £15,000 per party to trial and £10,000 to FDR. Higher bands would accommodate increasing factual and legal complexity, including business valuations, inherited wealth, allegations of dissipation and misconduct, or offshore trust structures. A Band 4 case involving substantial company interests and international assets might justify costs in the region of £250,000 to trial inclusive of expert fees and other disbursements. Within each band there would be additional provision for satellite add-ons such as intervenor proceedings and third-party claims.

Any fixed costs regime would require teeth to be effective. Some pain may be necessary to achieve this. As in civil proceedings, a party seeking to depart materially from an allocated band approved at the first appointment would be required to demonstrate good reason for doing so by D11 application. This should very much be the exception to discourage satellite litigation. Applications should be discouraged by awarding costs against the party who made the application if it is unsuccessful. Costs should be summarily assessed by the judge at the hearing. Any party seeking costs should place the other party on notice using form N260 as in civil proceedings to enable the judge to summarily assess in a few minutes at the end of any hearing.

Absent such justification, costs incurred beyond the approved budget would not generally be recoverable. Nor should such excess expenditure be capable of recovery indirectly through the back door by being presented as a liability within the ES2. This practice should cease.

As things stand, an unreasonable litigant can diminish the matrimonial pot through excessive or unnecessary expenditure and thereby reduce the resources available for distribution, sometimes causing one of the parties to be unable to re-house. The principle therefore reinforces the broader objective that parties should conduct litigation proportionately and with proper regard to the preservation of family assets.

If costs discipline is to be meaningful, parties must understand from the outset that disproportionate litigation expenditure will ultimately remain their own responsibility even in a needs case.

Such a system would not eliminate judicial discretion. Judges would retain a residual discretion to depart from fixed costs where justified by exceptional complexity or misconduct. However, it would impose an external framework of proportionality upon litigation that currently lacks meaningful restraint. It would also encourage practitioners and clients alike to focus upon the issues that genuinely matter and avoid expensive sideshows.

There is also a strong argument for reconsidering the role of *Calderbank*-style offers. Prior to the changes introduced in 2006, *Calderbank* letters played a significant role in encouraging settlement within ancillary relief proceedings, as they were then known. In civil proceedings a well-pitched Part 36 offer will often achieve settlement. The reintroduction of *Calderbank* offers could provide a more effective mechanism for penalising parties who pursue unrealistic positions. Any such regime would need to preserve the court's ability to avoid outcomes that interfere disproportionately with the substantive financial award itself. But judges should not shy away from a punitive costs award where it is clear an offer should have been accepted, even in a needs case. If a party fails to beat a *Calderbank* offer the court should ensure there is an adverse cost consequence, even if modest as in a needs case or a case with limited assets.

Ultimately, judges should not shy away from disallowing costs where a party has failed to litigate reasonably, whether by the front or back door. The current culture allows disproportionate expenditure to become an accepted feature of financial remedy litigation, notwithstanding the frequent howls of protest from the judiciary.

The money spent on legal costs is money removed from the resources available to the family. Greater costs discipline, sensible budgeting, and more robust consequences for unreasonable litigation would not undermine fairness in financial remedy proceedings. Properly implemented, it would enhance it.

Notes

1 www.judiciary.uk/guidance-and-resources/financial-remedies-guide-2026/

The Case for *Calderbank*: A Procedural Reform Too Far?

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Family law is not a 'desert island'

Many family practitioners will recall the prominent role played by *Calderbank* offers pre-2006.[1] Although some practitioners will remember their ubiquity, others may be less familiar with their historical role and it is important to revisit their origins.

The *Calderbank* principle originated in *Calderbank v Calderbank* [1976] Fam 93, in which the court offered guidance – with reference to the practice adopted in Admiralty and Lands Tribunals – that an offer can be in the form that it is without prejudice as to the issues, but reserving the right to refer to it on costs; what is now termed 'without prejudice, save as to costs'.

Although the observations in *Calderbank* were, strictly speaking, *obiter*,[2] the principle was quickly established in financial remedy (then 'ancillary relief') proceedings and ultimately found favour in wider application across civil litigation as a whole, per the judgments of Oliver and Fox LJJ in the Court of Appeal case of *Cutts v Head* [1984] Ch 290. It is important to pause here for a moment and consider the public policy rationale underpinning the *Calderbank* principle. Per Oliver LJ:

> '… parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings,'
>
> '… a consciousness of a risk as to costs if reasonable offers are refused can only encourage settlement whilst, on the other hand, it is hard to imagine anything more calculated to encourage obstinacy and unreasonableness than the comfortable knowledge that a litigant can refuse with impunity whatever may be offered to him even if it is as much as or more than everything to which he is entitled in the action.'

In layman's terms, the public policy was to protect negotiations by permitting them to be made without prejudice, as this would encourage parties to settle disputes without the fear that something said or offered in the course of negotiations might subsequently be deployed against them. But the without prejudice veil could then be lifted after trial to determine if a party had not been negotiating reasonably, which could result in a costs order being made against them. Absent this, where is the incentive for reasonable engagement? Already, one may sense the tension with our current rules (more of which below).

The *Calderbank* rule has been referred to and approved in countless cases, up to the House of Lords (cf *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280 and *Ofulue v Bossert* [2009] UKHL 16, for instance) and was enshrined in the Rules of the Supreme Court, then in CPR Part 44 and explicitly in the precursor to the Family Procedure Rules 2010 (FPR 2010), the Family Proceedings Rules 1991 (FPR 1991) at r 2.69, which provided, *inter alia*:

> '(1) Either party to the application may at any time make a written offer to the other party which is expressed to be "without prejudice except as to costs" and which relates to any issue in the proceedings relating to the application. …
>
> 2.69B Judgment or order more advantageous than an offer made by the other party
>
> (1) This rule applies where the judgment or order in favour of the applicant or respondent is more advantageous to him than an offer made under rule 2.69(1) by the other party.
>
> (2) The court must, unless it considers it unjust to do so, order that other party to pay any costs incurred after the date beginning 28 days after the offer was made.'

There it surely ends: the careful development within our common law, over many decades, of an important mechanism by which the court could impose cost consequences on a failure by a litigant to engage reasonably in the settlement of a dispute, whilst preserving the confidentiality which makes meaningful settlement negotiations possible.

2006 reforms

Actually, no. Quite the opposite, in fact. To the ongoing frustration of many family practitioners, the *Calderbank* rule was canned in 2006 with the insertion of r 2.71 into the FPR 1999 and 'the general rule in ancillary relief proceedings … that the court will not make an order requiring one party to pay the costs of the other party'. And so, the (damaging) presumption of 'no order as to costs' came to be. Incidentally, when the FPR 2010 came into effect on 6 April 2011 (to consolidate the rules operative in family law), FPR 1999, r 2.71 was mirrored in FPR 2010, r 28.3 (with which

we are all very familiar), subject to one very important future addition (see below).

Paragraph 7.1 of the Explanatory Memorandum to the Family Proceedings (Amendment) Rules 2006, which introduced this *volte face*, is illuminating:

> 'The purpose of these rule amendments is to make changes to the courts' power to make cost orders in ancillary relief proceedings. The new rules will only give the court power to make cost orders in ancillary relief proceedings where it is justified by the litigation conduct of a party. The policy objective is to discourage the making of costs orders in ancillary relief cases other than because of the conduct of one of the parties. Cost orders have a destabilising effect on financial settlements that have been carefully constructed by the court.
>
> The rules also provide that courts will no longer be able to consider any "without prejudice" or "without prejudice save as to costs" offers (also known as *Calderbank* offers) when making decisions on cost orders to avoid the procedural gamesmanship and uncertainty for the parties which these can produce.'

The case for this reform and the abolition of the *Calderbank* rule is also neatly summarised in *GW v RW* [2003] EWHC 611 (Fam) by Mostyn J, and in *Norris v Norris; Haskins v Haskins* [2003] EWCA Civ 1084 by Butler-Sloss and Thorpe LJJ. It can be summarised as follows:

(1) FPR 1999, r 2.69 was in parts incomprehensible.

(2) The nature of financial remedy proceedings had changed dramatically following *White v White* [2000] UKHL 54, [2001] 1 AC 596. As the costs committee noted at the time:

> 'Family proceedings arise out of the breakdown of a marriage, which may be seen as a misfortune falling on both parties. The fact that the court has to assist the parties to re-adjust their finances should not of itself imply blame on the part of either party. … As Mr Mostyn QC points out at para 86 of his judgment [in *GW v RW*], it may often be that "each party has had to come to the court to obtain an order which fairly disposes of the issues between them".'

This gave traction to the appeal of a presumption of no order as to costs.

(3) The *Calderbank* rule imposed on the parties the obligation to engage in a form of spread betting: guess the outcome of the case and take a position, leading to (harsh) binary outcomes, such that a party who beats their offer by even a 'tiny amount' would result in them being awarded their costs post-offer.

(4) The 'procedural gamesmanship' referred to the creation of two-tier negotiations. If an open offer carries little or no immediate costs risk, there is considerably less incentive to make it realistic. An ambitious open position can be maintained without necessarily exposing the party to the same costs consequences which accompanied the rejection of a reasonable *Calderbank* proposal. The consequence can be a curious two-tier negotiation. The open position becomes a piece of litigation positioning. The real negotiation takes place elsewhere. This could also upset a carefully crafted judgment, if a judge then felt duty-bound to make a costs order once the parties' without prejudice save as to costs positions were unveiled.

(5) The *Calderbank* rule resulted in keenly fought satellite costs assessment litigation.

Financial remedy litigation is unusually discretionary (and this is not always to its credit, especially with increasing numbers of litigants in person – we expand on this below). The outcome is rarely susceptible to the sort of binary prediction which is possible in much conventional civil litigation.

The reforms which followed were therefore not without foundation. But the solution went further than removing an undesirable degree of costs gambling and removed the costs protection which accompanied private settlement negotiations altogether. The new regime sought instead to encourage parties to negotiate openly and reasonably. Open offers could be made, and conduct *could* be taken into account when determining costs (and which could include consideration of any open offers made).

The intention was laudable. If parties were no longer able to deploy *Calderbank* offers, they would instead be encouraged to put sensible proposals openly before one another and thereby facilitate settlement.

Unintended consequences

With the removal of costs consequences for failing to negotiate reasonably, parties' open positions were often hugely ambitious and/or barely arguable, but, at the same time, possibly coupled with a slightly more reasonable without prejudice position that had no teeth. In effect, gone was the incentive for parties to engage reasonably, leading to entrenched positions,[3] which could only really be stymied, if at all, by attendance at an FDR, where parties may expose themselves to criticism from the FDR 'judge'; though (importantly) still with no costs consequences.

Did the changes to the rules have a further unintended consequence of leading some lawyers to being less focused on advising clients on the legal merits of their position and, instead, pitching proposals as high as could be argued? Intellectual rigour amongst practitioners would quite often fall away and so, too, discipline in the round: there were precious little consequences for the clients and their lawyers.

As aforementioned, while there was reference to 'any open offer to settle made by a party' under the umbrella of conduct under FPR 2010, r 28.3, this was of little practical effect. The received wisdom was that it was too risky to advance sensible (i.e. reasonable and responsible) open proposals for fear that any judge would assume that there was a more sensible without prejudice proposal lurking beneath.

Inevitably, this led to concern, not just amongst practitioners, but also the judiciary. In a bid to encourage parties to openly negotiate sensibly, Moor J said in *MAP v MFP* [2015] EWHC 627 (Fam)[4] at [87]:

> 'Now that we no longer have *Calderbank* offers, litigants must be encouraged to make open proposals as early as possible that are designed to encourage settlement. If the other party spurns such an offer, the court is entitled to ignore it completely and decide the case

> entirely on the merits. I will have no hesitation in a suitable case in awarding an applicant more than an open offer he or she has made if that is justified.'

Strictly speaking, the courts were permitted to consider parties' open offers under the umbrella of conduct when making decisions about costs orders. However: (1) there was no further encouragement within the rules; (2) it conflicted with the overarching presumption; and (3) there was considerable resistance amongst the profession to advise clients to advance sensible proposals. The rule change had become problematic and (belatedly) the Costs Working Group of the Family Procedure Rule Committee (FPRC) had this to say preceding the May 2019 amendment to PD 28A:

> 'FPRC is concerned that insufficient emphasis is given to encouraging parties to engage reasonably and responsibly in negotiations. In particular, there is concern that little positive guidance was given in PD28A to assist the parties to understand the likely costs consequences of failing to litigate sensibly and failing to engage in sensible negotiations and/or of making an open proposal which is significantly higher or lower than the award ultimately made by the court'[5]

What is frustrating about this is quite how obvious this issue was. We refer to Oliver LJ's comments above, as well as Fox LJ's comments in *Cutts v Head*, all made some 25 years prior to the FPRC's observations:

> 'If a party is exposed to a risk as to costs if a reasonable offer is refused, he is more rather than less likely to accept the terms and put an end to the litigation. On the other hand, if he can refuse reasonable offers with no additional risk as to costs, it is more rather than less likely to encourage mere stubborn resistance.'

The fudge

Therefore, and in the light of calls in many corners for a reintroduction of the *Calderbank* principle (albeit with some procedural reform) from Resolution[6] and many other practitioners, in 2019, in order to right the wrongs of the abolition of *Calderbank*, the FPRC introduced the following addition to FPR 2010, PD 28A, para 4.4:

> 'The court will take a broad view of conduct for the purposes of this rule and will generally conclude that to refuse openly to negotiate reasonably and responsibly will amount to conduct in respect of which the court will consider making an order for costs. This includes in a "needs" case where the applicant litigates unreasonably resulting in the costs incurred by each party becoming disproportionate to the award made by the court. Where an order for costs is made at an interim stage the court will not usually allow any resulting liability to be reckoned as a debt in the computation of the assets.'

This addition to PD 28A was later sharpened into an oft-relied-upon tool for seeking costs orders following open proposals, and perhaps most memorably by Mostyn J in *OG v AG* [2020] EWFC 52 at [31]:

> 'It is important that I enunciate this principle loud and clear: if, once the financial landscape is clear, you do not openly negotiate reasonably, then you will likely suffer a penalty in costs. This applies whether the case is big or small, or whether it is being decided by reference to needs or sharing.'

The force of *OG v AG* has extended well beyond the facts of that case. The passage is now routinely deployed by practitioners in correspondence as a warning that a failure to engage reasonably with an open proposal may carry costs consequences. In practical terms, it has become a familiar substitute for the negotiating pressure once supplied by a *Calderbank* offer: parties are told, in effect, that they may not be able to shelter behind their own litigation strategy if they fail to negotiate reasonably (often read, make significant concessions) once the financial landscape is sufficiently clear.

The addition to PD 28A, para 4.4 and the mounting case law following *OG v AG* which supported judicial treatment of open offers being referable to costs, has consequentially compelled the 'guessing' to the open arena to protect parties on costs by early admissions, and a paradox was created. If the abolition of *Calderbank* was justified in part because its costs consequences produced undesirable gamesmanship and uncertainty, why is the modern regime increasingly seeking to recreate costs incentives through open negotiation and conduct? The answer is that settlement still requires incentives.

The difficulty is that litigation conduct and open offers are now being asked to do the work once performed by *Calderbank*, but without the protection of allowing parties to negotiate on a without prejudice basis and without fear that those concessions will later be deployed against them. Moor J can say in *MAP v MFP* that judges are entitled to ignore the open offer and decide a case on its merits – and this may be right in principle – but, in practice, can this be assured in all cases? Judges are humans. It would be impossible to rule out open concessions colouring their judgments, and yet this very risk is positively imposed on litigants, else it will sound in costs.

That refusal to negotiate reasonably and responsibly on an open basis may result in a costs order against a party strikes at the very core of the without prejudice rule:

> 'The public policy justification [of the without prejudice rule], in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability.'[7]

The *Calderbank* benefit of a sealed offer, only opened at the point of costs (i.e. *after* judgment), was that the primary judgment could not be coloured by such without prejudice concessions.

This is not merely an arid theoretical concern; it affects us all in practice. Take the following examples:

(1) A party may be willing to be over-generous to 'kill' the litigation to avoid the cost or uncertainty of a hearing.
(2) A party may be emotionally unable to contemplate the stress of a final hearing (including the stress of cross-examination, etc) and so makes an offer against their interests (a particular risk in a case involving abuse/coercive control).
(3) A party may accept a lower spousal maintenance figure or term than they are entitled to for similar reasons. Doing so on an open basis is hugely risky, as maintenance is usually confined to 'need'.

(4) A party may agree to a particular division of capital because they want to retain an asset which has personal significance.
(5) Conversely, a party may offer more than they consider strictly justified because the financial and emotional cost of continued litigation has become disproportionate and/or the other side's position is completely unreasonable.

None of those decisions necessarily represents a party's true assessment of their legal entitlement; they are compromises, often significant. But, in order to apply costs pressure to the other side, the current regime effectively pressures parties to make such compromises openly and, yet, once the genie is out of the bottle, retreat becomes considerably harder.

This goes beyond tactical inconvenience and fundamentally strikes at the rationale for the without prejudice and public policy principles. Furthermore, if a party fails to engage in without prejudice discussions, the consequence is that a party has incurred costs in unsuccessful without prejudice or non-court dispute resolution attempts, and the spurning party cannot be held to account. Can that be regarded as fair?

Not so simple

There is a further practical difficulty.

The costs regime is not even uniform across closely connected financial proceedings. FPR 2010, r 28.3 only applies to 'financial remedy proceedings'. Proceedings which are merely 'in connection with' financial remedy proceedings fall outside that regime. The distinction is not merely semantic. At [51] in *Judge v Judge* [2008] EWCA Civ 1458, Wilson LJ drew a deliberate distinction between proceedings 'for' and 'in connection with' (then) ancillary relief, with the former attracting the 'no-order for costs' rule; the latter did not (thereby retaining the *Calderbank* jurisdiction):

> 'Although the proceedings before the judge were in connection with ancillary relief, they were not for ancillary relief…. The general rule in [the modern FPR 2010, r 28.3(6)] is only a concomitant of the modern approach in applications for ancillary relief that the sum owed by each party in respect of his own costs will be treated as his liability for the purposes of calculating the substantive award.'

The result is that closely connected financial litigation may be governed by materially different costs regimes. An application to vary a maintenance order falls within the financial remedy 'no order for costs' regime, whereas enforcement proceedings do not (even though they are commonly heard together). Thus, the same parties could attend the same hearing, concerning the same financial circumstances, with the applications heard together and often arising from the same underlying dispute, yet find themselves subject to two entirely different costs regimes.

The position is even more difficult for litigants in person. The Law Commission expressly observed that the interaction of the rules was difficult to follow and recommended that the costs rules applicable to enforcement of family financial orders be consolidated into a stand-alone regime.[8] However, the answer to the apparently straightforward question 'Can I make a private settlement offer which may have costs consequences?' continues to depend upon whether the proceedings are characterised as variation, enforcement, maintenance pending suit, an application for payment of legal services or some other form of financial application.

Indeed, if the concern was that private offers created gamesmanship and uncertainty, it is difficult to see why the answer should be to prohibit them in one category of financial litigation whilst leaving them potentially available in another closely connected category.

The modern costs position requires a litigant in person (and practitioner) to understand, amongst other things:

(1) the difference between proceedings for a financial order and those 'in connection with' a financial order;
(2) the general rule that there will be no order as to costs in proceedings for a financial order, and the rule that costs follow the event in proceedings in connection with a financial order;
(3) the exception based upon conduct (and then what qualifies as relevant litigation conduct);
(4) the importance of open offers;
(5) the limits of without prejudice offers; and
(6) the potential significance of departing from a reasonable proposal.

That is a considerable amount of procedure and procedural strategy to expect a lay party to absorb, with now ever more serious cost consequences for error.

It is particularly acute in financial remedy proceedings because the jurisdiction is not a conventional damages jurisdiction. The ultimate outcome is discretionary. A litigant may therefore be required to formulate an offer which reflects their best assessment of a highly uncertain judicial outcome, whilst not understanding or knowing that the offer may ultimately be relevant to the costs consequences of their conduct. That difficulty is not unique to open offers: it is inherent in any costs regime which attaches consequences to the gap between an offer and the eventual outcome. The important distinction is that a *Calderbank* offer permits the parties to test those positions within the protection of without-prejudice negotiations and explicitly referable to costs, whereas an open offer exposes the negotiating position itself to scrutiny and whether it was 'reasonable' (a highly uncertain concept, except perhaps in retrospect).

The supposed simplicity of 'make a reasonable open offer and negotiate reasonably' is therefore rather less simple in operation.

The way forward: restore, do not recreate

We are not saying that the answer is to return uncritically to the pre-2006 regime. The concerns which prompted reform were real and there were legitimate objections to a costs system in which parties could face substantial consequences for failing to predict with sufficient accuracy the outcome of a highly discretionary financial remedy exercise. The court must retain a broad discretion. Nor should settlement become a mathematical game in which the litigant who guesses the eventual award most accurately automatically wins the costs argument.

However, it does not follow that *Calderbank* itself was

the problem, but rather how its application and interpretation evolved over time. It was never the case that it was designed to provide binary outcomes and nor should it (though that does, in part, appear to be the thrust of Mostyn J's concerns in *GW*), especially in the fraught and highly discretionary area of financial remedy. Indeed, we understand that in civil litigation, the *Calderbank* jurisdiction is relied upon less than the Part 36 procedure under the CPR, precisely because it results in less binary outcomes in respect of costs.

The better answer may be to restore a properly defined *Calderbank* jurisdiction and allow the FPRC to finesse its operation. Factors such as the timing of the offer, the reasonableness of the proposal, the information available to the parties when it was made and level of disclosure available, the extent of the compromise sought, the complexity of the case, the parties' respective conduct and the eventual outcome could all remain relevant.

Crucially, with this reinstatement, the distinction between a settlement concession (made without prejudice) and an admission would also once again be respected.

Conclusion

The abolition of *Calderbank* was driven by legitimate concerns. Financial remedy litigation is unusually discretionary, and the 2006 reforms sought to reduce the tactical gamesmanship associated with private costs offers.

But remove the costs consequence of rejecting a reasonable private offer and there is less incentive to make one. The subsequent reliance on open offers and conduct has, instead, created a potentially more serious collision with the public policy underlying without prejudice protection.

Settlement requires candour, but candour requires protection. The answer cannot be to continue blurring that distinction through open offers and conduct.

Calderbank should be restored, with its operation refined by the FPRC. The court should retain discretion as to whether an offer was reasonable, whether its rejection was unreasonable and what costs consequence, if any, should follow. But that is very different from near abolishing its jurisdiction altogether.

Notes

1 Family law is not a 'desert island' is Lord Sumption's observation in *Prest v Petrodel Resources Ltd* [2013] UKSC 34. Family law is not a self-contained jurisdiction in which established legal principles acquire a different meaning simply because the dispute happens to arise between spouses. As Lord Sumption observed in *Prest*, where a legal right exists, it exists across the different jurisdictions of the High Court and county courts.

2 Indeed, the one thing strikingly absent from *Calderbank* was a *Calderbank* offer! Also curiously, it doesn't actually have much to say about the without prejudice save as to costs principle; the far better read is *Cutts v Head* [1984] Ch 290. However, it is worth your time, if only to read Scarman LJ take counsel for the wife (she being the wealthier party) to task for his somewhat antiquated submissions: 'Mr. Hordern is really saying that we must read section 25 [Matrimonial Causes Act 1973] as stating impliedly, because it certainly does not say so expressly, that financial provision may be made for a husband only in exceptional circumstances. The section says nothing of the sort'. He doesn't leave it there: 'It is very difficult to fault the judge's conclusion except upon the theoretical or conceptual basis advanced by Mr. Hordern that really this statute does not provide that a wife should make financial provision for her husband save in exceptional circumstances. Such a provision cannot be found in the relevant sections'.

3 The point being that, with the passage of time, clients often become very attached to proposals they advance, notwithstanding advice at the time that those proposals may be unrealistic or, worse still, fanciful.

4 This was oft-quoted by practitioners with open proposals in a bid to give them substance (or teeth).

5 Family Procedure Rules 2010, 'Consultation in relation to the treatment of *Calderbank* offers when determining issues relating to costs', para 5.

6 'Consultation in relation to the treatment of *Calderbank* offers when determining issues relating to costs: Resolution's response to the Family Procedure Rule Committee'. In answer to 'Do you consider that offers made "without prejudice save as to costs" should be admissible in considering the "conduct" of a party for the purposes of FPR r28.3?', 118 were in support and 17 in opposition.

7 Oliver LJ (again).

8 *Enforcement of Family Financial Orders*, Law Com No 370, 2016, para 16.10.

'Not a Lot of People Know That!' A Refresher on Some of the Perhaps less Well-known or Sometimes Overlooked Aspects of Enforcement

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Introduction

Enforcement is something of the ugly duckling of financial remedies work. The glamour is in getting the great result for your client. However, that glamour can be rapidly tarnished if the other person fails to pay or transfer what is ordered. Every financial remedy practitioner needs to be conscious of enforcement and, as we impress in this article, not just after the event, but also at the time of drawing the final order itself.

This article is not intended to be a comprehensive review of all the various methods of enforcement and the procedural rules that apply. Such almost justifies a textbook. Rather, we seek to highlight some of the substantive and procedural aspects of enforcement that are perhaps not as well appreciated as they should be in a series of questions one might receive from a client.

Client query 1: When can I enforce my financial remedies order?

This may seem a silly a question. You have an order thus it can be enforced, right? However, a financial remedies order is not a standalone order. It is ancillary to the divorce, nullity or dissolution of civil partnership. After all, we used to call it 'ancillary relief'. Thus, until you get the decree absolute/final divorce order you cannot enforce any lump sum, property adjustment or pension sharing order. Indeed, should death or bankruptcy intervene after the final financial order, but prior to the decree absolute/final divorce order, it may never take effect. So, the first tip is once you've got your final financial order make sure you get decree absolute/final divorce order as soon as possible (noting that this is, of course, going to be longer where there is a pension sharing order).

But what about the case of *DH v RH (No 6) (Application to Set Aside)* [2025] EWFC 175? Did MacDonald J not make an order under s 39 Senior Courts Act 1981 to sign transfer documents in aid of a property adjustment order where decree absolute was still outstanding? The answer is not entirely clear. The husband's application for decree absolute was recorded as being before the court at the outset of the judgment dealing with enforcement. Thus, still outstanding. However, nothing further was said in the judgment about whether this was being granted or even considered. To be fair, there were a plethora of other issues in the case, the wife did not turn up and the husband represented himself. Moreover, there is no suggestion in the judgment that the point that the lack of decree absolute prevented enforcement was ever raised. It is thus more likely than not that the issue was simply overlooked. It is certainly not authority to suggest enforcement of a property adjustment order can proceed without decree absolute/final divorce order.

There are, however, some genuine exceptions to this general rule. The following orders *can* be enforced prior to decree absolute/final divorce order:

(1) periodical payments orders (whether as part of a separate MPS application or made at final hearing);
(2) LSPO orders;
(3) assessed or agreed costs orders.

In respect of costs orders, it is important to bear in mind they must be 'liquidated' to be enforced. An order that a party pays costs to be agreed or the subject of detailed assessment is not liquidated and thus not enforceable until the amount is fixed either by agreement or assessment. Detailed assessment can be both expensive and time consuming. It is for that reason generally more beneficial to seek summary assessment of costs, even after a trial, in order to have a liquidated order.

It is worth remembering that there is no rule that there *cannot* be summary assessment after a hearing lasting more than a day, it merely ceases to be the default in that situation. Indeed, the costs rules state summary assessment should *always* be at least considered – CPR PD 44, para 9.1 (imported into the FPR by FPR 28.2). The experience of the authors is that Family Court judges will consider summary assessment perhaps more readily than civil judges even in longer cases. Even where a judge declines summary assessment it is still worth asking for a payment on account of such costs and any sum so allowed is itself enforceable as a liquidated sum. This is extremely common in civil proceedings but perhaps less used in family cases, though there is no reason in principle why that should be so.

In any case, where costs are likely to be sought

summarily, a Form N260 setting out the detail of the costs claimed should be served 24 hours before the relevant hearing – it is not sufficient to rely on Form H or even Form H1 – FPR PD 28A, para 4.5.

Lastly, it should be noted that although standalone enforcement needs to await decree absolute/final divorce order, that does not mean that enforcement cannot be baked into a final financial order. If the facts of the case justify it, for example, a charging order, third party debt order or attachment of earnings order may actually be made with and at the same time as the final financial order.

Client query 2: How do I enforce in the Family Court?

FPR 33.3(2)(b) allows the unique opportunity to make a general application for such method of enforcement the court may consider appropriate. That allows you to keep all of the enforcement options open and pursue potentially numerous methods of applicable enforcement at the same time. The court may make any of the following orders at the same time or subsequently, following examination of the debtor's means:

(1) Attachment of earnings.
(2) Third-party debt order.
(3) Charging order, stop order or stop notice.
(4) Writ or warrant of execution (seizure and sale of personal property).
(5) Appointment of a receiver.

It is not an either/or approach. The general application made in Form D50K can be filed alongside standalone applications for specific methods of enforcement. Notably, the general application cannot be used to pursue committal because of the hybrid process of oral examination that follows the filing of the Form D50K application. Per *Mubarak v Mubarak (No 1)* [2001] 1 FLR 698 there can be no such compulsion of evidence in committal proceedings which must be pursued separately and specifically.

Orders for sale do not cease upon the making of the final financial order. The court has the power to make a standalone order for sale as a method of enforcing lump sums and property adjustment orders. That allows for a quicker process compared to obtaining a charging order and thereafter an order for sale but their use is limited. An order for sale cannot be made to recover costs orders or arrears of periodical payments. There is also nothing to stop the debtor dealing with the property pending the order being made. Therefore, caution should be exercised if there are other potential creditors.

Client query 3: I've got a lump sum order with an order for sale in default. The lump sum has not been paid and I've heard my ex has recently been made bankrupt. What can I do?

The desirability of including an order for sale in default of payment of a lump sum is generally well known and indeed self-evident. It provides an automatic enforcement mechanism. However, what is generally less well known is that it also provides, once there is decree absolute/final financial order, a form of automatic security in respect of the lump sum amount by way of an equitable charge on the property identified for sale. This provides much wider protection against third party claims, including bankruptcy or charging orders, than a standalone lump sum order.

Authority for this proposition can be found in *DW & CW v GC* [2016] EWHC 2965 (Fam), [2017] 4 WLR 80. There, a lump sum order by instalments had been made in favour of the wife. The order stated that in default of payment of any of the instalments, a property owned by the husband would be sold to meet the balance outstanding. The husband had, subsequent to the order, purported to declare a trust in favour of his new partner in respect of the relevant property and thereafter had been declared bankrupt. The husband had defaulted on the instalments. The question arose as to whether the wife could still enforce by her order for sale despite the bankruptcy.

Moylan J was surprised that there was no authority he could find directly on point. However, he had regard to the civil Court of Appeal decision in *Hughmans Solicitors v Central Stream Services (In Liquidation)* [2013] 1 EGLR 27. There, it had been held that an agreement within a Tomlin order to sell a property belonging to one party out of which proceeds of sale a sum was to be paid to another party, created an immediate equitable interest in the property in favour of the other party. This equity was up to the amount of the outstanding debt. Furthermore, this equity would take priority to any subsequent charging order. Moylan J thought the position was, if anything, stronger where the obligation arose in the body of a court order.

He also had regard to the financial remedy case of *Mountnay v Treharne* [2002] EWCA Civ 1174, [2003] Ch 135. There the Court of Appeal held that a property adjustment order took effect in equity on the making of the order combined with decree absolute, prior to its implementation by legal conveyance. This in turn had been partly based on the 19th-century *Maclurcan* line of authority that established that a provision for maintenance to be secured on a property created an immediate equitable charge over the property, prior to the implementation of any legal charge, provided such property was sufficiently identified.

Drawing those threads together Moylan J concluded that the wife had an equitable charge in the property that took priority to any subsequent charges or dealings by the husband. Further, the husband's trustee in bankruptcy took his interest in the property subject to this equitable charge.

Thus, if there is any concern that the payor of a lump sum may be susceptible to bankruptcy or have other creditors sniffing around it is highly advisable to have any lump sum order backed up, if at all possible, by an order for sale in respect of identified property.

An equitable charge is, of course, not entirely secure in that it only takes priority to charges created after it. Moreover, it does not of itself protect against an early sale to a purchaser for value without notice and the judgment debtor then scuttling off with the proceeds of such sale. However, this latter risk can be mitigated by placing restrictions on the title at the Land Registry. These can either be by way of an agreed restriction or, if necessary, protected by a unilateral notice. Any subsequent purchaser would thereafter be in real difficulty in showing a lack of notice.

Client query 4: I've got an unpaid costs order which is now more than 6 years old. My ex owns a property. Can I still enforce the costs order after this amount of time?

The short answer is 'yes' and the most obvious and easiest way to do so on these facts is by a charging order. There is no formal time limit for charging order applications. Charging orders are a form of execution and not a fresh action. Thus, the limitation period for an action as contained in s 24(1) Limitation Act 1980 does not apply: *Lowsley v Forbes* [1999] 1 AC 329. This means charging orders may be used to enforce orders made long ago and, in particular, judgment debts and costs orders made over 6 years prior to the application. The only limit that applies is that conferred by s 24(2) Limitation Act 1980. This limits any interest claimed on the judgment debt or costs order to 6 years from the date of judgment. There is, however, no limitation bar to making the charging orders themselves.

Nor is there any procedural requirement to seek permission of the court to enforce a charging order after 6 years. Nowhere in FPR Part 40 nor the Charging Orders Act 1979 (nor indeed CPR Part 73) is there any mention of an express or implied requirement for permission to bring charging order proceedings to enforce a judgement more than 6 years after it was made (this is in obvious contra-distinction to other forms of execution). Given the absence of such requirement in the rules or statute there is no basis for implying such a rule: a point confirmed by the Court of Appeal in *Fraenkl-Rietti v Cheltenham & Gloucester Plc* [2011] EWCA Civ 524.

Further, once obtained, charging orders have an almost indefinite shelf life. In *Yorkshire Bank Finance Ltd v Mulhall* [2008] EWCA Civ 1156, the Court of Appeal refused to set aside a charging order made more than 16 years previously. Moreover, there is no limitation on interest accruing on the sum secured by the charging order. Once the charging order is made, interest is arising on the secured debt and not the underlying judgment and thus the 6-year interest limit under s 24(1) Limitation Act 1980 is of no application.

One of the implications of this is that it may well be worthwhile obtaining a charging order even when there are concerns regarding the extent of any equity in the property it is proposed to charge. This is because such equity may increase over time during which time the debt is accruing interest.

A word of caution, however. It is not necessarily a good idea to leave a charging order in place for a long time, at least without good reason. The vintage of a charging order may affect the likelihood of a court ultimately exercising its discretion to order an immediate sale of the property to enforce the charge. This is a separate and subsequent process to obtaining the charging order – though as *VS v RE* [2018] EWFC 30, [2018] 2 FLR 1213 made clear, such application can still be made in the Family Court. This does not mean the charge is of no value but if the court will not order an immediate sale, it defers the realisation to the time the judgment debtor chooses to sell or otherwise has a sale forced upon them.

Client query 5: I can already see the writing on the wall. They have already tried to plead that they do not have sufficient means to pay the maintenance, and I know they won't comply with the order. Am I staring down the barrel of the gun of inevitable enforcement?

It will take a very specific set of circumstances to be able to convince a judge that the other person is going to refuse to comply with an order that has not yet been made, but we have all seen those cases. Parties who have failed to comply throughout the proceedings; the cases that ran on inferences; those litigants in person who have been brazen enough to say that they cannot and won't afford the maintenance. Convincing the judge to make the maintenance order is only half of the battle. Rarely is security sought at that stage. Cue, an attachment of earnings order being made at the time of the periodical payments order in the final financial order.

Client query 6: There are no identifiable assets against which I can seek a third-party debt order but I know they have been paying their solicitor, what if there are still funds sitting there?

There is an ongoing debate that funds held in a solicitor's client account can be the subject of a third party debt order. Historically, third party debt order applications were refused on the basis that it could not be proven that the funds were owed by the solicitors to the judgment debtor. However, in *BCS Corporate Acceptances Ltd & Ors v Terry* [2018] EWHC 2349 (QB), Morris J accepted that funds held on account of future fees remained a debt due to their client and were accordingly capable of being the subject of a third party debt order. This can only be argued once the application is no longer *ex parte*, but McKendrick J recently confirmed in *A v Z (No 2) (Interim Third Party Debt Order)* [2026] EWFC 90 that an interim third party debt order could be made. There remains a clear warning that a judge will be cautious to tread the line between depriving a judgment debtor of litigation funding and the negative effects caused by their non-compliance, but there is authority that can get your foot in the door.

Note: this article is based on content from the Resolution Podcast – Talking Family Law, S5 Episode 10: 'Enforcement of financial remedy orders' where Christopher and Kara joined hosts Anita Mehta and Simon Blain.

Beyond Cash Equivalent Values: The Hidden Complexities of Pension Valuation in Family Law

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It is well-known to all those conducting financial remedy work that valuing assets can prove problematic. Valuing a private limited company can be fraught with difficulty. An expert report may produce such a wide range of figures that a court treats its conclusions as 'fragile' and unreliable.

Ultimately, as Peel J observed in *HO v TL* [2023] EWFC 215, [2024] 2 FLR 175 at [21], when setting out the legal principles that apply to business valuations, it is for the court and not the expert to determine the value.

In *Neil v Neil* [2019] EWHC 3330 (Fam), [2020] 1 FLR 1095, Moor J confirmed at [53] '[t]he expert advises but the judge decides'.

Some pensions have the same potential for dispute and debate as to value, and this article seeks to explore that fragility of a pension valuation or the need to examine in greater depth the underlying assets held within a scheme.

Form E/first appointment difficulties

The authors have long advocated for Form E to be amended to contain a dropdown box or expandable box which requires the pension holder to signpost and detail the assets held within the pension scheme and/or to give greater detail as to the nature of the assets, changes that might arise, underfunding issues they may be privy to, unassigned benefits, etc.

Worked example

H discloses membership of a self-invested personal pension (SIPP) with a fund value stated to be £1.3m. A drop-down box would explain:

- A commercial property, Brook House, 10 High Street, Henley in Arden, is held last valued on 2 January 2026 at £850k. The tenants are x, y and z and the rental agreements in place are a, b and c.
- A portfolio of equities with an up-to-date value of £320k.
- The balance in cash.

The procedure before the first appointment:

- the parties are required to file a concise statement of issues and to pursue what expert evidence is required/complete a Part 25 FPR-compliant application;
- FPR 9.15(1) states that '[t]he first appointment must be conducted with the objective of defining the issues and saving costs'.

However, how is one meant to comply with the overriding objective and the requirements of the *Financial Remedies Guide 2026* if one prepares for a first appointment with no knowledge of the assets which make up a potentially complex pension scheme?

Aspects of pension valuation fragility

We are going to focus on:

(a) the fragility of the cash equivalent value (CEV);
(b) the unreliability of actuarial valuations, including issues pertaining to *The Lord Chancellor v McCloud & Ors* [2018] EWCA Civ 2844 as affect public sector schemes; and
(c) specifics around the actual assets used to provide a pension credit.

Fragility of the CEV

As a general rule of thumb, CEVs of active contributing members grow over time, whether on account of further accrual of rights or the making of contributions from salary. Conversely, CEVs of pensions in drawdown or in payment generally decline over time, as rights are discharged to the individual. The CEVs of deferred or 'paid up' pensions will be more stable, on the ground that no explicit changes are being made to rights thereafter.

Moreover, CEVs will continue to change over time, depending on the type of scheme in which the rights are held:

- Defined contribution (DC) CEVs reflect the underlying fund values, akin to a stocks and shares ISA. Therefore, the CEVs will fluctuate in line with market movements of the funds in which the individual has invested.
- Private sector defined benefit (DB) schemes pay out CEVs that we might liken to the surrender value of the rights in the scheme, i.e. what it will pay out to discharge the member's liability upon request. Such CEVs are not necessarily reflective of the underlying

fair value of the accrued benefits, and the CEVs will change over time in line with both market movements (yields on HM Treasury bonds, and market-derived expectations of inflation chief amongst them) and explicit changes made by the scheme actuary to the 'basis' (being the collective term for the actuarial assumptions made to generate the CEV).

- Public sector DB schemes tend to have more stable CEVs: these are not explicitly market-related, but instead depend on actuarial factors set by the Government Actuary's Department which are revised wholesale every few years, and to this extent CEVs of rights only change when the member passes a birthday or in respect of other changes to benefits, for example, increases being applied each April.

However, there may be several further factors to consider thereafter.

Unreliability of actuarial valuations

First, some private sector DB schemes produce reduced CEVs because the scheme is significantly underfunded, i.e. the scheme actuary has determined that the assets fall short of covering the cost of paying out all the accrued pension rights to the scheme members. Pensions legislation allows the scheme trustees to pay out a reduced CEV, on the ground of balancing the needs of those who want to leave the scheme against its remaining members.

This has implications for pension sharing, as the CEV is used to determine the pension credit payable to the ex-spouse, and it follows that such a reduced CEV produces a loss in overall rights upon sharing. However, this might be mitigated by the fact that schemes are required to provide an internal transfer option for ex-spouses where reduced CEVs are being paid – with any pension credit payable to the ex-spouse being based upon the reduced CEV rather than the full amount – even where this is not the scheme's general policy.

Even where private sector DB pension CEVs are not being explicitly reduced by the scheme, such CEVs might still not necessarily reflect fair value. By contrast, public sector DB schemes require the internal transfer of pension rights to the ex-spouse – in effect, granting the ex-spouse shadow membership of the scheme – such that this takes place on fair value terms, with no loss of rights being incurred, regardless of the generosity or otherwise of the CEV.

Second, it is important to consider what is being valued when it comes to the computation of a CEV.

It is usually 'plain sailing' for DC plans with no guarantees or other attaching benefit promises but, as always, things are more complicated with DB pensions. The CEV is, by definition, the valuation of the *per annum* income payable in retirement to the member, but it will also include an allowance for any automatic tax-free cash lump sum that attaches to the pension. The calculation of the CEV will assume that the pension benefits are unreduced at the earliest possible age (usually the Normal Retirement Age) and no allowance will be made for the commutation of pension, i.e. the member's right to take a reduced pension in exchange for a one-off lump sum at retirement.

DB pensions almost always come with a reversionary spouse's pension, typically 50% of the member's pension, and the CEV will contain an allowance for this (notwithstanding that, upon the finalisation of the divorce, there becomes no legal spouse to whom such a pension may be payable). Some pensions accrued before April 1997 increase in payment only at the scheme trustees' discretion, and the CEVs of such pensions will usually only take account of such increases where there has been an established practice of paying these each year.

The long running litigation in *McCloud* gave rise to changes in the way that public sector CEVs were computed. This typically affects DB CEVs where accrual has taken place during the 2015–22 *McCloud* 'window', and the compliant CEVs now being produced by the schemes are computed based on the member being assumed to invoke the choice (new scheme vs old scheme for the 2015–22 period) that gives the better outcome. There did exist a period between the identification of the *McCloud* issue and the issue of such compliant CEVs, but this is now of historic interest only. Experienced pension on divorce experts were able to determine workaround solutions in the interim period that were intended to remain robust, regardless of what happened thereafter.

Third, given that DB CEVs are valuations of retirement incomes payable, they are a function of actuarial estimates of life expectancy. The modelling involved here tends to be rather sophisticated, drawing on actual pension scheme experience but making allowance for expected improvements in longevity, i.e. the assumption that someone born in, say, 1982 would be expected to live longer in retirement from age 65 onwards than someone born in 1962. However, scheme members are assumed to enjoy 'typical' life expectancy, and no attempt will usually be made to reflect the specifics of an individual's health or lifestyle (in contrast to the purchase of life insurance products, etc). Where an individual has retired on grounds of ill health, the scheme may compute a lower CEV to reflect the individual's reduced life expectancy, and again this can have an impact on what can be shared with the ex-spouse.

The public sector DB schemes are known to make such adjustments, but the practice in private sector schemes is less clear. Practitioners might not be thanked for drawing to a DB scheme's attention the much-reduced life expectancy of their client if this will in turn lead to the trustees' seeking to reduce the CEV accordingly, in recognition that the transfer of rights to the ex-spouse will reflect selection against the scheme, i.e. the scheme trustees have 'got wise' to the fact that the pension is going to be in payment for a much shorter period than would be typical.

The assets that underpin such valuations

We note that all such considerations are actuarial in nature, in that they consider the valuation of the accrued rights in the pension scheme. It is also important to look at how a CEV is comprised and the assets that underpin it.

In most cases, such valuation issues do not arise. In particular:

- DC plans tend to be invested in listed/unitised arrangements, i.e. managed funds or perhaps specific stocks and shares, if the member holds a SIPP. Such amounts are easily realisable for the purposes of providing the ex-spouse with a pension credit.
- Private sector DB schemes may invest in a multitude of assets but, overall, it is the responsibility of the scheme trustees/administrators to manage cashflow, and the pension credit payable to an ex-spouse via

external transfer is unlikely to present any such liquidity challenges for the scheme.
- Again, public sector DB schemes require the internal transfer of the pension credit, and thus liquidity issues do not exist as no attempt is being made to realise a capital amount *in lieu* of pension rights payable in retirement. (Indeed, it is noted that these schemes – barring the Local Government Pension Scheme – are all unfunded, with HM Treasury not explicitly holding assets to meet the public sector workforce's accrued rights.)

Valuation issues may arise with more bespoke arrangements, such as small self administered schemes (SSASs), which may hold one main but illiquid asset such as a property, in particular, the premises of a business operated by one or more of the member trustees. It can be difficult to assess the present 'market value' of a property which is not going to be sold for the foreseeable future.

Moreover, great diversity exists in how SSASs are structured. Some may have assets explicitly ring-fenced for the beneficiaries; some may have a common pool of unassigned benefits of which members hold a percentage share, and others may reflect a mix of the two. Arrangements where there exist such unassigned benefits may create further implementation issues, as it follows that the rights of other SSAS members – being those not party to the divorce – should not be fettered or compromised by the need to effect a pension sharing solution for one (or two) SSAS participants.

Worked example

- SSAS contains commercial property worth £6.5m.
- The property is the subject of a potential compulsory purchase order in respect of a road widening scheme being explored by local government.
- The property is subject to planning permission applications to convert into eight self-contained apartments (impermissible asset to be held in the SSAS but would, if granted, have significant impact on the value).
- A commercial loan is secured against the property in the sum of £2m.
- The property is rented by the company the spouse is a director and shareholder of.
- There are five other members of the SSAS.
- The company is in rent arrears having not paid for 12 months/the company is suffering cash flow difficulties.
- The rent historically paid has been utilised to service the borrowing and to pay insurance premiums and some essential maintenance costs.
- The SSAS contains only £40k in cash.

The above creates real challenges when it comes to the divorce settlement and advising the other spouse. For example:

- How any pension credit may be discharged to the ex-spouse.
- The timing of implementation of a pension share in the light of the potential for increased value.
- Non-payment of rent, which is ultimately a further point around the fair value of the assets in the SSAS.
- Other members' objections to the scheme's borrowing against the asset, in specie transfers of some assets to the ex-spouse, or the use of an internal transfer option within an SSAS which preserves the overall arrangement's asset holdings and at least defers the issue raised until a later date. All such solutions do, however, have various drawbacks and need to be considered carefully by all parties as these arise.

Issues can also occur where investments are held in exotic asset classes, such as cryptocurrency and unlisted shares. Specialist advice from investment advisers, forensic accountants and others might be required, in addition to more conventional pensions on divorce support.

It follows therefore that the actual arithmetic associated with such pension sharing orders may well be trivial (e.g. 50% each), but the challenge is presented by both such valuation and implementation issues.

Conclusion

Pension valuation in family law financial remedy proceedings remains inherently challenging. As we have sought to demonstrate in this article, the fragility of CEVs, the unreliability of actuarial assumptions, and the complexities of valuing underlying assets create significant difficulties for practitioners and courts alike.

As always, practitioners should not hesitate to seek specialist support. Actuarial experts, forensic accountants and investment advisers play a critical role in identifying valuation risks and implementation solutions. Early engagement with such specialists during case preparation can prevent costly disputes and ensure that pension sharing orders accurately reflect the parties' true financial circumstances. The arithmetic of pension sharing may appear straightforward, but delivering substantive fairness requires expert guidance tailored to each scheme's unique characteristics.

Taking the Biscuit: A Critique of the NCDR Process, for Which We All Bear Some Responsibility

Greg Williams

Coram Chambers



The purpose of this article is to examine whether our profession's march towards non-court dispute resolution (NCDR) has gone too far, or too quickly.

Before I begin, I must declare several interests. The permeation of NCDR into my daily practice means that, in the calendar years 2025 and 2026 to date, I have personally been into actual court buildings less frequently than once every 2 months (not including remote hearings). I do not miss the early morning train ride to visit Oxford, for example, where I will wait hours to be called on. Neither do I miss sitting on an uncomfortable Thameslink train seat for long round trips to Cambridge or Bedford. I much prefer a quick 15-minute hop on the Elizabeth line into Chambers or another London set. Not arriving already tired to start the work day has now become the norm and not the exception.

I also enjoy, as I'm confident we all do, the benefits of NCDR facilities hosted in modern offices. During the summer heatwaves, it was significantly more pleasant to be in Coram Chambers' air conditioned conference rooms with chilled mineral water and refreshments on demand. I am partial to Coram's good coffee, chocolate biscuits and excellent service. I doubt I am alone in that. For balance, other good Chambers are also available.

None of us in private practice can faithfully say that we prefer the broken water cooler at the Central Family Court; or the oppressively hot (or cold) courtrooms, depending on the season. Yes, the Bar Pass has made entering the court estate easier, but do we really need to have to show it every time we go to the toilet (Luton), or when re-entering the court building after running out for lunch (everywhere else)? Chairs in Chambers are not broken, lavatories are clean and hot water dispenses from taps. Conference rooms are guaranteed. If we require something printing, it appears, as if by magic. Did I also mention the biscuits?

I must further declare that I am, too, a barrister who offers my services as a Private FDR (pFDR) tribunal – with decent market traction and forward bookings in the diary. Providing neutral evaluations is enjoyable work. However, I am not yet a trained mediator and I am not an arbitrator, though I appear as an advocate at both. I wonder, if I were to search my soul deep down, whether my lack of appetite to qualify further has anything to do with my concerns raised in this article.

Having now provided all reasonable ammunition to those who wish to accuse me of being part of the problem, let me now try to ventilate some of my concerns which our collective enthusiasm appears to have looked past.

The obvious place to start is the two-tier justice argument. I am not making a party political point. It is a statement of fact that those with deeper pockets can pay to jump the queue. Business models are being built on it. If I had twenty pounds for every explicit comparison I have seen in internal client correspondence comparing a pFDR ('BUPA') to a court-based FDR (the 'NHS'), I would be significantly closer to my retirement pot target. The trend towards NCDR has been strongly encouraged by the profession. It has also been encouraged by the judiciary. Well-meaning, over-worked judges encouraged our enthusiasm, because it helped make their lists shorter. Has it succeeded? I suggest that one cannot noticeably tell, save perhaps in very carefully managed courts. Ah, I hear you cry, but you can save costs by going to NCDR! A pFDR means an upfront cost, but there are much larger savings to be made in the long run. I can also hear you say: parties who pay for a service are more likely to settle. They are more invested, mentally and financially. Perhaps this is (or was) true, but I will examine it below. But before we get to that we must all remember that some parties live hand to mouth and can't afford *any* extra cost. To every NCDR proponent who says 'there are plentiful cheap, junior evaluators', I say 'look at the litigants who cannot afford even their own lawyer'. Litigants in person are appearing every working day before real judges. This is two-tier justice, and we must face that fact.

The second difficulty I have with NCDR is the nature of full-day evaluative hearings. Plainly, everyone wants a judge who has read the papers properly and who is capable of giving a thoughtful indication. But do all barristers and solicitors seeking repeat work as an evaluator make for a suitably robust tribunal? I have seen an opponent make submissions for 1 hour and 25 minutes at a relatively straightforward FDR. True, they were asked questions by

the evaluator, which did not help to speed them up, but the evaluator was equally at fault for failing to stop them. Who wants an indication at 2 pm? No one. Yet it happens, all too frequently. Who also thinks it is helpful to get a written follow up at 4 pm, when the parties have already been there for 7 hours? Good evaluators manage time effectively. The best set submission time limits. Yes I want to be heard, but I also want my indication before lunchtime. In the real world, judges have time constraints and other cases to get to. The only real utility to a written indication is to file it away for reference, if the matter fails to settle.

My third point is that as pFDRs become the norm, have they lost some of their lustre? Are our clients truly getting a special service? Or are some parties (and their advocates) choosing to leave at 3 pm because they did not like the indication? Where is the real judge to stop them? I have seen parties politely decline to see an evaluator a second time because they didn't like what they said. I have seen them depart before receipt of the written follow up. I am yet to see a party refused permission to leave a Chambers. I have frequently seen a party refused permission to leave the court, at least until they come back in to explain their sticking point to the judge. NCDR (and pFDRs in particular) are advertised as being a panacea to ineffective court-based FDRs. The judges will have had time to read the papers, our clients are told. The quality of the tribunal will be excellent. This is all true. But is there any actual evidence (other than anecdotal) that pFDRs have a higher settlement rate? Didn't we used to settle FDRs at court as well? Is not one potential answer that when pFDRs really took off, it also coincided with the COVID-19 pandemic, when all pFDRs were almost entirely online anyway? Perhaps we should investigate whether online FDRs have an equally high settlement rates? Perhaps parties sitting in comfort at home with counsel on standby make for capable decision makers. Advocates being able to have a breather from lay clients during lulls in the negotiation? Yes, please. Years ago, when the court closed at 5 pm, so did the case for the day. One would drag one's trolley bag back to the train station, decompress on the ride home, and then think about the next day. Is it possible that the so-called 'higher' pFDR settlement rate is nothing more than the fact that we are settling more cases late in the day, after 5 pm, or in the days that immediately follow the pFDR? Where do we draw the line about when a pFDR should end? Is settling late really a sensible strategy? Is there not a well-being concern for the parties and the advocates? I recall a mediator telling me (with pride) that he had helped to settle a case close to midnight. I was horrified. As a better alternative to the late finish, are we not just doing more business electronically, by checking in with our opponents by phone or email in the days after the hearing to see if anyone has budged? Is this really because of NCDR, or just because we can all use WhatsApp?

Fourth, there is the potential for subconscious bias. This one has been nagging at me for a while. I had a case where a firm recommended three counsel to be the pFDR evaluator. We picked one. When the hearing came around, one of the other two on that list was now my opponent. If professional people are so clearly capable of picking their favourites, can tribunals guarantee absolute objectivity? How long will it be before a party complains that their ex-spouse's solicitor recommended a particular evaluator or arbitrator (to whom their own solicitor did not object), only to find later that that same advocate is now instructed in a different case by that same firm? The world is full of tech savvy litigants who scour the internet. Would they be justified to feel aggrieved if the tribunal who they felt found or indicated against them is later instructed by the firm who recommended that person for their case? If that sounds far-fetched, how many times have our lay clients refused a tribunal from the same chambers as that of their spouse's counsel? Frequently, is the answer. Advocates are generally relaxed about it. We believe such suspicion is ill-founded. We maintain that we and our colleagues are not going to sacrifice our professional reputations by giving loaded indications to a colleague or a potential instructing solicitor. But are we all naïve enough to think that it will never happen, somewhere, at least subconsciously? The real issue here is the *perception* of the potential for bias. The litigant is the most important person in the system. Appearances matter. Justice must be seen to be done. Mark my words: one day, there will be a complaint brought by a dissatisfied litigant. There may have been absolutely no bias whatsoever. But the optics are not good. It looks grubby. If you are not with me on that point, then what about the potential for bias or subconscious bias in favour of the gender of a spouse? How often have we heard colleagues say 'oh [that arbitrator] is pro-husband' or '[that evaluator] is quite generous on maintenance?' How many of us have read, to our horror, a short-list of potential tribunals picked by the other party's lawyer who we know will likely suit the gender of that particular party. I can assure you this does happen. I have been a part of WhatsApp groups, both in and out of Chambers, where professionals swap gossip about who allegedly has 'pro-husband' or 'pro-wife' sympathies. I have heard members of Chambers consoled at the water fountain with words like 'oh, don't worry, that [person] is notoriously pro-husband'. Would I admit to being cynical enough to putting forward such tribunals to my own client's advantage? Not in this article. Does such potential bias also feature in the public court sector? Almost certainly. Water cooler conversations have happened for eons. The point is that before NCDR took root one couldn't pick one's own tribunal. One arrived at a real court building to play a judicial lottery in which we all had the same ticket.

Fifth, as a result of cases going private, is evaluative experience being lost from the resident Bench? As time goes on, will the newer intake of judges become less skilful at providing indications? Speaking personally, I had a recent judge at a court-based FDR in the South East of England, who produced a shocker of an FDR 'indication'. It was no indication at all. It consisted of berating the parties for spending so much in costs before putting them to the back of the list. Not even a wide settlement bracket was indicated. Both parties had counsel. Did the judge think they had not already been advised? They came to court for judicial help to settle. Had it been 4 pm on a Friday, one might have been more sympathetic to the judge's position. But this FDR was first in the list on a Monday morning. Everything was lodged in perfect time. I had a suspicion the judge did not know what the answer was. It was not a very hard case.

Sixth, there is the matter of self-regulation. To my noble friends who decide policy at Resolution, I am sorry to report that not all self-regulation is welcome. Some members of the Bar, at least, do not want a Code of Practice mandated

by any particular organisation, of which one presumably has to then become a paid member to participate in the existing legal marketplace. If we eventually reach a position where all pFDRs can only be conducted by those of us who have agree to subscribe to a particular Code of Practice, or some other requirement dictated by a representative body, that would be a barrier to entry into the market. It would hurt the more junior barristers harder than most because some such organisations charge significant annual membership fees. It seems to me that the market is not perfect (as already ventilated above), but isn't a free legal market the best guardian of quality? Those members of the Bar or solicitors who already sit as fee paid judges should get more private work as a result of their judicial credentials. Even those who are not (like me) gaining a reputation for giving quality indications – quickly – will likely get repeat business.

Seventh, how does the stealth privatisation of financial remedies applications protect against litigants who abuse the process? NCDR tribunals have blunt teeth. It is said that early neutral evaluation promotes efficient settlement. So it does. But what when cases can't settle? When my arbitrator tells the witness I am examining under 'oath' not to speak to anyone during the lunchbreak, what sanction is there when they fail to abide by that direction? If the witness under examination cheerily walks out into the car park and starts chatting on their mobile phone, what is the arbitrator to do? And what happens when someone lies during their evidence during arbitration? Are they potentially guilty of perjury? To be precise, is an arbitration a 'judicial proceeding' within the meaning of s 1 Perjury Act 1911? While undoubtedly an arbitrator can draw adverse inferences against a non-disclosing party in accordance with case law principles, what real and immediate deterrent is there against a suitably minded party who is considering lying when there are no obvious or immediate repercussions before an arbitrator? A judge has committal powers or the power hold a party in contempt. An arbitrator has neither.

Eighth, both the process of NCDR and the humans within it are not infallible. While we all laud the expertise of our NCDR tribunals, are there not potential limits to their powers? I had a Schedule 1 case where the Form ARB1FS explicitly provided that the arbitrator was to determine not only the Schedule 1 aspect, but other financial matters as well (a family shareholders dispute). One side had deliberately wished to arbitrate both matters together to avoid ruinously expensive separate family and civil proceedings. The other side, despite signing the ARB1FS, later served a skeleton argument claiming that the IFLA arbitrator had no power to deal with company law issues, despite their lay client having signed up to a determination of those company law issues. They argued that an arbitrator's powers mirror only the jurisdiction of the Family Court, which cannot hear company law issues. I will not tell you the actual answer in this article. What I want to make clear is that arbitration is not always plain sailing in smooth waters. There can be some chop. Furthermore, NCDR tribunals are no less human, and therefore no less fallible, than judges. True, you can pick an expert in your designated area. That is small comfort to those clients who got an unhelpful or unexpected indication. When judges fall into error, there is a well-trodden route of complaint. Do we think that those of us in private practice are incapable of making mistakes? I am not saying our tribunals are of poor quality. Indeed, they are generally of the highest quality. I *am* saying mistakes can happen in any human system and in arbitration the remedies to those errors can be as or even more troublesome to rectify, as anyone who has ever had cause to read s 57 Arbitration Act 1996 can attest to.

Ninth and lastly, there is the admittedly niche question of career progression. Those who regularly appear in, or sit as NCDR tribunals, are insulating themselves away from cases which might make or break a silk application. Ironically, the better we are at settling, the less able we are to demonstrate that we can meet the core competencies of excellence, which revolve around court-based advocacy, because specimen cases must be tendered. Yes, an arbitrator can be a judicial assessor for a silk application, but unless something changes, presently a pFDR tribunal cannot be. If one spends 80% of one's time advocating at pFDRs, then it becomes a vicious circle. I can think of several friends who, in my humble view, should have taken silk long ago, but who spend their time settling or sitting. Hardly anything litigates to trial now. It is hard to get a reported case, even for specialists. The annual silk list contains painfully few family barristers compared to civil and crime, and financial remedy barristers are arguably the most underrepresented category of all.

So there it is. Have we created a superhero system or are we gradually creating Frankenstein's monster? You decide. Meanwhile, I shall continue to eat excellent biscuits while noting the irony of the sweet taste. But when I stop to reflect occasionally, I shall continue to worry that we are perhaps all somewhat guilty of taking the proverbial biscuit, which may not always be a good thing.

Spilling the EOT: Employee Ownership Trusts in Financial Remedy Proceedings

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Introduction

The sale of a private company to an employee ownership trust (EOT) has, to date, received generous tax treatment. In this article, we explore some of the valuation issues that can arise when dealing with EOTs within financial remedy cases and how family practitioners can approach these corporate structures.

What is an EOT?

An EOT is exactly what it says on the tin. It is a trust that exists to hold shares in a company for the benefit of the company's workforce. Introduced in the Finance Act 2014 by Chancellor George Osborne, the aim of EOTs was to encourage more companies to move to an employee ownership model. The incentive to do so was achieved by the business owner selling their shares to the EOT receiving 100% relief from capital gains tax (CGT) on the transaction (providing that certain qualifying conditions were met).[1]

Since their introduction, there have been several amendments to EOT legislation, including the Finance Act 2026, in which Chancellor Rachel Reeves halved the CGT relief for sales to EOTs, resulting in only 50% of the seller's gain being exempt from CGT from 26 November 2025.[2] Nevertheless, and as a result of the generous tax benefits on offer, sales to EOTs are a popular way in which business owners can dispose of their shares in their companies.

By way of high level example, in Figure 1 we show an example schematic depicting the sale of a company to an EOT.

As business valuers, we see a large number of financial remedy proceedings in which one of the parties has sold a company to an EOT. It raises a number of interesting valuation questions which we discuss in this article.

The high level structure of an EOT

In most cases, EOTs are newly established as part of a pre-arranged sale process. As a result, the EOT which is to acquire the underlying company often has limited cash or assets with which to purchase the shares from the seller. Instead, the seller is usually paid by a combination of: (1) an upfront payment, often using existing cash reserves held within the company; and (2) deferred consideration, funded from the company's future profits.[3]

The EOT itself exists to hold the shares in the underlying company for the benefit of the employees. It follows, therefore, that the beneficiaries of the EOT are typically the employees, as a whole, with the trustees often, in our experience, taking the form of a single corporate trustee or 'Trust Co'. This Trust Co is often a newly incorporated company whose directors (sometimes referred to as the 'individual trustees') can include the seller themselves or a representative appointed on their behalf, a representative or representatives of the employees, and independent third parties.[4]

In our experience, the sellers (or their representatives) often cease to act as an individual trustee following the full repayment of all deferred consideration, or following the end of some other trigger event, such as the passing of an agreed amount of time.

Valuations where an EOT sale has occurred

How to approach it then, when an EOT appears in a Form E? How do you assess the relevant value where a party to proceedings has sold their shares in a company to an EOT?

First, it is important to define what interest or asset actually requires valuation. This in turn depends on the valuation date. For example, if the valuation date is the date of the sale (or prior), the relevant asset may be the shares in the company itself. Alternatively, if the valuation date is after the sale, then the relevant interest to be assessed may no longer be the shares in a company, but rather the debt that is owed to the seller in the form of deferred consideration, which may be paid out over a number of years by the EOT, from profits generated by the underlying company.

Valuing the company at the time of the sale

Since 30 October 2024, trustees to EOTs have been required to 'take all reasonable steps to secure that the consideration for the disposal does not exceed the market value of the ordinary share capital at the time of the disposal'.[5] Does this mean that the sale price provides a reliable indication

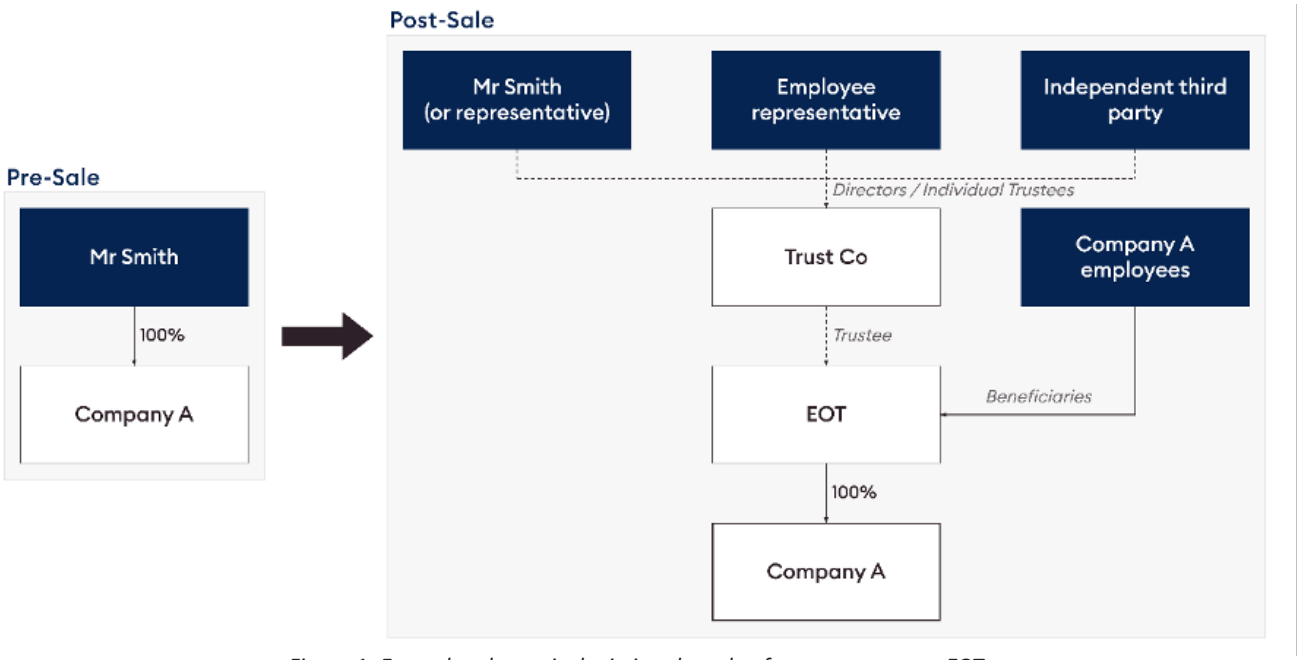


Figure 1: Example schematic depicting the sale of a company to an EOT

of market value for the purposes of financial remedy proceedings, as at the date of the sale?[6]

Unfortunately, the reality is often not that simple. There are a number of potential issues with simply adopting the headline sale price as the value of the business. These can include:

(1) **a lack of consistency with market value**, namely whether the sale of a company to an EOT can be said to be at market value will be fact-specific and depend on the process adopted by the seller and the EOT in reaching the agreed sale price;
(2) **risk and timing** and the potential failure to account for risk and time of receipt when setting the level and rate of payment of any deferred consideration; and
(3) **tax benefits** and the role that such benefits can play in determining the sale price.

We discuss each of these issues, in turn, below.

Is a sale to an EOT consistent with the IVS definition of market value?

Market value is defined by the International Valuation Standards (IVS), as:

> 'the estimated amount for which an asset and/or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's-length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion.'[7]

There are a number of aspects of this definition which may not align with the realities of an EOT sale:

(1) **negotiation between buyer and seller** – the IVS definition of market value assumes a well informed and willing buyer negotiating the price downwards and a well informed and willing seller negotiating the price upwards. It is that inherent tension that, ultimately, results in the price being market value. However, this is not necessarily the case with a sale to an EOT, where there may be limited ability for the buyer (e.g. the Trust Co which acquires the company on behalf of the EOT) to negotiate or decide to walk away from the deal. The extent to which external third party opinions or analysis are relied upon by either the seller or the EOT when contemplating the sale is likely to be relevant information when considering this aspect;
(2) **'arm's-length transaction'** – the IVS definition of market value requires that the buyer and seller do not have a relationship that may cause a departure from the market price. However, in an EOT sale, the Trust Co, acting as the buyer: (1) has typically been established at the seller's direction; (2) usually includes a representative of the seller on its board of directors (until the full proceeds have been paid); and (3) is often advised by professionals introduced by the seller. These factors cast doubt over whether the transaction can truly be considered to be arm's length; and
(3) **lack of market exposure** – the IVS definition of market value requires adequate exposure of the asset to the market, with competing bidders driving the price towards an appropriate market value. In an EOT sale, there may be no exposure of the business to the open market, with no competing bidders. Again, this factor can have a bearing on whether the sale of an EOT can be said to meet the definition of market value.

Failure to account for risk and time of receipt

According to finance theory, cash received in the future is less valuable than the same sum of cash received today. Therefore, when considering the value of deferred consideration (i.e. consideration to be received following the sale of an EOT) it can be appropriate to apply a discount to those future cash receipts. This discounting is typically achieved by the application of a discount rate that reflects two distinct factors, namely:

(1) the '**time value of money**', which in simple terms, states that £100 received today is more valuable than £100 received at some point in the future, say, in one year's time. This is because £100 received today could be invested to earn a return in the intervening period; and
(2) the **risks** associated with the cash flows. The term 'risk'

can have different meanings in different contexts. In the case of EOT sales, these risks relate to both the company's ability to generate cash flows that are used to pay the deferred consideration to the seller, as well as the risks associated with the Trust not paying the deferred consideration to the seller (although in circumstances where the seller, or their representative, remains as a trustee of the EOT, this risk can be somewhat mitigated).

As we note above, given that EOT sales can often involve significant elements of deferred consideration to be paid out of the company's profits in future years, it may be necessary to apply a discount to the sale price to arrive at the market value of the company equal to the present value of those future receipts.

The appropriate discount to apply will depend on a number of factors such as the timing of the receipts, the contractual terms of the EOT sale, and the risk profile of the business. However, and importantly, if a discount is deemed to be necessary, this would imply that the stated sale price may be in excess of market value.

Requirement to consider tax benefits

Another factor that a valuer may also need to consider is the tax benefit of an EOT sale. This is because typical trade or private equity sales of companies may incur significant CGT liabilities for the seller, whereas an EOT sale grants full (before 26 November 2025) or partial (from 26 November 2025) relief from this tax.[8]

As a result, a seller may be willing to accept a lower sale price in an EOT sale, as compared with a typical trade or private equity sale, given that an EOT sale would result in the same or greater proceeds, net of tax.

Such considerations will always be fact-specific. Nevertheless, if this is the case, it may be that the sale price of an EOT sale is below the market value that a purchaser would have paid in an open market sale. As such, and in order to compare 'apples with apples', it may make sense to compare net of tax proceeds, rather than the gross sale price if seeking to compare an EOT sale to an open market sale to a trade or private equity buyer.

Can an EOT sale price be relied upon at all?

That all being said, the agreed price of an EOT transaction is often based on a contemporaneous valuation analysis which, if well performed, may be a reasonable estimate of the market value as at the time of the sale. Further, it can also be argued that an independent, contemporaneous valuation report, if performed, in combination with the seller and the Trust Co both accepting the valuation conclusions therein, will provide a reasonable indication of value, as at the time of the transaction.[9]

Valuing the debt after the sale

As we explain above, if the relevant valuation date is after the sale, i.e. if what appears in the Form E is the future cash proceeds to be received by the relevant party following an EOT sale, then the relevant asset may no longer be shares in the company itself, but rather the debt that is owed to the seller (in the form of deferred consideration), which is often paid out over many years.

In order to reliably assess the value of this debt, i.e. the deferred consideration, a number of factors will need to be considered, including:

(1) the contractual terms of the EOT sale;
(2) payments already made, which have the effect of reducing the balance owed;
(3) the anticipated timing of future payments, and the time value of money;
(4) the risk attached to the company's cash flows, and its ability to generate sufficient profits to pay future deferred consideration;
(5) any outstanding CGT relating to the disposal; and
(6) any further information arising after the sale, but before the valuation date, which may impact the value of the debt to the seller.

In practice, a valuer may value the debt using the discounted cash flow (DCF) method, in which the above factors will be reflected in the assumed future cash flows and the application of an appropriate discount rate to reflect and quantify the relevant risks. However, DCF valuations can be highly sensitive to their inputs and so it is important to ensure that the assumed cash flows and discount rates are appropriate and reasonably assessed.

Conclusion

Sales to EOTs have become an increasingly common method by which business owners exit their companies in a tax-efficient way. This means that, as financial remedies practitioners, we need to be aware of the issues that can arise with EOTs, as and when they appear in Forms E and asset schedules. As we note above, EOTs can also bring with them a host of interesting valuation questions.

Where a valuation is required, it is first important to establish the valuation date, which will inform whether it is the shares in the company, or the seller's right to collect deferred consideration, that need to be valued.

If the shares in the company are to be valued, the sale price is a natural point of reference, though the discussion above shows why it may not be as simple as adopting the sale price without further scrutiny. If the seller's right to collect deferred consideration is to be valued, then an appropriate valuation will need to take into account several factors, such as the contractual terms, the expected timing of the remaining payments and the company's ability to make them.

Notes

1 Finance Act 2014, s 290/Sch 37.
2 Strictly speaking, the gain is not fully extinguished but is instead reflected in the base cost for the trustees. Specifically, the base cost of the shares acquired by the trustees is deemed to be the consideration paid less the portion of the gain that was exempt for the seller. That said, from the seller's perspective, the relief functions as an exemption. Finance Act 2026, s 35.
3 See, e.g. ICAEW, 'Need to know: employee ownership trusts', 18 February 2025.
4 A comprehensive guide to the legal requirements around the formation and running of EOTs is beyond the scope of this article (and the author's expertise!) but the following are helpful guides: 'Trusts and taxes', www.gov.uk/trusts-taxes;

and ICAEW, 'Need to know: employee ownership trusts', 18 February 2025.

5 Finance Act 2025, Sch 6.

6 Market value is adopted by Mostyn J in *FZ v SZ* [2010] EWHC 1630 (Fam) as the 'usual measurement of value' ([118]).

7 IVS 102 Bases of Value: A10. Market Value.

8 Finance Act 2014, s 290/Sch 37 and Finance Act 2026, s 35.

9 Ultimately, however, the reliance that can be placed on such evidence will always be fact-specific and depend upon the circumstances of the transaction, including the ability of the Trust Co to act independently from the seller, and whether each party to the transaction was sufficiently well informed.

Pleadings in Proceedings Involving Interveners

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Samuel Cathro

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Introduction

This article aims to assist financial remedy practitioners faced with directions for formal pleadings in proceedings involving interveners. It encourages the practice of disciplined pleading to ensure that the issues in dispute are properly delineated. It also highlights common issues, such as late amendments and pleading fraud, and offers practical solutions.

When will pleadings be required?

In this article, we use the term 'pleadings' to refer to the types of pleadings most commonly directed in financial remedy disputes involving interveners, namely points of claim, points of defence and a reply to a defence.

The FPR are silent on the question of when pleadings should be required in financial remedy proceedings. As we go on to explain, in practice, pleadings are typically ordered in many such disputes where third parties are joined.

The key cases are *TL v ML* [2005] EWHC 2860 (Fam), [2006] 1 FLR 1263 at [33]–[36]; *Goldstone v Goldstone* [2011] EWCA Civ 39, [2011] 1 FLR 1926 at [66]; and *Edgerton v Edgerton* [2012] EWCA Civ 181, [2012] 2 FLR 273 at [52]. These authorities were recently applied in the decision of MacDonald J dated 8 September 2026 in *MF v NF* [2026] EWFC 243 (which, although beyond the scope of this article, also addresses the higher and more nuanced approach the court takes to strike out applications in financial remedy proceedings).

The authorities provide some useful pointers.

First, a dispute with a third party heard in financial remedy proceedings must be approached on exactly the same legal basis as if it were being determined in the Chancery Division (*TL v ML* at [34], per Mostyn J).

Second, although not all cases involving a third-party issue will require the joinder of the third party (*Behbehani v Behbehani* [2019] EWCA Civ 2301 at [69]), where the third party is joined, pleadings will ordinarily be directed where the third-party issue would otherwise be tried as a free-standing civil claim.

Third, pleadings will typically be directed in the following types of intervener disputes:

(1) Disputes concerning the beneficial ownership of property between a spouse and a third party (e.g. *TL v ML*). This may include:
   (a) A claim that property legally owned by a spouse is held on trust for a third party (e.g. *Bloom v Bloom (Kontipaylova intervening)* [2017] WL 08223847; *A v N (R intervening)* [2025] EWFC 371 (B).
   (b) A claim that property legally owned by a third party is beneficially owned by a spouse (e.g. *Sloutsker v Sloutsker* [2025] EWFC 369).
   (c) A claim that a trust is a sham and/or is illusory (e.g. *Michael v Michael* [2024] EWFC 463).

(2) Disputes concerning the existence of a loan said to be owed to a third party (e.g. *TP v OP* [2026] EWHC 1179 (Fam)).

(3) Applications to set aside a disposition under s 37 Matrimonial Causes Act 1973, s 23 Matrimonial and Family Proceedings Act 1984 or s 423 Insolvency Act 1986, in particular where repayment is sought from the third party (e.g. *AC v DC & Ors (Financial Remedy: Effect of s 37 Avoidance Order)* [2013] 2 FLR 1483 (FD)).

(4) Enforcement proceedings where orders are being sought against assets in respect of which a third party asserts an interest (e.g. *Behbehani v Behbehani* [2019] EWCA Civ 2301).

(5) Although such disputes are less common, disputes as to whether a gift made by a third party to a spouse is subject to conditions and/or should be set aside for mistake (e.g. *Perez de la Sala v Copinger-Symes & Ors* [2026] EWCA Civ 282).

This is not to say that pleadings will invariably be ordered in intervener claims. The court retains a discretion in its case management powers, bearing in mind costs and proportionality. Nonetheless, we consider that it is usually appropriate for such an order to be made to ensure that the nature and precise scope of the issues in dispute are clearly identified as early as possible and that rights of the third party are not unfairly prejudiced.

While some may initially be reluctant to seek a direction for pleadings due to the costs involved, we respectfully suggest that such reluctance often leads to a false economy. As Munby J remarked in *A v A* [2007] EWHC 99 (Fam), [2007] 2 FLR 467 at [24]:

> 'In the present case the muddle confusion and ambiguities in the wife's case would have been more pitilessly exposed, and at a much earlier stage in the proceedings, had the presentation of her case been exposed to the intellectual discipline which is one of the advan-

> tages of any system of pleading. Moreover, if the wife had been required to plead her case everyone would have had a much clearer idea, and at a much earlier stage, as to exactly what she was or was not asserting and as to exactly what the husband and the interveners were or were not saying by way of defence. As it was, matters were wholly unclear even as late as the first day of the final hearing.'

Pleadings should be sequential (points of claim, followed by points of defence, and if appropriate, a reply to the defence). Witness statements should be filed after pleadings. As the editors of the *Family Court Practice 2026* (the Red Book) note (at procedural guide A4):

> 'It is bad practice for the court to be invited to order the parties to exchange simultaneously a statement of case with witness statements "exhibiting all statements upon which they intend to rely." This telescoping of pleadings, disclosure and evidence misunderstands the requirement for the pleadings to set out the claim, for disclosure to ensure "all cards are on the table"; and for witness statements to be exchanged once respective cases have been understood by each side and all relevant documents are in play.'

What procedural rules apply?

In the absence of any rules on pleadings in the FPR, the court may turn to the CPR for guidance. There are at least two recent authorities in support of that proposition: *Re P, HL (Children) (Mobile Phone Extraction)* [2023] EWCA Civ 206, [2023] 2 FLR 528 at [54] and *SM v BA & Anor (No 3: Amendments to Statement of Case)* [2026] EWFC 9 at [28].

However, absent a specific direction, reference may be made to the CPR (and any relevant authority pertaining to them) for guidance only. Financial remedy proceedings (whether under the Matrimonial Causes Act 1973, Sch 1 Children Act 1989 or Part III Matrimonial and Family Proceedings Act 1984) remain family business to which the FPR apply (see FPR 2.1, s 32 MFPA 1984 and s 61 Senior Courts Act 1981), irrespective of the involvement of an intervener. The court may apply the CPR by analogy, with or without modification where appropriate, but it is not bound to do so.

In practice, partitioners are likely to find useful guidance in CPR Part 16, which concerns statements of case (meaning a claim form, particulars of claim where these are not included in the claim form, defence, Part 20 claim or a reply to a defence (CPR 2.3(1)) and CPR Part 17, which concerns amendments to a statement of case.

Important provisions of both parts are discussed in further detail below. Chapter 4 of the *Business and Property Courts Chancery Guide on Statements of Case*[1] also contains a useful summary of key CPR provisions and relevant case law.

What should statements of case contain?

Statements of case must be concise and plead the relevant facts. As the Court of Appeal explained in *BB v Khayyat* [2023] EWCA Civ 253:

- A statement of case must set out the facts on which the claimant relies to establish the essential elements of the cause of action, so the defendant knows the case they have to meet (at [37]).
- Statements of case 'must be concise', and plead 'only material facts, meaning those necessary for the purpose of formulating a cause of action or defence, and not background facts or evidence'. Still less should they 'contain arguments, reasons or rhetoric'. This reflects the matters which each party will need to prove by evidence at trial (at [38]).
- Irrelevant statements may be 'embarrassing' and the statement of case may be struck out in whole or in part if irrelevant matters are included (at [37]).

Although it may be tempting to plead (for example) details of the marital history or the other party's conduct, the pleader should ask of every averment: is this a material fact necessary to establish the cause of action, defence or relief sought? If it is background, evidence, commentary or advocacy, it does not belong in the statement of case.

A recurring practical question is whether a pleading may properly be left open-ended to accommodate information that has not yet emerged. There is a tension here. A pleading must give the other side sufficient notice of the case to be met. An entirely open-ended pleading that provides no particulars and amounts to bare assertion is liable to be struck out. However, at the time of pleading, a party may only have an incomplete picture – and it is permissible to plead a case by inference, so long as the facts which are said to give rise to the inference are clearly set out.

Special rules in the CPR apply to the requirements for defences and replies, and may be applied in family proceedings by analogy.

A defence (CPR 16.5) must deal with every allegation in the particulars of claim and make clear which are admitted, which are denied and which the claimant is required to prove. If an allegation is denied, the defendant must state their reasons for doing so and state their own version of events if different to that alleged by the claimant. If a defence fails to deal with an allegation in the particulars of claim, the defendant is taken to have admitted it (unless the defence otherwise sets out the defendant's case in relation to the issue to which that allegation is relevant). It is therefore important to carefully consider each of the specific allegations in the particulars (or points) of claim when drafting a defence, and ensure that they have all been dealt with, to avoid inadvertent admissions.

There is no requirement to file a reply. If a claimant does not file a reply, the defendant is required to prove the matters raised in the defence; and if a reply does not deal with a matter in the defence, the defendant is required to prove that matter (CPR 16.7). However, if the claimant wishes to rely on positive matters not alleged in the particulars (or points) of claim in response to those raised in the defence, those matters should be set out in a reply.

CPR Part 16 and PD 16 also contain a number of detailed rules which must be followed in proceedings in the Chancery Division relating to certain specific claims, including where the statement of case pleads interest; exemplary, aggravated or provisional damages; oral or written agreements; or fraud, undue influence, etc. To the extent that the CPR have been applied by analogy, the drafter should (re)familiarise themselves with CPR Part 16

and PD 16 before finalising the pleading to ensure these detailed provisions are complied with.

All statements of case must be verified by a statement of truth (CPR 22.1).

When can a party amend a statement of case?

Rules on when a party may amend a statement of case (as defined in CPR 2.3(1), see above) are contained in CPR Part 17. Most disputes in this area concern amendments to statements of case after they have been served. A party may only amend a statement of case after it has been served if: (1) the other parties consent; or (2) with the permission of the court (CPR 17.1(2)).

When considering whether permission to amend should be granted, the court will have regard not only to the proposed amendment itself, but also to its timing.

Two recent financial remedy decisions shed some useful light on the issue of late amendments in financial remedy proceedings involving interveners: *SM v BA & Anor (No 3: Amendments to Statement of Case)* [2026] EWFC 9 and *Michael v Michael* [2024] EWFC 463.

In *SM v BA*, Nicholas Allen KC (sitting as a deputy High Court Judge) reviewed the relevant civil authorities on CPR 17.1(2) at length ([30]–[37]). His judgment is essential reading for any practitioner seeking a late amendment to pleadings. Of particular note are the *dicta* adopted from Coulson J's judgment (as he then was) in *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd (No 3)* [2015] EWHC 1345 (TCC) at [19]. In summary:

(1) The lateness by which an amendment is produced is a relative concept. An amendment is late if it could have been advanced earlier, or involves the duplication of cost and effort.
(2) An amendment can be regarded as 'very late' if permission to amend threatens the trial date.
(3) There must be a good reason for the delay.
(4) The court will consider the particularity and/or clarity of the proposed amendment.
(5) Prejudice to resisting parties if the amendments are allowed may involve the simple fact of being 'mucked around', disruption in the run-up to trial, or the duplication of cost and effort. If allowing the amendments would necessitate the adjournment of the trial, that may be an overwhelming reason to refuse the amendments.
(6) Prejudice to the amending party if the amendments are not allowed will, obviously, include its inability to advance its amended case, but if that prejudice is caused by the amending party's own conduct, then it is a much less important element of the balancing exercise.

In *SM v BA*, the court refused to grant the wife permission to amend her points of claim. The application to amend was made over 8 months after her points of claim had been filed and served. The amendments were lengthy and significantly expanded the scope of the wife's claims. It was argued on the wife's behalf that the amendment was necessary to fill a legal lacuna in the points of claim which could lead the court to reach a conclusion which was unsustainable in law. Nicholas Allen KC found that there was no such lacuna. The amendments, if allowed, would also have jeopardised the trial date. It is important to stress, however, that even late amendments which would not result in the trial being adjourned may be refused (see *SM v BA* at [32]).

Exceptionally, amendments may nonetheless be allowed as late as the trial itself. We say 'exceptionally' because such cases are rare. For instance, in *Michael v Michael*, HHJ Hess (sitting as a deputy High Court Judge) permitted the wife to amend her points of claim during the course of the trial, accepting the submission (at [95]) that: 'for the wife trying from the darkness to work out what the husband has been doing, this has been a developing picture and she should not be penalised for wishing to hone her case in the light of developing evidence …'.

We suggest that it is important not to read the decision of HHJ Hess to allow the wife's late amendment in *Michael v Michael* as providing broad licence to make very late amendments. The court in that case made significant findings of non-disclosure and dishonesty against the husband. Cases inevitably develop in the lead up to trial, whereas the prejudice to a respondent caused by a very late amendment may be significant.

Consequences of not pleading, or not pleading properly

Perhaps surprisingly, failure to plead a claim relied on at trial is not necessarily fatal. As Lord Denning MR observed in *In Re Vandervell's Trusts (No 2)* [1974] Ch 269 (CA) at 321–322:

> 'It is sufficient for the pleader to state the material facts. He need not state the legal result. If, for convenience, he does so, he is not bound by, or limited to, what he has stated. He can present, in argument, any legal consequence of which the facts permit. The pleadings in this case contained all the material facts. It does appear that [counsel] put the case before us differently from the way in which it was put before the judge: but this did not entail any difference in the facts, only a difference in stating the legal consequences. So it was quite open to him.'

However, Lord Denning's observations would not absolve a party who fails to plead the relevant facts required to establish a cause of action (such as the relevant contractual provision relied on, or the relevant mental state of the counterparty). It therefore remains very important at the time of pleading to identify every cause of action which will be relied on at trial and to ensure that each of the elements of that claim have been pleaded and are squarely put in issue.

Even if new arguments sought to be raised at trial are strictly matters of legal characterisation of pleaded facts, courts may nevertheless be wary of allowing a party to raise them, when they could and should have been raised earlier. To give a recent example, in *TP v OP* [2026] EWHC 1179 (Fam) at [59]–[60], Trowell J observed that the exercise of his duty under the FPR to manage the case would be 'thwarted' if 'parties spring issues on the court at the very last minute'. The judge considered that response from the defendant's counsel that:

> 'one can take fresh points of law all the way up to the Supreme Court – is an inadequate response. Litigation is not a game in which cards can be held back to be played at critical moments. Litigation is a matter of

> significance in the parties' lives which requires each side to have fair notice of what is in issue and be able to prepare for it.'

The safest course is therefore to seek to plead all relevant causes of action at the earliest stage.

Pleading fraud

Lastly, it is worth briefly considering the special requirements for pleading fraud. The requirements are exacting and it is easy to inadvertently slip into error.

Any allegation amounting to fraud or dishonesty must be pleaded distinctly and with particulars, and it is impermissible to advance a case that is, in substance, an allegation of fraud without expressly pleading it: *Three Rivers District Council v Bank of England (No 3)* [2001] UKHL 16, [2003] 2 AC 1 (see [51] and [184]–[186]). The claimant must plead the facts, matters and circumstances relied on to show that the defendant was dishonest and not merely negligent. A claim in fraud is not sufficiently particularised if the facts pleaded are consistent with innocence (at [184]). The court also gave useful guidance regarding the correct approach to pleading fraud by inference (at [186]) – a party is not permitted to seek to draw an inference of fraud at trial from facts which have not been pleaded.

What amounts to an allegation of fraud for these purposes may be wider than the label suggests. To give just one example, undue influence has been described as 'a species of fraud': *CIBC Mortgages Ltd v Pitt* [1994] 1 AC 200 at 209, per Lord Browne-Wilkinson.

In the financial remedy context, where allegations of concealment of assets, sham transactions and pressure or overreaching in relation to nuptial agreements are relatively common, the pleader must consider carefully whether the case being advanced is, in substance, one of fraud or dishonesty, and if so must plead it distinctly and with particulars. Allegations of fraud cannot be deployed as a rhetorical flourish or a tactical makeweight.

Further, under the Bar Standards Board Handbook,[2] rC9(2) provides that a barrister 'must not draft any statement of case, witness statement, affidavit or other document containing: … (c) any allegation of fraud, unless you have clear instructions to allege fraud and you have reasonably credible material which establishes an arguable case of fraud'. It may therefore be necessary to ask for further supporting documentation or interrogate the reasons why one is being asked to plead fraud and whether there is a proper basis for doing so.

Conclusion

Pleadings often introduce helpful procedural and intellectual rigor into disputes involving third parties. With that, however, comes important formal requirements which must be followed – otherwise, the consequences for non-compliance can be significant.

Notes

1 www.judiciary.uk/courts-and-tribunals/business-and-property-courts/chancery-division/litigating-in-the-chancery-division/the-chancery-guide/

2 www.barstandardsboard.org.uk/the-bsb-handbook.html%3Fpart=E3FF76D3-9538-4B97-94C02111664E5709%26audience=%26q=

A *Shield* Against Ruinous Costs: The Case for Court-Based FDRs in Intervenor Actions

Luke Nelson

3PB



For any case to reach the Financial Remedies Court (FRC), a fair amount must have already 'gone wrong' between the parties.

If everything 'goes right' once that case has reached the FRC (defined loosely for the purposes of this article as settling the matter at FDR), both parties will almost invariably have paid (or owe) *at minimum* five-figure sums to their respective legal teams. These sums, almost invariably, will be swallowed by the party instructing those teams unless one of the few exceptions in FPR 28.3 apply.

To help parties reach the 'least worst' outcome once proceedings have started, the court is bound by FPR 9.15(4) to require parties to engage in an FDR:

> '(4) The court must direct that the case be referred to a FDR appointment unless—
>
> (a) the first appointment or part of it has been treated as a FDR appointment and the FDR appointment has been effective; or
>
> (b) there are exceptional reasons which make a referral to a FDR appointment inappropriate.'

When parties fail to reach settlement and litigate 'to the death', the High Court has no qualms voicing colourful criticisms about legal costs that are 'nihilistic',[1] 'apocalyptic'[2] and 'a calamitous waste of resources'.[3] This has no doubt played a part in the increased push towards non-court dispute resolution (NCDR) in recent years.

If the 'standard' financial remedy case is defined by a lot going wrong between the two parties, intervention in those proceedings by other family members takes that misery and turns it up to 11.

Now, instead of two warring parties, there are three or more. Years of resentment, unspoken grudges and imperceivable slights are laid out for all to see (usually with far more clarity than the parties themselves). The lawyers involved are tasked with untangling it all and applying it to the doctrines of equity, shoehorned as they are into the FRC.

It doesn't take a genius to ascertain what third party intervention does to legal costs: clients can be advised to 'take what you would have spent and double it'.

That's bad enough, but the bad news just keeps coming: if they lose, they'll likely be ordered to pay the other side's costs. Usually not just *one* other side's costs, but perhaps *two* or even *three* sets of costs, depending on the issues and the result.

'Surely, the court will hold an FDR appointment to try to help us settle our differences as they would in a two-party claim?' the fictitious, conveniently-aware-of-financial remedies-procedure client asks.

Not so: despite the duty to negotiate becoming increasingly central to financial remedies disputes, there is remarkably little encouragement for negotiated agreement in intervenor actions.

Whilst intervenor actions 'must be approached on exactly the same legal basis as if it were being determined in the Chancery Division'[4] and the FPR still apply,[5] Part 9 does not: third party claims fall outside the definition of 'financial remedy' or 'financial order' in FPR 2.3. Hence, FPR 9.15(4) does not apply to the intervenor action itself. Therefore, there is no rules-based requirement for an FDR.

As a result, the standard approach adopted in FRCs across the country seems to involve listing the matter straight to trial, often with a multi-day time estimate, under the entirely misleading guise of a 'preliminary issue hearing'.

The upshot is this: warring parties, whose conflicts and legal costs are exacerbated by the introduction of other parties with their own scores to settle, are essentially forced by convention to fully litigate a dispute without any conciliatory input from an unbiased judge. That cannot be right. It isn't right. In any case not involving the highly wealthy, it almost inevitably leads to one party facing some form of financial ruin.

So how did we get here? It started with *TL v ML*.

The *TL v ML* directions

In *TL v ML & Ors (Ancillary Relief: Claim against Assets of Extended Family)* [2005] EWHC 2860 (Fam), Nicholas Mostyn QC (as he then was) said this:

> '[36] In my opinion, it is essential in every instance where a dispute arises about the ownership of property in ancillary relief proceedings between a spouse and a third party, that the following things should ordinarily happen:

(i) The third party should be joined to the proceedings at the earliest opportunity;

(ii) Directions should be given for the issue to be fully pleaded by points of claim and points of defence;

(iii) Separate witness statements should be directed in relation to the dispute; and

(iv) The dispute should be directed to be heard separately as a preliminary issue, before the FDR.'

This formulation was endorsed by two differently constituted Court of Appeal benches in *Goldstone v Goldstone* [2011] EWCA Civ 39 and *Edgerton v Edgerton* [2012] EWCA Civ 181, adding further persuasive effect to the judgment.

In most cases involving third party property disputes, overreliance on *TL v ML* has led to directions orders that effectively adopt [36] wholesale. On the whole, that is no bad thing: (1) a party who passes the test for joinder set out in FPR 9.26B (not in force at the time of the judgment) should be joined at the earliest possible opportunity to enable effective case management; (2) parties should properly plead their respective cases – doing so defines the issues and disciplines all concerned to the appropriate test; and (3) separate witness statements are necessary to enable the parties' evidence to be tested in accordance with the rules of natural justice.

However, the assumption that third party property claims should be determined without an FDR is, in this author's view, antithetical to the increasingly significant culture shift towards negotiation and settlement.

Nicholas Mostyn QC's reasoning for this procedure was clear:

> '[37] In this way, the parties will know at an early stage whether or not the property in question falls within the dispositive powers of the court and a meaningful FDR can take place. It also means that *the expensive attendance of the third party for the entire duration of the trial can be avoided*. It is a great pity that none of these steps took place in this case. Had they happened, *I believe that a great deal of the costs would have been saved*.' (emphasis added)

TL v ML concerned a claim by the wife that the family home, legally owned by her brother-in-law, was beneficially owned by the husband. That claim, the judge found, was entirely invented. Moreover, at [35]:

> 'At no stage since the first appointment has this discrete issue been the subject of any case management, notwithstanding that the parties have been before the court on numerous occasions.'

It's plain to see that the judge's guiding principles were: (1) the appropriate pleading of third-party property issues; and (2) avoiding the unnecessary proliferation of legal costs. Arguably, the appropriate pleading of third-party property issues was intended as *the means by which* the unnecessary proliferation of costs could be avoided.

Adopting the *TL v ML* directions undoubtedly addresses the first principle. Proceeding without any consideration of a court-led or private FDR categorically fails to achieve the second. Slavish devotion to the letter of [36] has led to ongoing case management decisions which defeat the spirit of the judgment.

Shield

This was an issue highlighted, in tentative and qualified terms, by Nicholas Francis QC (as he then was) in *Shield v Shield & Anor* [2014] EWHC 23 (Fam).

Shield concerned an intervention by the parties' son, Christopher, asserting a constructive trust over 50.22% of the Category A shares in a family business held by the husband. Christopher and the husband agreed that this was the case. The wife, supported by witness evidence from the parties' daughters, denied it.

Christopher's application to intervene was granted by District Judge Hess (as he then was) and directions given to resolve the issue prior to FDR (one can assume these were the *TL v ML* directions, but there is no mention of this in the judgment).

The matter proceeded to preliminary issue hearing before Nicholas Francis QC which lasted for 8 days, not including reading or judgment writing/delivery days.

To reach the end of the preliminary issue hearing, the family had spent over £1m in legal costs between them. It is not clear from the judgment between which parties those costs were divided, but on any analysis, it was a sum which no doubt would have been better invested back into the family. The core financial remedy claim remained extant and the whole family had already been effectively torn apart by the dispute.

Shield is a salutary example, albeit in a bigger money case,[6] of the costs exacerbated by the failure to undertake *or even consider* an FDR: court time, the parties' time, financial cost and potentially irreparable relationship damage.

This does not appear to have been lost on the judge. At [108] of the judgment, he said this:

> 'I note that there was no FDR in relation to the preliminary issue. Whilst, as been made clear in a number of cases, (sic) an FDR will not necessarily be appropriate to the resolution of a preliminary issue, *I express the view that consideration should at least be given to the possibility of an FDR prior to the hearing of a preliminary issue*. It may well have been the case here that the input of an experienced FDR judge might have helped to save this family from the course which it has taken.' (emphasis added)

This passage in *Shield* is alluded to briefly in the Red Book commentary to FPR 9.17, which suggests that the *Shield* approach is most often utilised in practice. That is unfortunately not this author's experience, hence this article on the *Financial Remedies Journal* blog.[7] Intervenor actions are routinely directed straight to trial without a second thought for an FDR appointment. Moreover, parties are *actively arguing against* FDR appointments in reliance upon *TL v ML*, as if it is the beginning and end of the matter.

These arguments are most certainly not made with the intention of increasing costs. More likely, they stem from the – not unreasonable – impression that *TL v ML* is a characteristically insightful judgment, and a Court of Appeal approved formula as to the way things should be done.

Whether this issue is brought about by a lack of knowledge of *Shield*, a lack of time to consider such things at the early stages of complex litigation or by the understandable desire not to be seen to depart from the law of Mostyn J, it should not continue.

A way forward?

TL v ML is not a hard and fast formula. Almost nothing in the financial remedies sphere is. Practitioners are required to analyse the case management needs of each specific case. In an intervenor action, those needs can be guided by *TL v ML*, *Shield*, the FPR and even the CPR. The aims to be achieved are these:

(1) involving the relevant parties as quickly as possible;
(2) ascertaining the exact nature of the dispute as quickly as possible;
(3) resolving the dispute as quickly and cost-effectively as possible;
(4) resolving the underlying financial remedies action as quickly and cost-effectively as possible.

To that end, perhaps it is time to introduce a broad amendment to the *TL v ML* directions: make a court-based FDR the default position, adopting a similar test as in FPR 9.15(4).

The broad thrust of these amended directions would look like this:

(1) The third party should be joined to the proceedings at the earliest opportunity.
(2) Directions should be given for the issue to be fully pleaded by points of claim and points of defence (with provision for reply if necessary).
(3) A further case management hearing should be listed, with the option to be vacated upon the provision of agreed directions, to consider *inter alia*:
    (a) listing the matter for an FDR/early neutral evaluation (ENE) before a suitably qualified judge unless exceptional circumstances apply;
    (b) considering whether the FDR/ENE will address just the intervention or will subsume the entire dispute;
    (c) directing disclosure and inspection of any relevant documents;
    (d) considering whether separate witness statements should be directed before the FDR or should follow in the event it is unsuccessful;
    (e) considering such further directions as may be required to ensure the FDR judge is able to provide a suitably persuasive indication on the intervention issue and the substantive financial remedy application, if appropriate;
    (f) considering how to manage the attendance of the third party to respect the parties' confidentiality in the underlying financial remedies proceedings.

Can such change be affected?

Valid criticisms of this approach may include:

- the increased cost of a further case management hearing;
- whether a third-party property claim is even suitable for FDR;
- the practical difficulty of resolving a core computational issue (third-party ownership of potentially distributable property) and the ultimate distribution of assets 'in one sitting';
- how to practically manage a multi-party FDR;
- the risk of a second FDR and trial in the financial remedy proceedings if the intervenor action isn't resolved;
- how to address costs between the intervenor(s) and the parties at the FDR.

Each is taken in turn.

The cost of a further hearing can be eliminated through proper engagement by legal professionals. The success of the accelerated first appointment procedure tells us this – most first appointments are avoided because appropriate directions are made by consent.

If the hearing is genuinely required, as is the case in more complex matters in the accelerated procedure, that money is an investment to ensure unforeseen case management issues do not arise in the future.

Whether an FDR appointment is a suitable forum to address third party interests in land. There is somewhat less discretionary wiggle-room available in the determination of matters arising out of third party interests in land. That is arguably more reason to justify early judicial involvement. If one party's case is obviously stronger than another's, that can be made clear in the indication. If the case is more likely to turn on the witness evidence, the indication will necessarily be broader.

The Chancery Division (now renamed the Business and Property Division (BPD)) has operated its own chancery FDR (Ch FDR) scheme since 2014, following the successful adoption of FDRs in financial remedy proceedings. The Chancery Guide (September 2025 update) specifically states as follows:

> '10.27 It is generally necessary for the parameters of the dispute to have crystallised before a Ch FDR takes place. This will generally not be before completion of statements of case or the exchange of evidence in a Part 8 claim.
>
> 10.28 However, if once acknowledgments of service have been filed, the parties consider that an early Ch FDR would be beneficial, they do not need to wait for the first hearing but can make an application using form N244.'

The above paragraphs can be interpreted as a restatement of the underlying aims that inspired the judgment in *TL v ML*: identify the issues adequately, then try to settle the matter.

Whilst Ch FDRs have not formed the bedrock of standard civil procedure in the same way FDRs have in financial remedies proceedings, their existence adds credibility to their utility in intervenor actions.

That said, the ability of the BPC to order ENE at a case management conference even if one or both of the parties don't consent has been made expressly clear since c.2019.[8] This is unlikely to be particularly surprising in the current climate, considering the wide publication of the court's power to stay proceedings to order the parties to engage in NCDR in *Churchill v Merthyr Tydfil County Borough Council* [2023] EWCA Civ 1416, but it illustrates the BPC's willingness, somewhat ahead of the curve, to enforce NCDR on unwilling parties.

If it works in the civil sphere, there is no reason to suppose it cannot work in the Family Court. In fact, given the obvious crossover between claims under the Trusts of Land and Appointment of Trustees Act 1996 (TLATA) and the claims in the Family Court, the case can easily be made for

the introduction of mandatory FDRs in the county court too. It is a rare case indeed that would not benefit from an institutionally established settlement meeting chaired by an experienced judge.

Practical difficulty in resolving computational issues before meaningful indication can be given. This is something that is regularly faced in FDRs already. A great many cases reach FDR in which the parties are still not agreed as to the value or liquidity of a company, the existence or otherwise of overseas assets or the value of a particularly important chattel.

FRC judges are more than capable of giving an indication on such matters, providing the case has been managed well enough to that point. Such indications are often caveated as imperfect, and many reflect legal advice on risk that has already been given, but lay parties are almost universally assisted by hearing it from a judge.[9] The facts speak for themselves: most cases settle at FDR,[10] but most cases that reach FDR do not have all the computational issues sown up.

Practical management of multi-party FDR. Clearly, a multi-party negotiation is difficult to manage. Whether it is even feasible will depend upon the issues in the case and the will of the parties and their representatives. If a multi-party FDR is sought, it may be prudent for the intervening party to sign a confidentiality agreement regarding the underlying financial remedies case. This step is not without precedent: the Chancery Guide says this at 10.32:

> '… if the parties consider it necessary for a non-party to be present for the purposes of the negotiations because they have an interest in or are necessary for any overall resolution of the dispute, but are not a party to the claim itself, consideration should be given to the need for them to sign a confidentiality agreement and/or what role they are to have at the Ch FDR. It may affect the terms and form of any agreement reached by the parties at the Ch FDR and how it is to be approved or implemented.'

There is no reason a similar approach cannot be adopted in the FRC: 'non-parties' to the underlying financial remedies claim – the intervenors – can sign an agreement not to disclose any confidential information they hear in the proceedings.

If a multi-party FDR is considered desirable, a longer time-estimate may be required to facilitate an effective appointment. Dividing the appointment into two sessions, the first addressing the intervention and the second addressing the core application, may be sufficient. In some circumstances, it may be that a judge feels able to wrap up an indication in one session, especially if there are overlapping issues concerning resources available to the parties.

It also cannot be ignored that most third party interventions that pass through the FRC are 'bank of mum and dad' cases in which the family may be able to reach a sensible compromise on all matters in the best interests of the family and, more importantly, any children of the family. Nicholas Francis QC plainly felt similarly in *Shield*.

Whilst arranging a multi-party FDR is not without difficulty, it isn't impossible. The nettle should be grasped and the matter case managed to achieve the best result for the families served by the FRC.

As for the risk of a second FDR and trial in the substantive matter, that is a risk that is difficult to escape from. However, such cases are likely to be the exception, rather than the rule.

Readers of this journal will no doubt recall matters from their own professional diaries that seemed incapable of settling only to reach a remarkably sensible compromise at an FDR. Others will recall, hopefully, fewer examples of cases that were simply intractable. No doubt there will be room for further High Court hyperbole in respect of such cases and the costs they incur, but the risk of such cases should not stand in the way of resolution of more agreeable matters.

Costs. Intervenor actions are subject to a 'soft' costs-follow-the-event regime.[11] The 'no order' principle of FPR 28.3(5) does not apply and CPR 44.2(4) and (5) apply instead.

It follows that intervenors (or successful defenders of such a claim) may be somewhat more concerned about costs recovery than a party in a 'standard' financial remedy claim. That is no reason to eschew an FDR. Indeed, an unreasonable refusal to engage in NCDR may amount to 'conduct' for the purposes of a civil costs order.[12] This echoes FPR 28.3(7)(aa) and paragraph 24 of *The Financial Remedies Court of England & Wales: Financial Remedies Guide 2026*,[13] which requires the court to have regard to any failure by a party, without good reason, to attend a mediation information and assessment meeting or NCDR. Whilst a court-based FDR is, by definition, not NCDR, the reason for these rules is the encouragement of settlement. If the rules committees, driven by the needs of court users, have introduced rules to encourage NCDR, those same rules must apply to the use of court-based FDRs as well.

Practitioners should be aware of the different costs rules and should advise their clients accordingly. Judges can give an indication of where costs are likely to fall depending on the outcome reached (there's a strong hint in the name of the regime), and the parties can make offers taking into account litigation risk or otherwise. These sorts of considerations are commonplace in the county court but they do not appear to affect the ability of those involved to settle matters: broadly speaking, only 2%–4% of county court claims reach trial. According to the Quarterly Civil Justice Statistics: April–June 2026, 12,000 claims went to trial, whereas 571,000 claims were issued.[14]

Conclusion

The author may be criticised for sticking his oar in with an imperfect solution. In a situation where the very fabric of a family is tearing apart, too much has gone wrong for any resolution to be straightforward. However, pressing ahead to preliminary issue hearings without enforcing some form of court-led dispute resolution is not the answer. That was recognised in *Shield* and has only increased in urgency since then.

Astute readers may point out that limited reference has been made to NCDR in this article. Clearly, NCDR is an increasingly important part of financial remedies practice and the increased flexibility and control it offers makes it a more ideal solution to the problem addressed herein. But not all parties can afford such intervention and if even one of the parties is unwilling to consider such a course, then it cannot be embarked upon (unless they are ordered to do so). NCDR is being utilised to fill the cracks brought about by

chronic underfunding and the re-prioritisation of judicial sitting time. NCDR should not be the only feasible option for a means to resolve complex multi-party litigation in the FRC.

Notes

1 Peel J, *Crowther v Crowther & Ors* [2021] EWFC 88.
2 Mostyn J, *Xanthopoulos v Rakshina* [2022] EWFC 30.
3 Peel J, *M v M* [2020] EWFC 41.
4 *TL v ML & Ors (Ancillary Relief: Claim against Assets of Extended Family)* 2005 EWHC 2860 (Fam) at [34].
5 See the judgments of Hughes LJ and Thorpe LJ in *Goldstone v Goldstone* [2011] EWCA Civ 39.
6 No effort to value the business in question was attempted, but both sides estimated it to be worth tens of millions: *Shield v Shield & Anor* [2014] EWHC 23 (Fam) at [10].
7 Siân Smith, 'Intervener Cases: Preliminary Issue Hearing or FDR (or NCDR)?, https://financialremediesjournal.com/intervenor-cases-preliminary-issue-hearing-or-fdr-or-ncdr/
8 *Lomax v Lomax* [2019] EWCA Civ 1467.
9 See also Peel J's forceful encouragement of the FDR process in *GH v GH* [2024] EWHC 2547 (Fam).
10 According to Peel J in 'The Financial Remedies Court: A Year in Review', [2023] 3 FRJ 170, 85%–90% of financial remedies cases settle before final hearing.
11 See *Baker v Rowe* [2009] EWCA Civ 1162 at [25] and *Solomon v Solomon* [2013] EWCA Civ 1095 at [22].
12 See CPR 44.2(5)(e).
13 www.judiciary.uk/guidance-and-resources/financial-remedies-guide-2026/
14 Whilst the claims that went to trial wouldn't have been from the same quarterly intake of issued claims, the statistics nevertheless indicate the vast majority of claims settle before trial.

Are All Lies Created Equal? The Limits of Without Prejudice Privilege

Rhiannon Lloyd

4PB



Surely they can't get away with that?

It is a common question that arises, where someone has admitted a relevant fact in a without prejudice letter and later denies the same fact in court. How can this be right? Fair? Just? Most people assume this sort of thing would not be protected by the without prejudice rule. This article examines whether that assumption is indeed correct.

The first part of this article focuses on the law on 'unambiguous impropriety' as it stands, with an examination at the end of whether this is inapt to contemporary family law practice, posing the question of whether it is worth reconsidering at appellate level.

First, a reminder of the without prejudice privilege and its objectives.

The privilege attaches to statements or admissions made in the course of a 'genuine attempt' to compromise the proceedings. The seminal case is *Cutts v Head* [1984] Ch 290, with the classic statement at [306]: 'The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions'. The rationale was further explained in *Rush & Tompkins Ltd v Greater London Council* [1989] AC 1280 so as to encourage free and frank negotiation and make the settling of disputes outside the court arena more likely. This aim is so fiercely guarded by the appeal courts that the consequences of it can sometimes appear surprising. The rationale is that it is generally not considered to be an abuse of the privilege to tell the truth in without prejudice discussions, even if outside them you do not.

Unless both parties agree to waive the privilege then it remains privileged unless an exception applies: *Woolwich Plc v Le Foe and Le Foe* [2001] 2 FLR 970. In this sense the privilege is different to legal privilege. There are however some exceptions to the rule, which allow without prejudice material to be admitted. These were codified in the leading case on the privilege, a patent dispute called *Unilever Plc v The Proctor & Gamble Co* [1999] EWCA Civ 3027 (*Unilever*). This case sets out a list of six exceptions to the rule, which is not exhaustive, and some of them (e.g. disputes about whether a settlement has concluded, vitiation of agreements) are well known to financial remedy practitioners. This article is not focused on those and they are not addressed in detail. It is also worth noting that the rules in respect of the privilege in relation to Private FDRs are more absolute and codified in FPR PD 9A (para 6.2) as stringently applied recently by Peel J in *BC v BC* [2025] EWFC 236. So the forgoing applies outside the pFDR situation.

Of those exceptions 'fraud … perjury, blackmail or other "unambiguous impropriety"' is the route most travelled to meet the argument that an admission made on a without prejudice basis cannot be relied on, and it is this upon which this article will now focus.

The 'unambiguous impropriety' exception in *Unilever* essentially operates to prevent a party being able to deny a fact or statement they made under cover of without prejudice if it effectively acts as a cloak for fraud, perjury, blackmail or other 'unambiguous impropriety' applicable in only the 'clearest cases of abuse of a privileged occasion'.

In the family law context *Unilever* also recognises the exception in *Re D (Minors) (Conciliation: Privilege)* [1993] 1 FLR 932: that statements made between parties in a 'conciliation meeting' prior to the proceedings would not be admissible except in the very unusual case where the statement clearly indicated that the maker had in the past caused, or was likely in the future to cause, serious harm to the well-being of a child; and the discretion afforded in that event would only be exercised in circumstances where the interest of the child outweighed the public policy interest in maintaining the privilege.

'Unambiguous impropriety'

The classic situation is where a party has admitted a fact under cover of a without prejudice letter, perhaps it was a resource they had not disclosed or an acceptance that they intend to move to place X rather than place Y, for example. Subsequently, they deny the same fact, or assert a contradictory set of facts, in the proceedings on an open basis. It may seem surprising that the 'liar' has the law's support to conceal their lie.

However, this is an admissibility question, and in that sense is different to legal professional privilege or confiden-

tiality. Another difference is that partial waiver (i.e. putting information in with redactions) is not usually permitted as the documents have to be considered as a whole to give context.

Isn't lying to the court always perjury? Well, no.

Perjury is a specific criminal offence, namely making a knowingly false statement under oath to mislead the court (Perjury Act 1911). For 'risk of perjury' to successfully lift the privilege, there must be a clear, incontrovertible contradiction showing that a party is abusing the rule to actively mislead the court, rather than just shifting their negotiating position.

The leading case on unambiguous impropriety is *Savings & Investment Bank Ltd v Fincken* [2003] EWCA Civ 1630 (*Fincken*). That case considered the question of the risk or possibility of a lie amounting to perjury and Rix LJ said at [58]:

> 'It may be said … that even if the mere possibility of future perjury does not suffice to destroy the privilege, the admission which demonstrates that perjury has been committed in the past, by reference to an existing affidavit, is or should be different and that no authority suggests otherwise … There is indeed a substantial case to be made that the courts should not pass by such proof of perjury with indifference. There is a clear public interest in the discouragement of perjury. Nevertheless, on balance I do not think that the courts should adopt such a position. If they did, the very serious and criminal charge of perjury would fall to be debated, without the protection which should be available to the accused party, on an interlocutory outing (as here) or even at trial, with the potential of derailing the trial by the exposure of without prejudice material to the trial judge. Essentially the same problem would arise in connection with statements of truth, which now apply under the CPR to all particulars of claim or defence: although they cannot give rise to the offence of perjury, they can give rise to the only relatively less serious matter of contempt of court.'

He continued at [62]:

> 'It is of course distasteful for this or any court to avert its eyes from an admission which, subject to any point about value, appears to incriminate Mr Fincken in lying in a sworn document. However, in the tension between two powerful public interests, it seems to me that that in favour of the protection of the privilege of without prejudice discussions holds sway – unless the privilege is itself abused on the occasion of its exercise.'

At [57] Rix LJ emphasised it is not just the mere inconsistency between an admission and a pleaded case or statement, with the possibility that such a case, if persisted in, might lead to perjury, that is enough. Rather, it is the fact that the privilege is abused that provides sufficient grounds. He went on to say:

> 'It is not an abuse of the privilege to tell the truth, even where the truth is contrary to one's case. That, after all, is what the without prejudice rule is all about, to encourage parties to speak frankly to one another in aid of reaching a settlement; and the public interest in that rule is very great and not to be sacrificed save in truly exceptional and needy circumstances.'

Lies and damn lies

So an inconsistency with an open position will not be enough to satisfy the 'unambiguous impropriety' exception, lies are not enough. It must be more than a lie, more than just dishonesty or inconsistency. There must be a clear, outright abuse of the privileged occasion itself (such as explicit threats, blackmail or criminality) rather than just discovering an admission that a party was dishonest or inconsistent. Indeed, *Fincken* says explicitly that if lies/admissions alone were sufficient to displace the privilege, it would undermine the purpose of the rule and make it impossible for any court action involving claims of dishonesty to settle. Less scrupulous people who would not admit to their wrongdoing would be in a better position than those who do.

The particular lie in *Fincken* was an initial admission in a without prejudice meeting that the appellant *did* hold assets he had not disclosed in a previous affidavit of means. In particular, that a company he said he didn't own or have an interest in was, in fact, held by someone else as a nominee for him. The other party wanted to rely on this admission to show the appellant had perjured or fraudulently misrepresented himself in an affidavit and that he did have ownership of the assets that had been denied. That was held not sufficient to meet the test.

Factual examples of unambiguous impropriety

So if a lie by itself isn't enough, what does qualify as unambiguous impropriety? The answer to the question requires the court to balance the public policy interest in protecting the privilege against the interests of justice itself. As such, the answer is not straightforward and is fact-specific.

The conduct has to be so clearly and obviously wrong that the protection is being abused. The exception will only be allowed in narrow and 'exceptional' circumstances and where there is no ambiguity about the facts asserted/what was said or, indeed, the meaning of both. If what was uttered could be subject to different interpretations, then it will not pass the test. Certainty about what was said can be more difficult to establish if the statements were made orally rather than in a document and not recorded on a tape/video.

In the court below, Patten J did find Fincken's admission to come within the exception but this was overturned on appeal. He felt (at [30]) that it didn't or shouldn't just apply to:

> 'instances where the without prejudice occasion is abused by the making of threats but also to cases where there is an equally unambiguous admission of facts which is intended to be followed by an equally unambiguous denial of those facts by the same party. Circumstances of that kind amount to an abuse and the exclusion of such evidence by virtue of the rule would act as a cloak for perjury.'

The appeal court did not agree.

If you are grappling with this issue in practice, *Fincken* is required reading as it helps to give a sense of the different factual scenarios that could or could not amount to unambiguous impropriety. Rix LJ scrutinised a number of scenarios in the preceding case law.

As Rix LJ identified, the issue with an alleged blackmail is

usually whether objectively the threat made actually does amount to blackmail or is simply part of aggressive negotiation tactics, for example, 'accept this offer or I'll see you in court'. Even with blackmail it seems likely that this will only succeed to lift the privilege where it goes to the heart of the legitimacy of the litigation itself.

For example, where a party stated that unless the claim against him was withdrawn, he would give perjured evidence and bribe other witnesses to perjure themselves, that was unambiguous impropriety. However, where a party said they felt honour bound by an agreement but would deny they had any legal obligation in the litigation, this was 'very far from blackmail' and so did not meet the test.

Where (in *Hawick v Caplan*, unreported) a party was secretly recorded admitting that he had brought a dishonest case against the other party for a £10,000 debt which he knew did not exist and was doing so in order to blackmail the other party to settling other matters, that was held to be unambiguous impropriety. It was of significance that the tapes were agreed to be accurate and there was no doubt as to what was said. However, secret recordings can be problematic for the same reasons they are in the Family Court and there is judicial comment about the need for scrupulous care when considering evidence obtained by 'clandestine' methods.

Intimidation may also amount to unambiguous impropriety. While negotiations can often be heated, overstating the case and asserting that what an employee had done was 'serious misconduct' which amounted to a criminal offence or summary dismissal (in a letter making an offer) when there was no basis for that was found on appeal to have 'sailed very close to the wind'. It was only the very strong public interest in the privilege that tipped the balance against lifting it. Such tactics could be construed as dishonest and amount to blackmail, at the very least they may give rise to arguments from the party on the receiving end of 'improper pressure' particularly if an agreement is reached on this basis: *Swiss Re Corporate Solutions Ltd v Sommer* [2022] EAT 78. It seems, nonetheless, that hard bargaining and unreasonable offers will not of themselves waive the privilege.

It is perhaps unsurprising that fraud would make out the unambiguous impropriety exception, particularly if something was said to try to trick someone into an agreement. However, the cases discussed in *Fincken* demonstrate it is still not straightforward. Admissions in without prejudice discussions of a party's involvement in fraudulent securities transfers and their theft were found not to be sufficient to waive privilege (*Merrill Lynch Pierce Fenner & Smith v Raffa*, unreported) as these did not amount to blackmail-type threats. However, there was judicial comment that this would not be so if that person mounted a defence in the subsequent litigation asserting that they *did not* do these things, because the defence would be 'fundamentally dishonest' as it was cloaking admitted fraud. There was no evidence from the party who made the admission to indicate whether or not the admission was challenged and potentially therefore 'ambiguous', which was highlighted in *Fincken* as another reason to be cautious about this statement.

The problematic admission in *Fincken* was him admitting to perjury in a past affidavit. A distinction was drawn at [57] (above) between that and a 'blackmailing threat of perjury', i.e. 'if you don't do X I will perjure myself in the future litigation'. There was no accompanying threat in the securities case, the party just admitted that they had been involved in the fraud: that by itself was not enough. Neither was it enough in *Fincken* to admit in without prejudice discussions that a previous affidavit had not set out the full picture.

Evidential ambiguity

The other takeaway from *Fincken* is that it is not just the *conduct* that has to be unambiguously bad, there must not be any evidential ambiguity either. In effect, if there is a dispute about what might have been said or asserted or if what was said or asserted was open to another innocent explanation then it does not meet the test of 'unambiguous'. This was most recently applied in *FW Aviation (Holdings) 1 Ltd v VietJet Aviation Joint Stock Company* [2024] EWHC 1823 (Comm). VietJet's vice chairman was recorded in a contemporaneous attendance note to have said at a without prejudice meeting:

> 'You can wait till you go to court and get an English judgement and then go to Singapore too and Vietnam and get another judgement. I cannot speak for the Vietnamese Government but my sense is they are not going to collaborate with anyone from the UK or Singapore or anywhere else, and this could go on for years, but that's not a threat, that's just an observation, a Donal Boylan observation.'

The court did not accept this was an effective threat to collude with the government of Vietnam to frustrate the enforcement of any English judgment, but rather a 'warning' as to the difficulties of enforcement in Vietnam. Additionally, Mr Boylan asserted the note was not accurate so there was ambiguity about what was said. It may be that a lack of agreement about what was said would act as a knockout blow before any conduct was qualitatively examined.

It *is* unambiguous impropriety … what then?

Unilateral action should not be taken; do not proceed to lay out what has happened in open correspondence thereby revealing the offending assertion. Without prejudice privilege is a joint privilege and one party cannot waive it without the other's agreement. So if a dispute arises and cannot be resolved then there must be an application to the court. That application can outline the issue but should not, at that stage, disclose the offending communication to the court.

However, there may be a few cards to play prior to this. Asking a question to elicit the response on an open basis may force the other side to commit to what they have said in open correspondence. If the admission could be evidenced by underlying documents, then disclosure of those documents could be sought, pursuant to the ongoing duty of full and frank disclosure in financial remedy cases. FPR 22.15 could be deployed with a formal notice to admit facts, though care will have to be taken not to allude to the fact that *this fact* had already been admitted in without prejudice communications.

If an application is still necessary then *Cardiff City Football Club Ltd v McKay* [2025] EWHC 1439 (Comm)

confirms it must be made without providing the material at that stage. It will usually necessitate a separate hearing before a different judge (who would not hear the final hearing).

Does this legal framework sit well within the family law arena?

Unambiguous impropriety is narrowly drawn and it is plain that 'robust', some might say bullying, negotiating tactics, quasi threats and dishonesty may not be enough to satisfy it and enable waiver of the privilege. How does this sit within the operation of financial remedy?

It is notable that the law in this area has been almost exclusively developed in the civil commercial sphere. The *Re D* exception is explained, in *Unilever*, as based on 'public interest in the stability of marriage'. This is odd because the case arises from a marriage that had come to its end, and many children disputes arise in non-marital relationships. The exception in *Re D* is actually based on welfare principles. *Re D*, like the civil cases, emphasised the public policy interest justification. In fact, it goes a bit further, highlighting the particularly harmful impact of litigation on family relationships to make this justification even more potent in family law.

Re D has been interpreted subsequently at High Court level to suggest that in cases concerning child arrangements where there is a mediation or conciliation, *only* this exception applies and none of the other *Unilever* exceptions would apply (see [30]–[31] of *Re E (A Child) (Mediation Privilege) (Rev 1)* [2020] EWHC 3379 (Fam), Leslie Samuels KC (sitting as a Deputy High Court Judge) endorsing comments from Williams J in an earlier case). So, there is a suggestion arising out of those cases that it is even harder to lift the privilege in a family conciliation setting than it would be in a civil law dispute.

Re D itself also suggests that the application of these rules to family law may be more stringent than the civil sphere. In it Sir Thomas Bingham MR said:

> 'Again, even if *Kitcat v Sharp* (1882) 48 LT 64 is authority for the proposition that a "without prejudice" marking does not protect evidence of a threat as to what will happen if an offer is not accepted, it does not in our view follow that evidence can be given of threats, even credible threats, made by parties in the course of attempted conciliation. Where deep human emotions are engaged, as they often are in disputes concerning children, such threats are commonplace. To override the privilege in such an event would be to emasculate the privilege and so undermine the whole process of conciliation'.

Although this passage focuses on communications during a conciliation meeting, the judgment later confirms the same would applying to statements in the course of meetings held or communications made for the purpose of conciliation.

However, *Unilever* itself seems to recognise that familial relationships or dynamics may justify exceptions of their own as distinct from general civil law exceptions, despite the family courts tightening the screws on the lid of the privilege as applied to children cases. So in one sense the more restrictive approach taken by the family courts seems perverse.

Surely the increased connectiveness between litigants in family law, the absence of 'arm's length' bargaining between spouses or partners who have had intimate relationships, provides more scope for a dominant party to abuse the privilege? Where the court is considering vitiation of agreements by undue influence, the heightened impact an intimate relationship can have on consent or autonomy was re-emphasised recently by Cobb J in *PN v SA* [2025] EWFC 141. At [41] he cited a 2006 judgment of Baron J in *NA v MA* [2006] EWHC 2900 (Fam) at [18]:

> '… in a case involving a husband and wife where it is clear that interdependence and mutual influence are the basis of the relationship, I consider that the court has to take special care when assessing the manner in which each party's conduct affected the other. For example, if a wife has been accustomed to placing reliance upon her husband's decisions, she might be much more easily influenced than an individual in a commercial transaction'.

Wouldn't that be equally as applicable when considering hardball negotiation tactics, threats, and lies (or a significant factual variance from the openly asserted position) where no agreement was reached? Do the intimate relationships between the litigants in family law make a rule which protects some forms of dishonesty more ripe for abuse and shield greater imbalances of power? Should a domestic abuse survivor be 'strongarmed' in negotiations with an abuser, even where a solicitor is on record? Should that abuser be allowed to use litigation to contest admitted facts with a risk that, in itself, turns the court into an instrument of abuse?

Re D is now 33 years old. Today, there is increasing recognition within the court system of domestic abuse, coercive control and other more subtle and pernicious forms of abuse. These problems of abusive dynamics apply in financial remedy negotiations and non-court dispute resolution (NCDR) as much as they would in child arrangements negotiations and NCDR.

Although there is a suggestion that *Unilever* exceptions might be excluded from children's cases, in *LS v PS* [2021] EWFC 108 Roberts J does not seem to proceed on the basis they are excluded from application in financial remedy (other than at a pFDR). This is implicit from various paragraphs (e.g. [23]–[25], [80], [83]) and Roberts J's citation of the well-known paragraph in *Prest* to emphasise that the 'Family Division exercises its jurisdiction in terms of established legal principles in accordance with established law across the jurisdictions'.

Other reasons for less stringency?

There is then a question as to whether there is enough room within existing authorities to allow for the impact of an abusive relationship to be considered when assessing how words/threats/lies or admissions may be interpreted.

Most of the cases which have developed the high bar of unambiguous impropriety are commercial disputes between corporations, banks or wealthy individuals who can afford to litigate. In the family sphere, many litigants are forced to court to resolve their basic financial needs having no commercial or legal experience and no money. In financial remedy disputes, often one party holds the bulk of the assets and income while the other party is struggling to

fund basic costs. A rule that shields aggressive negotiation tactics and dishonesty seems oddly out of sync with those realities.

In money cases, the primary guiding principle is 'fairness', not so in civil disputes. Fundamentally, doesn't achieving fairness as between two parties mean one not being able to gain an advantage in subsequent litigation on the basis of a lie?

There is the ongoing duty of full and frank disclosure, civil disputes tend to have one disclosure event, and if disclosure is mandated to be full and frank should this privilege protect admissions about the existence of or presence of assets that are then later denied on an open basis, for example?

It is also difficult to reconcile how the rule sits with the oft cited 'quasi-inquisitorial nature' of family proceedings, enunciated by Baroness Hale's observation, at [36] of her judgment in *Re A (A Child) (Family Proceedings: Disclosure of Information)* [2012] UKSC 60, [2013] 2 AC 66 that, 'The court's only concern in family proceedings is to get at the truth'. *Re E* (above) suggests an answer to that question but not one the author finds particularly convincing.

Has the law got to a point where the balance of the competing interests of justice and public policy interest is tipping off-kilter, having swung too far in favour of the latter? One might understand the hard-nosed commercial approach of the courts in the civil sphere, but does this sit as well when it comes to family matters?

Rather than redoubling ever more restrictive interpretations of it, is it fairer or more just to recognise that different Divisions have different guiding principles and priorities and so require a divergence in approach? *Re D* recognises the need to incorporate welfare paramountcy within the exceptions, so shouldn't there be some recognition of the particular aims and principles of financial remedy law?

Lord Byron wrote about a lie, ''Tis but the truth in masquerade' and to an extent there seems to be recognition of that within authorities and their defence of a litigant's right to 'masquerade' the truth. More recent High Court authorities seem to suggest a divergence of approach to the privilege as between children and money cases. If a money case on this point ever gets beyond High Court level, it will be interesting to see whether there will be a rebalancing in line with our unique guiding principles. But for now it appears that all lies are not created equal and many will continue to be protected by the privilege to varying degrees and in varying contexts.

My Time on the Family Procedure Rule Committee

Rhys Taylor

Vice Chair of the FRJ Editorial Board,
The 36 Group



I have served nearly 6 years on the Family Procedure Rule Committee (FPRC) as a barrister member. You get two terms of 3 years and then you make way for someone else. My time is almost up.

Prior to appointment I am not sure exactly what I expected. I had some vague notion of five or six people sitting round a table with biscuits, with a trusted-old-hand District Judge taking a bit of drafting off with them for the weekend. How wrong I was.

The FPRC is the family law equivalent of a military-industrial process. In advance of meetings a substantial set of pre-reading is sent out to all attendees. In the plenary meetings, there are usually about 20 people in the room in the Royal Courts of Justice, with an equal number or more attending remotely.

Members can choose whether to attend in person or remotely. I have done both. Remote attendance can be convenient, but you get a better feel for the room when in person. Most officials attend remotely and pop up to speak to particular agenda items. There are two or three officials in the room, managing the administrative burden of the session, taking minutes and sorting the tech.

The FPRC is the committee where it happens. Practitioner committees can call for change about this or that, but unless it involves changes to primary legislation, it is the FPRC that usually decides how it is going to be. It is a huge privilege to sit in the room with the good and the great and make a modest contribution to the direction of family law.

It can be slightly daunting to have The President, a Lord Justice, a brace of High Court Judges, two Circuit Judges and two District Judges weighing what you have to say. But the appointment to the FPRC is a public appointment. You are there on merit. You are there to speak truth to power. You sometimes simply have to take a deep breath and go for it. Sometimes, your arguments land and change the course of the discussion. Sometimes, you are politely moved on.

The FPRC evolves over time with different personalities coming and going, but the atmosphere is always collegiate and respectful.

It is now almost impossible to get a pet topic onto the agenda. The FPRC runs a tiered agenda. It is a publicly available document. Tier One issues are the priority and where the firefighting happens. Tier Two issues will be dealt with when the decks are clear on Tier One. Tier Three sometimes feels like an oubliette where good ideas go to die.

Those involved with financial remedies will be aware of the blight of delay caused by poor pension disclosure. With my Pension Advisory Group hat on, I pitched a reformed Form P to fully modernise pension disclosure. It is a matter of public record that it has been triaged to Tier Three. I doubt it will see the light of day.

There are currently about 40-odd potential agenda items which require attention, if time would allow.

One of the biggest lessons I have learnt in my time on the FPRC is that there are limits on what can get done with the resources that are allocated to the FPRC. This is just a hard fact of public resource allocation.

Mostyn J called for a modest rule amendment to FPR Part 3 in 2014 and it only eventually came to fruition in 2024. You need to play a long game.

Those who criticise the work of the FPRC would do well to attend a public meeting, held annually, to see for themselves the volume of work and the competing demands for agenda slots. The notion that you can sound off via email to the FPRC and expect immediate change is for the fairies.

But sometimes magic does happen. When interviewed for appointment I was asked what rule would I change? I said I would introduce costs for an unreasonable refusal to engage with NCDR. Led by Karen Barham, I had been involved in pitching ideas about Part 3 reform for some time prior to my appointment.

Part 3 came to the top Tier One at just the right time for me. It was an issue where I knew I could make a meaningful contribution. Much of the work of the FPRC is done in sub-committees. My first suggestion for the Early Resolution Working Group was to call for Karen Barham. It was a hugely enjoyable experience being tasked to update the rules and protocols in this regard.

Not that anyone will thank me, but I pitched the need to modernise PD 27A. I thought it could be done quickly and would make life less confusing for litigants in person. It took about 2 years and several consultations. The process of

reform can be painstaking. I almost wish I had kept my mouth shut.

The second big lesson for me is how impressive the officials are. The drafting acumen of the officials is a marvel to behold. It is a real pleasure to work with different kinds of lawyers and officials whose contribution to family law is immense but is often not seen or understood by those engaged only in litigation.

The role is unpaid (albeit travel expenses are provided for). I regard it as a privilege to have been part of the committee. I do not regret the first Monday of the month being booked out for the FPRC. Meetings are usually finished by 1 pm and so it is often possible to slip in a conference in the afternoon. But sometimes I do wonder about diversity. Are the practitioner roles now limited to those who can afford to take time out of the diary?

I would encourage others to apply to join the FPRC. We live in interesting times. I have learnt so much about the process of rule making, its complexity and limitations.

My experience has made me a more astute lawyer but also a less starry-eyed campaigner about what is capable of change.

Obiter Barder Palaver Makes Matters Harder: *Kanabar v Kanabar (Deceased)*

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The case of *Kanabar v Kanabar (Deceased) & Anor* [2026] EWCA Civ 582 involves, by its ratio, fascinating consideration of an important matter of law.

Considering first the facts, the husband (H) was Dipak Maganal Kanabar. His first wife, Sonal Kanabar (A), to whom he was married in 1999, was the respondent in financial remedy proceedings issued by H in September 2021. This was over 13 years after their separation on a date between 2006 and 2008, and over 10 years after their divorce in November 2010.

H and his second wife, Seema Kanabar (B) married in 2012 and had one daughter, a minor.

At the time of the issue of the financial remedy proceedings between H and A, there were three principal assets, being three properties, all in the same road. The first of these was the former matrimonial home of both H and A, and subsequently of H and B. It had equity of £33,880. The second property was purchased in 1998, so before the relevant marriage, in the joint names of H and his father. It had equity of £132,020. H asserted that there was a life interest settlement, made on 17 March 2005, such that the beneficial interest was held on trust for H's two brothers. The third property, purchased in 2021, after the end of the marriage, was in H's sole name, but, H contended, his father provided the funds and was the sole beneficial owner. This had equity of £110,000.

So far, so law school problem.

H's father was eventually invited to intervene, there having been various issues, including A not complying with directions. Directions required the father to be joined, and for *TL v ML* [2005] EWHC 2860 (Fam) pleadings if he wished to be joined. A preliminary issue hearing was listed.

The father did confirm he wanted to intervene, but did nothing else. His application to intervene was therefore dismissed, and instead of the preliminary issue hearing that had been pre-emptively listed, a final hearing was substituted, the court recording that the 'entire position that we find ourselves in today … has been brought about by [H's] father'. That order was not appealed.

The final hearing therefore took place in November 2023. The court directed that the third property be sold, with A having conduct of the sale and receiving the proceeds, with H paying all the outgoings until sale. H retained the remainder of the assets, including the family home. This judgment therefore gave A £110,000 (being the value of the third property). H retained his interest in the first property, which had an agreed equity of £33,000 and which has been in H's joint name with A; and the second property, with equity of £132,000, which, as above, H stated was not his. The parties otherwise retained their assets including pensions.

The judgment recorded that District Judge Birk had heard from H's father as a witness, that she gave little weight to his evidence, and that the question of his beneficial interest was not an issue before the court, as the correct procedure had not been followed.

In terms of other assets, the court found that H had pensions of £177,000 against A's of £163,000; that savings were modest; that H did not owe his father £98,000; and that H had a net income of £54,700 against A's of £13,700. A needed a one-bedroom property. H needed a two-bedroom property as he needed to accommodate B and their daughter. H's need was met in the former matrimonial home.

The court found that, in the absence of evidence to the contrary, the third property, being in the sole name of H, was his, so added £110,000 to the pot; and in respect of the second property, noted that there had been no intervention in respect of the third property, and, as it was in the legal names of H and his father, attributed to H a half share (£66,000).

As such, the matrimonial pot was £210,000, and A therefore received 55%, to reflect the imbalance in contributions towards the financial burden of their two children.

H appealed.

H contended that the district judge erred:

(1) in refusing to consider the arguments made with respect of the legal or beneficial interests of the second and third properties;
(2) in failing to properly consider whether either the second or the third properties were matrimonial property (even if their beneficial interest did lie with H) prior to division;
(3) in failing to give proper weight to the fact that these parties had separated some 17 years prior to the date of this final hearing, and either the quantification of

the matrimonial assets or their division should be reflected to address this issue;

(4) in determining the case solely on the basis of 'needs' for A, rather than giving any weight to the other section 25 criteria; and

(5) despite considering the case on the basis of needs, by ending the case in a position where A's needs were then still not met.

Permission to appeal was granted, with the appeal listed to take place in September 2024.

However, H then died, on 29 July 2024. He died intestate.

The appeal was adjourned and re-listed to take place on 20 March 2025. H's solicitors, presumably because they realised that they had no one to take instructions from in circumstances in which no grant of letters of administration had been made, asked to come off the record, and also informed the court that they understood that B was to apply for a grant of letters of administration, but had not done so. A's solicitors opposed a request for an adjournment. The court discharged the solicitors but did not adjourn, inviting B to attend, with or without legal representation. A hearing took place on 20 March 2025, where A was represented by counsel and B attended, unrepresented.

In a reserved judgment handed down on 17 June 2025, the judge considered the procedural issue of there being no personal representative of H's estate, B having stated that she did not wish to take on the role of personal representative, and nor did anyone else. The judge considered that 'the absence of a live and active appellant creates a sort of legal limbo'. He cited the decision of the Supreme Court in *Unger v Ul-Hasan (Deceased)* [2023] UKSC 22 as authority for the proposition that 'procedurally financial remedy appeal proceedings survive the death of a party … so long as a suitable representative party is appointed to act on behalf of the estate of any deceased party'.

Faced with this procedural conundrum, the judge considered a number of options – a further adjournment to see if someone took on the role of executor; dismissal of the appeal summarily; strike out under FPR 4.4(1); or strike out under FPR 30.10. Counsel for A had indicated that she was content for the appeal to be determined on its merits. B was of the same view, and that was the course that the judge ultimately took.

The judge focused on the first ground of appeal, noting that the court had a duty, at the computative stage, to determine what issues are in play, and just because a third party was uncooperative, this did not prevent a party from pursuing the point. He held that the appeal succeeded on ground 1 and also on ground 2. The order was set aside, and the court was not in a position to substitute an order, as the judge considered he could not resolve the beneficial ownership disputes. He recognised that, as a result of *Unger*, this might mean that A could no longer pursue her claim, and suggested she consider other statutory routes, which the Court of Appeal took to mean under the Inheritance (Provision for Family and Dependants) Act 1975 (the 1975 Act) or under the Trusts of Land and Appointment of Trustees Act 1996 (TLATA). They noted that A would not be treated as a spouse under the 1975 Act, given the date of decree absolute.

A appealed on 16 July 2025 and was granted permission. B was joined as a respondent, the court recording that B had now obtained a grant. However, she had in fact not done so but had made an application; there had been no grant. A had obtained a caveat, but it had expired.

The appellant was given permission to appeal on four grounds:

(1) The court erred in not striking out the appeal in circumstances where H had died and none of those who would benefit from the success of the appeal were willing to administer his estate.

(2) The court was wrong to allow the appeal on the basis of assertions of beneficial interest that were improperly pleaded and would inevitably have failed.

(3) The court was wrong to find that the district judge misapplied the law in respect of non-matrimonial property in circumstances where she rightly considered that she had to distribute that property to meet needs.

(4) In the alternative, having allowed the appeal, the court was wrong not to substitute a different order, thereby leaving the appellant with almost nothing from the marriage, and with no clear remedy under the 1975 Act. The court should have made what provision for A it could in the circumstances.

Cobb LJ, in granting appeal, considered that ground 1, which was the focus of the appeal, raised an important point of principle and/or practice, namely what a court should do when an appellant with permission to appeal dies intestate and no person is willing to take a grant or prosecute the appeal. He considered that the hearing of the appeal was arguably irregular, and troubling given the appeal was allowed leaving A with no relief. He directed that the Attorney General appoint an advocate to the court to address the following issues:

(1) What should an appellate court do when the proposed appellant (to whom permission to appeal has been granted) dies intestate, and no person is in a position (or apparently willing) to take out letters of administration and/or is authorised to prosecute the appeal before the appellate court?

(2) Should an appeal, in these circumstances, fail for want of an appellant?

(3) Should the court, in these circumstances, have granted A's application to strike out H's appeal:

  (a) pursuant to FPR 4.4(1)(b) as an abuse of process because it sought a remedy for a party who has died, and no one else sought to prosecute it on his behalf?;

  (b) pursuant to FPR 30.10, as there is a compelling reason to do so?

Baker LJ, giving the lead judgment, considered ground 4 first, noting that it raised difficult questions which required consideration of *Barder v Caluori* [1988] AC 20 together with *Unger*. He noted that s 1(1) Law Reform (Miscellaneous Provisions) Act 1934 (the 1934 Act) provided that on death, all causes of action shall survive, save defamation. However the 'orthodox' view is that financial remedies proceedings do not survive death (based upon *Sugden v Sugden* [1957] P 120, holding (in the context of claims for maintenance) that there was no right to the same), but that this may not be correct given the recogni-

tion that such claims are brought as of right and thus do amount to a cause of action.

The Court of Appeal went on to consider *Barder*. To recap, in that case, the wife killed the children, and herself, after a financial remedies order was made, after the time for an appeal, but before the order was implemented. The order was set aside on the basis of fundamental mistake.

The Court of Appeal noted that Lord Brandon had stated (in a passage not cited in *Unger*) that:

> 'The purpose of the statutory right of appeal is to enable decisions of a county court which are unjust to be set aside or varied by the Court of Appeal. The fulfilment of that purpose is not made any the less necessary or desirable by the death of one of the parties to the cause in which the decision was made. In a case other than a matrimonial cause I do not think that it would even be suggested that the statutory right of appeal would lapse because of the death of one of the parties to it. I cannot see why a matrimonial cause should be different in this respect. Where an appeal is brought or continued after the death of one of the parties to a cause, procedural steps have to be taken to substitute another party for the party who has died. Provision for the taking of such steps is made by rules of court.'

Thus, in *Barder* the House of Lords considered that both an appeal out of time and an enforcement of an order were permissible after the death of an appellant. The ancillary relief order was set aside. However, as the Court of Appeal noted, in similar circumstances, the appellate court has determined the matter: *Smith v Smith* [1992] Fam 69, *Reid v Reid* [2004] 1 FLR 736 and *WA v Executors of the Estate of HA & Ors* [2015] EWHC 2233 (Fam), [2016] 1 FLR 1360.

Baker LJ then considered *Unger*. There, the Supreme Court held that on their true construction, the statutory provisions in the Matrimonial Causes Act 1973 (MCA 1973) and the Matrimonial Property and Finance 1984 (MFPA 1984) (under which *Unger* was decided), considered in the context of the 1975 Act, created personal rights and obligations which can only be adjudicated between living parties and that the issue whether a claim for financial relief after divorce is a cause of action which survives against the estate of a deceased spouse under the 1934 Act did not arise for determination. Any change in the law was, the Supreme Court held, a matter for Parliament.

Having considered *Unger*, Baker LJ went on to consider *Harb v King Fahd Bin Abdul Aziz* [2005] EWCA Civ 1324, a case that also limited relief to joint lives.

At [55], Baker LJ identified the question, which had never previously been expressed, as to whether the court has the power to set aside or vary a financial remedies order on an appeal where leave to appeal has been granted but one of the parties dies before the appeal is heard. As he noted:

> 'On one reading of Lord Brandon's analysis in *Barder*, there is "no good reason" why the statutory right of appeal, and the power on appeal to re-determine the claim for financial remedies, should ever lapse on the intervening death of one of the parties, *a fortiori* where the appellant has been granted permission to appeal. On the other hand, the Supreme Court in *Unger* has ruled that the *Barder* principles, confined to cases where a *Barder* event has occurred, represent "a discrete but limited exception to the general rule that the 1973 Act creates personal rights and obligations which end with the death of a party to the marriage."'

The argument on behalf of A was that the court could substitute a different order, and the observations above were not limited to *Barder* appeals. It was conceded (the author considering wrongly) that the court had the power to substitute a different order, but was argued (correctly) that *Barder* was limited to specific circumstances.

The Court of Appeal ducked the issue.

Baker LJ rightly found that, without a party acting for H, in circumstances in which there was no FPR equivalent of CPR 19.12 (which allows for the appointment of a party to represent an estate – probably a limitation in the FPR), and where the appellant was non-existent, it was wrong to say that the appeal was properly constituted. Therefore, the court ought to have brought the proceedings to an end, by striking out the appeal.

The conclusion is probably right, given: (1) that no one was prepared to take up letters of administration; and (2) what appears to be a failure in the FPR to provide that in the circumstances a third party can be appointed (as the CPR provides for, and which deals with similar, though not these particular, circumstances). But it is dissatisfactory. That is clear from what Baker LJ said at [80]:

> 'there is clearly very considerable force in the views expressed by Mostyn J and Lord Leggatt in *Unger*. The forthcoming government consultation on matrimonial financial and cohabitation law may provide an opportunity for a review of the circumstances in which claims for financial remedies after relationship breakdown survive the death of one of the parties.'

However, with the greatest respect to that conclusion, and the understandable position taken at [79], that full argument is required regarding ground 4, it is disappointing that such an important issue has been ducked.

In particular, the question of how *Barder* fits with *Sugden* needs to be resolved, and the hope of parliamentary intervention does not advance the current position. The suggestion, derived from *Sugden*, and ducked by the Supreme Court in *Unger*, that financial remedies is not a cause of action and thus does not survive death, is no longer defensible. This is particularly so when the *Barder* jurisdiction is retained, without question. *Barder* is anomalous. In *Unger*, Lord Stephens considered that:

> 'the unanimous view of the House of Lords in *Barder* was that the ratio of the decision in *Sugden* turned on the true construction of section 26(1) of the Matrimonial Causes Act 1950 which created a personal obligation that lasted only so long as the husband lived.' (at [53])

> 'The Court of Appeal in *Sugden* also considered whether there was in existence during the lifetime of the husband an enforceable claim against him which survived against his estate under section 1(1) of the 1934 Act. It is unsurprising that the members of the court decided that there was not, given that they all agreed that section 26(1) created a personal right which ended with the death of the husband. Denning LJ stated, at page 135, that there was no "enforceable right at the time of [the husband's] death". Hodson LJ adhered to his judgment in *Dipple v Dipple* that there was no cause of action within section 1(1) of the 1934 Act except that he agreed that the word "discretionary"

> which he had used in coming to that conclusion in *Dipple* (see para 46 above) was a misleading adjective. Morris LJ stated, at page 138, that "[it] seems to me that there is no room for the application of the [1934 Act], in this case". As the right against the husband was personal and ended on death, there was no cause of action which subsisted against and survived against his estate.' (at [54])

Lord Stephens then held:

> 'If an applicant successfully satisfies the conditions for leave to appeal applying the principles in *Barder* and if the appeal is allowed, then the appeal court can, on a redetermination, consider what order ought to have been made, even though one of the spouses has died. I consider this to be a discrete but limited exception to the general rule that the 1973 Act creates personal rights and obligations which end with the death of a party to the marriage, and which cannot be pursued against the deceased's estate. I consider that this limited exception is not a sufficient basis on which to undertake a radical change to the construction of matrimonial legislation.' (at [100])

The Supreme Court, with some discernible reluctance, has made clear that the position at law (and it is for Parliament to change this position) is that when a party to financial remedy proceedings under the MPFA 1984, but in reality, also the MCA 1973 and the 1975 Act, dies during the currency of those proceedings, the proceedings cannot be continued. The only exception is a *Barder* appeal. The Court of Appeal agrees. This means that, if a party to financial remedy proceedings dies, there is no further scope to progress those proceedings. There is no order under the MCA 1973 that can be made. The proceedings simply come to an end. This is the case after an appeal (if it is the case that an appeal should be able to be brought – which is probably now not right).

There are a number of issues that arise which have not been dealt with:

- What if an order had been substituted? *Barder* would suggest that this is permissible. But why should that be the case if remitting is not? How do you bind the estate without a personal representative? Who makes the arguments?
- How do you deal with an appeal when a party is not actually party, absent the provision in CPR 19.12? Surely Cobb LJ was right to say that there was a procedural issue, and this appeal was in effect academic – could it bind the estate without a similar provision to CPR 19.13?
- Is this really a *Barder* appeal? Taking aside the fact that *Barder* sits uncomfortably against the law – particularly *Sugden* as (reluctantly) applied in *Unger*, what makes this a case that satisfies the necessary requirements?

In reality, this is a case which demonstrates the lacuna in family law based upon fiction – *Unger*'s attempt to reconcile *Sugden* with the modern law. *Sugden* arose in circumstances in which Denning LJ (as he then was) tried to reconcile 1950s law with a more modern approach. *Unger*, and *Kanabar*, are the courts crying out for a solution to the trap that they find themselves in – how to deal with a situation that the common law never envisaged. The answer is simple, but, as the Supreme Court identified, it requires parliamentary intervention.

Planning Ahead: Marriage Contracts in Monaco

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Introduction

The Principality of Monaco, by virtue of its favourable tax environment, its geographical appeal and the concentration of ultra-high-net-worth individuals within its borders, has long been a jurisdiction of particular significance in the realm of international family law. A substantial proportion of marriages celebrated or domiciled in Monaco involve spouses of different nationalities, with assets spread across multiple jurisdictions.

This article aims to provide English legal practitioners with a comprehensive overview of the Monegasque approach to marriage contracts and to draw clear distinctions between these instruments and the prenuptial agreements familiar to common law jurisdictions.

Defining the key concepts: marriage contract vs prenuptial agreement

At the outset, it is imperative to dispel a common misconception: a Monegasque marriage contract and an English prenuptial agreement are fundamentally different legal instruments. They arise from distinct legal traditions, serve different purposes and operate within different conceptual frameworks. They must not be conflated.

Marriage contract

Under Monegasque law, a marriage contract is a notarial deed which determines the matrimonial property regime applicable to the spouses. It is, in essence, an agreement governing the ownership, management and division of assets within the marriage. The marriage contract is concluded before the celebration of the marriage and must comply with the formal requirements of Monegasque notarial law.

The marriage contract does not, strictly speaking, regulate the financial consequences of divorce in the manner that an English prenuptial agreement does. Its primary function is to define the property regime the couple are signing up to: which assets are owned jointly, which are separate, how they are managed and how they are to be divided upon dissolution of the regime (whether by divorce, death or otherwise). As such, a marriage contract cannot be challenged by the court, which must enforce it without being able to amend it.

Prenuptial agreement

By contrast, our understanding is that a prenuptial agreement in the English and broader common law tradition is a private agreement between prospective spouses that seeks to regulate the financial consequences of the breakdown of their marriage. Our English colleagues have mentioned that since the landmark decision of the Supreme Court in *Radmacher v Granatino* [2010] UKSC 42, English courts have accorded significant weight to prenuptial agreements, provided that certain safeguards are met – principally, that both parties entered into the agreement freely, with a full appreciation of its implications, and that it would not be unfair to hold the parties to the agreement in the circumstances prevailing at the time of divorce.

It is thus our understanding that a prenuptial agreement in the common law sense typically addresses matters such as lump sum payments, spousal maintenance, the capping or potential waiver of financial claims, and the ring-fencing of non-marital assets. These are matters that go well beyond the scope of a matrimonial property regime.

The fundamental distinction

The distinction is therefore clear: a marriage contract governs the matrimonial property regime; the prenuptial agreement serves primarily to govern the financial outcome upon divorce. These are two separate legal categories. A marriage contract may have consequences upon divorce (insofar as the property regime determines what each spouse owns at the point of separation), but it does not purport to determine matters such as spousal maintenance, how capital needs will be met, or the exercise of judicial discretion in dividing assets. Consequently, Monegasque law does not require disclosure of assets, separate legal representation for each spouse, or a minimum period between signing and marriage in connection with the execution of a marriage contract. English practitioners must bear this distinction firmly in mind when advising clients with connections to Monaco.

Marriage contracts: scope, utility and strategic value

Under Monegasque law, the default matrimonial property regime – that is, the regime that applies in the absence of a marriage contract – is the regime of separation of property.

This means that, unless the spouses agree otherwise, each spouse retains ownership of the assets acquired in his or her own name before or after the marriage, and there is no community of property.

English practitioners may reasonably ask: if the default regime is *already* one of separation, what is the purpose of entering into a marriage contract?

The answer is multifaceted.

First, although the default regime is separation of property, a marriage contract allows the spouses to tailor the regime to their specific needs. They may, for example, wish to establish a limited community of property for certain categories of assets (such as the family home), while maintaining separation for all other assets. They may wish to include specific provisions regarding the management and administration of assets, the contribution of each spouse to household expenses, or the fate of particular assets upon dissolution. A marriage contract may also include donations between spouses of existing assets or future assets.

Nevertheless, while spouses are generally permitted to organise their matrimonial property regime by agreement, Art 1236 Civil Code restricts certain arrangements that would otherwise contravene public policy. In particular, that Article prohibits clauses that would derogate from the rights and duties arising from marriage, alter the legal order of succession, or include stipulations incompatible with the principles governing matrimonial regimes under Monegasque law. Accordingly, any provision that exceeds those bounds may be deemed null and void.

Second, and of critical importance in an international context, a marriage contract provides the vehicle through which the spouses may exercise their choice of applicable law for the matrimonial property regime and the divorce, as permitted by the Code of Private International Law (PIL Code). Without a marriage contract, the applicable laws are determined by the default rules of the PIL Code, which may not produce the result that the spouses desire.

Thus, Art 36 PIL Code provides that the matrimonial property regime is governed by the law chosen by the spouses. The available options are: (1) the law of the state in which the spouses establish their domicile after the celebration of the marriage; (2) the law of a state of which either spouse holds nationality at the time of the choice of law; (3) the law of the state in which either spouse is domiciled at the time of that choice; or (4) the law of the state in which the marriage is celebrated. This is a relatively broad palette, reflecting the international character of marriages in Monaco.

Where no choice is made, Art 38 provides default connecting factors: the law of the state where the spouses establish their first common domicile after marriage; failing that, the law of their common nationality; and, as a last resort, Monegasque law.

Article 41 PIL Code addresses the law applicable to divorces. The default position is that Monegasque law applies, unless both spouses request the application of the law of their common nationality. However – and this is of particular importance – Art 41 further provides that the spouses may agree, even before the celebration of the marriage, to apply the law of a state of which either of them has nationality, or the law of the state in which they share a common domicile.

This means that the marriage contract can serve as the instrument through which the spouses designate not only the law applicable to their matrimonial property regime (under Art 36), but also the law applicable to their divorce (under Art 41). The marriage contract thus becomes a dual-purpose instrument of considerable strategic value.

Third – and this is a development of particular practical significance – we have developed a practice of including declarations made by the spouses within a marriage contract that go beyond the strict scope of the matrimonial property regime.

As the Monegasque marriage contract is, by its nature, an instrument governing the matrimonial property regime, it does not, in itself, allow spouses to regulate in advance the broader financial consequences of a potential divorce in the manner of a common law prenuptial agreement.

To address this structural limitation, we have developed a practice of including within the marriage contract 'declarations' which sit alongside the contractual clauses governing the regime but do not share their binding legal force under Monegasque law. These declarations typically refer to the foreign law relevant to our client's situation and incorporate provisions addressing the financial consequences of the divorce that would be recognised as valid and enforceable in that jurisdiction. Their purpose is to create a formal, notarised record of the spouses' agreement on matters that fall outside the scope of the Monegasque marriage contract proper, but that are of critical importance to internationally exposed clients.

It would be wrong to suggest that those 'declarations' provide an absolute guarantee of protection. The uncertainty is not, however, general. Where the declarations merely seek to ensure the validity of the marriage contract in a foreign jurisdiction, little difficulty arises. Where they concern spousal maintenance (*pension alimentaire*), there is no doubt that the Monegasque courts will consider them contrary to public policy and refuse to apply them. However, where the 'declarations' concern the *prestation compensatoire* – the compensatory allowance that may be awarded to a spouse upon divorce – the position becomes considerably more complex and uncertain.

The enforceability of the declarations by the court will depend on the characterisation of the *prestation compensatoire* under Monegasque law. The relevant distinction is whether the payment is intended primarily to meet the financial needs of the former spouse or to compensate for the economic consequences of the breakdown of the marriage. If it is regarded as serving a maintenance-related purpose, it would constitute a matter of public policy, and any declaration purporting to waive or limit it would be unenforceable as contravening a mandatory rule of Monegasque law. If, on the other hand, the *prestation compensatoire* is regarded as being intended primarily to compensate for the economic consequences of the divorce, rather than to meet the former spouse's financial needs, it would not fall within the scope of public policy and the declarations should, in principle, be enforceable.

It is our considered view that the *prestation compensatoire* has a predominantly compensatory character, as it is intended to redress the economic imbalance resulting from the dissolution of the marriage rather than to meet the former spouse's continuing financial needs. On this basis, we consider that a declaration addressing the *prestation*

compensatoire should not be regarded as contrary to the public policy of Monaco.

We stress, though, that there is, at present, no Monegasque case law directly on this point. The question remains open. What we can say with confidence is that, at a minimum, such declarations demonstrate the spouses' common intention and may serve as a guide to a judge in exercising his or her discretion. They are not without value – but their enforceability cannot, as matters stand, be guaranteed.

In practice, we frequently complement the Monegasque marriage contract with a shadow agreement – a separate contract governed by the relevant foreign law, which restates the key financial provisions of the marriage contract in a form and with the formalities required by that jurisdiction. This dual approach maximises the likelihood that the spouses' intentions will be given effect, whether proceedings are brought in Monaco or elsewhere.

A marriage contract cannot, however, address all the uncertainties that may arise in an international divorce. In particular, the lack of enforceability of jurisdiction clauses in divorce matters means that the parties may remain exposed to forum shopping and *lis pendens* issues.

Jurisdiction uncertainty in divorce matters

A further difficulty arises from the uncertainty as to which court will have jurisdiction to hear divorce proceedings.

Invalidity of jurisdiction clauses in divorce matters

Forum shopping – the practice whereby a spouse initiates divorce proceedings in the jurisdiction perceived as most favourable to his or her interests – is a matter of acute concern in international family law, and particularly so in Monaco, where the concentration of wealth and the international character of the population make it an especially fertile ground for jurisdictional disputes.

Under Monegasque law, jurisdiction clauses (*clauses attributives de compétence*) are not valid in divorce matters. Article 8 PIL Code permits jurisdiction clauses only in matters where the parties may freely dispose of their rights under Monegasque law. Divorce is not such a matter.

The consequence is that spouses cannot, by agreement, confer exclusive jurisdiction on any particular court for the purpose of divorce proceedings. This leaves open the possibility of a race to the courthouse – a scenario in which each spouse seeks to file first in the jurisdiction most favourable to his or her financial interests. In practice, this race is a recurrent feature of high-value international divorces involving Monaco.

Lis pendens: Art 12 PIL Code

The PIL Code addresses the problem of parallel proceedings through its rules on *lis pendens*. Article 12 provides that where an action having the same object is pending between the same parties before a foreign court, the Monegasque court seized second may stay proceedings until the foreign decision is rendered. Moreover, the Monegasque court shall decline jurisdiction if the foreign decision is capable of being recognised in Monaco under the PIL Code.

This mechanism offers a degree of protection against the costs and uncertainties of parallel proceedings, but it is not a complete solution. In practice, the question of which court was seized first, and whether the proceedings are truly identical in object, can itself become a contested issue.

For practitioners, the practical lesson is clear: where a client is at risk of divorce proceedings in multiple jurisdictions, the timing of the filing is of critical strategic importance. The absence of valid jurisdiction clauses in Monegasque divorce law means that pre-emptive filing may be the only effective means of securing the desired forum.

Considering all of the foregoing and depending on the particulars of their situation, the parties may also consider a marriage contract governed directly by a foreign law capable of addressing the financial consequences of the divorce.

Marriage contracts governed by foreign law

Spouses may also choose to enter into a marriage contract governed by foreign law – that is, to exercise the choice of law permitted by Art 36 PIL Code in favour of a foreign legal system which permits the marriage contract to include provisions addressing the financial consequences of divorce (as is the case under many continental European legal systems).

Such an agreement may be entered into in two different ways. The spouses may either execute a marriage contract before a Monegasque notary, while expressly choosing a foreign law to govern the agreement, or they may enter directly into prenuptial agreements in the form prescribed by the foreign law concerned. Provided that the relevant requirements of the applicable foreign law are satisfied, the use of such a foreign law agreement is permitted by the PIL Code.

The public policy exception

Where the matrimonial agreement is governed by foreign law, the relevant limitation is not the ordinary domestic public policy of Monaco but the more narrowly construed concept of Monegasque international public policy. In matters involving a situation validly created abroad, this reflects the attenuated effect of public policy: rights validly acquired abroad should, in principle, be recognised in Monaco unless their recognition would manifestly offend the fundamental principles of the Monegasque legal order.

This distinction has practical consequences. Indeed, if spousal maintenance (*pension alimentaire*) should fall within Monegasque international public policy, as should the protection of the family home – which is subject to mandatory rules under Art 35 PIL Code where the home is situated in Monaco – it is our opinion that any amount negotiated by the spouses in a foreign prenuptial agreement to deal with the financial consequences of their divorce should not be considered contrary to Monegasque international public policy.

Prenuptial agreements before Monegasque courts: the judgment of 27 March 2014

The question of how Monegasque courts treat foreign prenuptial agreements was addressed in the only judgment rendered on the subject by the Tribunal de première instance on 27 March 2014 (*SC-VA c/ CO*). In that case, the court was seized of divorce proceedings between German nationals domiciled in Monaco who had entered into a German marriage contract (*Ehevertrag*) in Munich. The

court applied German law to the divorce and assessed the validity and enforceability of the German marriage contract under the applicable German law, including the provisions of the German Civil Code (*Bürgerliches Gesetzbuch*) on maintenance (*Unterhaltsrecht*). The court upheld the application of the foreign marriage contract, examined and rejected the wife's claim of invalidity (based on her pregnancy at the time of signing) and gave effect to the contractual provisions.

Although this judgment concerned a German rather than an English marriage contract and did not address the question of the *prestation compensatoire*, it is of considerable significance. It demonstrates that the Monegasque courts are willing to apply foreign marriage contracts in divorce proceedings, provided that the contract is valid under the applicable foreign law and that its provisions are not manifestly contrary to Monegasque international public policy. By extension, there is a reasonable basis for concluding that an English law prenuptial agreement, if properly executed and valid under English law, should also be applied by a Monegasque court, subject to the same international public policy reservation.

The traditional Monegasque marriage contract, as it currently exists, is no longer suited to today's circumstances. Monaco is responding by pursuing concrete reform to better meet the demands and expectations of spouses, particularly in international high-net-worth contexts.

Looking ahead: proposed legislative reform

The legislative landscape in Monaco is evolving. Where Monegasque law previously offered only marriage contracts, a new bill proposes to introduce the *accord nuptial*, echoing the Anglo-Saxon prenuptial agreement. This agreement would allow spouses to organise the financial and patrimonial consequences of a dissolution, could be concluded before or during the marriage, or in the course of dissolution proceedings, and could take the form of a simple private document.

As in *Radmacher v Granatino*, validity would require free consent with full financial disclosure, independent counsel and adequate negotiation time; compliance with public order and children's best interests is also mandatory. The court could ratify the agreement to render it enforceable but would not be able to modify its terms. This convergence of civil law rigour and common law flexibility would be particularly valuable for Monaco's internationally mobile families.

Whether or not the *proposition de loi* is enacted in its current form, the direction of travel is clear: Monaco is moving towards a legal framework that bridges the continental tradition of the marriage contract with the pragmatism of the English prenup, thereby simplifying the ability of couples residing in Monaco to put in place the equivalent of a prenup within the Monegasque legal order.

A Tribute to His Honour Clive Million

Born on 7 September 1946.
Died on 13 July 2026.

His Honour Philip Waller CBE

Coram Chambers



Clive Ernest Million, who has died at the age of 79, was a conscientious and highly regarded judge with a keen analytical mind and a strong sense of fairness, who made significant contributions in the fields of family and criminal justice throughout a judicial career spanning over 20 years.

His appointment in 1993 as a District Judge of the Principal Registry of the Family Division (PRFD) came at a time of change for family justice, following the introduction of the Children Act 1989 and amidst moves to regularise the process for financial remedy (then ancillary relief) cases and Clive made a significant contribution to the development of new practices.

Clive was born in London in 1946 and educated at St Dunstan's College, Catford and Birmingham College of Art and Design, from where he graduated with a degree in Industrial Design. His artistic interest was inspired by his parents and he showed an early aptitude for the use of computers in design (an ability which later served him well in his judicial role).

Following a change of direction he was called to the Bar in 1975, joining chambers in the Temple practising in family and general common law work. He developed a particular expertise in family law and his appointment to the PRFD was a natural progression.

Clive rapidly became a popular and respected member of the judicial team. His sharp mind took him quickly to the heart of any problem. His courtroom manner was calm and courteous, but he deplored 'fudge' and financial profligacy and did not mince his words. In *Kavanagh v Kavanagh* (unreported, Court of Appeal (Civil Division), 2012), where the parties had spent almost all their resources on litigation, he was reported as commenting that 'The ship of marriage may founder, but this couple have driven theirs full-tilt onto the rocks'.

With the introduction in 1996 of the Ancillary Relief Pilot Scheme and the new FDR appointment, the judges had to adapt to a new way of working and Clive played an important part in the implementation of the changes at the PRFD. He provided great support to the District Judges and Deputy District Judges of the PRFD with training materials and guidance on practice. With his expertise in IT he developed standard 'order menus' to ease the process of drafting orders. He later developed his guidance notes and forms into *Family Law: Tips and Traps*, published by Jordans in 2009, making the sometimes arcane practices of the PRFD available – and understandable – to a much wider audience.

Clive's judgments were sound and well-reasoned. He was rarely appealed and his decisions and reasoning in several significant financial cases received approval in the higher courts.

In *H-J v H-J (Financial Provision: Equality)* [2002] 1 FLR 415, Coleridge J cited with approval this passage from Clive's judgment on contributions, describing it as 'very wise words from a wise and experienced district judge':

> 'For my part, I would find it repugnant as a judicial exercise to have, in effect, to draw up a merit table in which fine gradations of contribution give rise to a marginally increased or decreased share in the financial spoils of marriage. By whose standards should I measure such distinctions? We live in a multi-cultural society in which there is a variety of aspirations, expectations and traditions. As a judge, I have to maintain some consistency across all such cases. This is only possible by approaching these questions in a broad way.'

The same passage was later expressly approved by Thorpe LJ in *Lambert v Lambert* [2002] EWCA Civ 1685, [2003] 1 FLR 139.

Similarly, Clive's reasoning on housing provision in *Re C (Financial Provision)* [2007] 2 FLR 13 (a Children Act Schedule 1 case) has been cited with approval in later authorities.

And in 2017, his decision (made nearly 10 years earlier) in a complex Inheritance (Provision for Family and Dependants) Act 1975 case, having been the subject of a series of appeals and partly overruled by the Court of Appeal, was vindicated when his order was restored in the Supreme Court: *Ilott v The Blue Cross & Ors* [2017] UKSC 17.

The way in which Clive dealt with these difficult cases speaks volumes about his wisdom, judgment and financial acuity and the principled approach he took to his decisions.

Clive was made an Assistant Recorder in 1995 and a Recorder in 1999 and was appointed to the Circuit Bench in 2009. His commitment to the PRFD was unwavering and he remained a strong advocate for the expertise of the judges and the court's role as a centre of excellence.

As a Circuit Judge, Clive sat first at Willesden County Court, in civil and family but moved in 2014 to the nascent East London Family Court where HHJ Carol Atkinson

welcomed his experience and enthusiasm. She recalls in the early days how he insisted that all the judges gathered each day for lunch, no doubt recalling the joyous lunches at the PRFD; the idea caught on and Clive no doubt played a significant part in the happy and collegiate atmosphere at that court.

Clive retired in 2016, at the age of 70. In 2012 he had married Linda, whom he had met on a tour of Sri Lanka, and he wanted to enjoy family life with her. He was previously married to Pauline, with whom he had three sons, one of whom, Tom, works at Central Family Court, and before that at the PRFD. Pauline had suffered from a long illness during which Clive had cared for her for many years. In 2015, Clive and Linda moved to Lancaster where he enjoyed being a step-father to Linda's three children and then a step-grandfather. Clive and Linda built a beautiful house with a delightful garden on the outskirts of Lancaster.

Meanwhile, he continued up to the age of 75 as a member of the Parole Board and each year came to London for the reunion dinner of the PRFD District Judges.

Clive was a great judge and colleague and a good friend to many. He will be much missed.



With grateful thanks to HHJ Lynn Roberts for her contribution to these memories.

The Calculation Conundrum: Top-Up Maintenance After the *Morgan* Appeals

Christie O'Connell

1 Hare Court



A maximum Child Maintenance Service (CMS) maintenance calculation is a condition precedent of a top-up order. But could a subsequent decision by the CMS bring the court's order to an end? The question has exposed a tension between the court's limited jurisdiction to make top-up orders and the continuing operation of the statutory child support scheme.

The difficulty arises from the interaction between two provisions of the Child Support Act 1991 (CSA 1991). Section 8(6) permits the court to make a top-up maintenance order where a CMS calculation is already in force, the paying parent's gross weekly income exceeds £3,000, and the court considers it appropriate to award additional maintenance. Section 10, read with Child Support (Maintenance Arrangements and Jurisdiction) Regulations 1992 (SI 1992/2645) (the 1992 Regulations), reg 3, provides for certain court maintenance orders, including top-up orders, to cease to have effect upon the making of a subsequent maintenance calculation. The question was therefore whether a later CMS revision or supersession constituted a fresh maintenance calculation, with the consequence that an existing top-up order would cease to have effect.

James Pirrie put the problem before practitioners in his August 2025 article for the FRJ Blog.[1] After examining some imaginative ways of keeping top-up orders intact, he ended with an invitation: 'I very much hope that someone will come up with alternative solutions. I am sure our editors will rush to print with them'. It seems that King LJ has now come to his assistance.

In *Antoniou v Morgan*; *Morrell v Morgan* [2026] EWCA Civ 1363, handed down on 21 October 2026, the Court of Appeal held that an initial CMS maintenance calculation continues in force notwithstanding later reviews, revisions and supersessions. Those later decisions do not, simply by changing the sum payable, engage s 10 CSA 1991. The judgment resolves the central question of statutory interpretation, although its implications for the wider operation of the child support scheme warrant further consideration.

The statutory difficulty

Section 8(3) CSA 1991 prevents a court from exercising powers it would otherwise have to 'make, vary or revive' a maintenance order where the Secretary of State would have jurisdiction to make a maintenance calculation. Section 8(4) expressly reserves the power to revoke. The top-up exception in s 8(6) applies where a calculation is in force, the payer's gross weekly income exceeds the statutory ceiling (currently £3,000 per week), and the court considers additional payments appropriate. It is the CMS, not the court, which must determine whether the income threshold has been crossed (*Dickson v Rennie* [2014] EWHC 4306 (Fam)).

Section 10(1), read with the 1992 Regulations, reg 3(2), provides that a prescribed court order ceases to have effect, so far as it relates to periodical payments, from the effective date of a maintenance calculation. Regulation 3(3) protects school fees and disability expenses orders under s 8(7) and (8) CSA 1991. Top-up orders are not expressly included in that protection.

Therein lies the apparent trap. The receiving parent first needs a maximum CMS calculation to obtain a top-up order, but the CMS continues to administer the statutory liability thereafter. If a subsequent revision or supersession amounted to the making of a fresh maintenance calculation, s 10 could bring the top-up order to an end, even where the payer's income remained above the statutory ceiling.

The possibility had long been recognised. In *Re TW & TM (Minors)* [2015] EWHC 3054 (Fam) at [7]–[8], Mostyn J observed that a court maintenance order made by consent could be brought to an end by a subsequent CMS calculation, leaving the receiving parent to seek a fresh top-up order if the statutory conditions were met. Those observations were *obiter*. The appeal concerned the variation of a consent order and the effect of a subsequent CMS decision upon an existing top-up order was not in issue. Professor Nick Wikeley took a similar view of top-up orders in his book, *Child Support: Law and Policy*: 'rather unhelpfully, however, any subsequent Agency calculation after the top-

up order is made has the effect of discharging the latter order'.[2]

The issue arose again in *H v I (Child Maintenance)* [2024] EWHC 3512 (Fam). Williams J questioned at [50] whether an annual review producing a different maintenance figure might constitute a fresh calculation. The reviews before him had left the amount payable unchanged, and his conclusion at [58] that they did not constitute fresh calculations was expressly tentative. The effect of a supersession decision remained unresolved.

As James Pirrie explored in his article, practitioners had considered various means of protecting top-up orders from subsequent CMS decisions. These included undertakings, closing the CMS case once a maximum calculation had been obtained, and the so-called 'Christmas order', comprising successive orders of less than 12 months' duration intended to prevent a fresh CMS application. None resolved the underlying question of statutory interpretation.

The question for the Court of Appeal was whether a decision made under the statutory machinery for revision or supersession constituted a fresh maintenance calculation for the purposes of s 10. As King LJ noted at [93], that question had not previously received full argument before the courts.

The linked appeals

The appeals arose from separate top-up orders concerning two of Mr Morgan's children from different relationships. Following his retirement from professional football, the CMS initially reduced his assessed liability to nil. That decision was challenged and the First-tier Tribunal ultimately found that his assessable income remained above the statutory maximum throughout the material period. The mothers respectively sought to enforce arrears. The lower courts reached opposite decisions as to whether their respective top-up orders had survived the intervening CMS decisions. Both appeals were transferred to the Court of Appeal given the dearth of authority on the point.

A calculation, a decision, or both?

Section 54(1) CSA 1991 defines a maintenance calculation as a 'calculation of maintenance made under this Act' with express provision for default and interim decisions. It does not expressly confine that definition to an initial decision under s 11. The father argued that it was broad enough to encompass subsequent decisions recalculating liability. The mothers contended that there was only one continuing maintenance calculation, with later decisions serving to revise or supersede it.

Sections 16 and 17 provide the machinery for those later decisions. A revision may take effect retrospectively, whereas a supersession replaces an earlier decision, ordinarily following a change in circumstances. An annual review may result in a supersession, but the two are not synonymous. Child Support Maintenance Calculation Regulations 2012 (SI 2012/2677) (the 2012 Regulations), reg 3 defines a 'calculation decision' as including decisions under ss 11, 16 and 17. Whether those subsequent decisions also amounted to fresh 'maintenance calculations' within the meaning of the Act was the point in dispute.

King LJ found support for the distinction between a maintenance calculation and subsequent decisions affecting the amount payable in the structure of the CSA 1991. Sections 16 and 17 provide for the revision and supersession of decisions, rather than expressly providing for fresh maintenance calculations. The 2012 Regulations, reg 3 uses the term 'calculation decision' to encompass decisions under ss 11, 16 and 17, while regs 73 and 74 refer to the effect of a variation on an existing maintenance calculation, rather than the making of a fresh one. King LJ also drew support from s 20 CSA 1991, which distinguishes between a decision not to make a maintenance calculation under s 11 and a decision not to supersede an existing decision under s 17: [55] and [62]–[64].

Of particular significance was Sch 1, para 16 CSA 1991, which specifies the circumstances in which a maintenance calculation ceases to have effect. These include the death of a parent or there no longer being a qualifying child, but not revision or supersession. Nor did King LJ consider that para 15 of the same Schedule, which permits separate calculations for different periods, supported the father's interpretation: [60]–[67].

At [99], King LJ concluded that the statutory scheme contemplated a single continuing maintenance calculation.

There remains, however, a question as to the breadth of the statutory definition. Section 54(1) defines a 'maintenance calculation' as a 'calculation of maintenance made under this Act', expressly including default and interim maintenance decisions. It contains no qualification confining the term to an initial decision under s 11. A supersession which determines a different maintenance liability would, on its face, appear capable of satisfying that definition. King LJ's construction depends upon the distinction drawn elsewhere in the Act between the original calculation and subsequent decisions affecting it. That distinction is supported by the wider statutory scheme but is not readily apparent from the definition Parliament enacted.

King LJ went on at [100]–[106] to consider the wider purpose of the legislation and the practical consequences of the competing interpretations. On the father's construction, subsequent CMS decisions could repeatedly bring top-up orders to an end, requiring receiving parents to return to court notwithstanding that the payer's income remained above the statutory ceiling. The court considered that consequence inconsistent with the purpose of a scheme intended to reduce litigation over child maintenance.

Was the annual review really the problem?

Much of the concern before the court centred on the prospect of top-up orders coming to an end at the next annual CMS review. The father's argument, however, distinguished the review itself from any supersession which followed it. The 2012 Regulations, reg 19 requires the Secretary of State to fix an annual review date. Regulation 20(2) provides that, where updated income information shows a change, the Secretary of State *may* make a supersession decision. An annual review does not, simply by occurring, necessarily produce a supersession. It was suggested that the Secretary of State could decline to supersede where the payer remained comfortably above the maximum income threshold. In that situation, replacing one maximum assessment with another might achieve little, while potentially affecting an existing top-up order. A

genuine reduction below the threshold would present a different case: the CMS would then have reason to reassess the payer's statutory liability.

King LJ was not persuaded. At [75]–[80] and [94]–[97], she considered the Secretary of State's discretion to decline supersession to be extremely limited in a scheme governed principally by a statutory formula. At [84], she illustrated the difficulty by reference to one of Mr Morgan's older children ceasing to qualify as a 'relevant other child'. The resulting supersession increased statutory maintenance by approximately £6 per week but, on the father's interpretation, would also have brought a recently made top-up order worth more than £25,000 annually to an end. Whether the £6 affected the overall maintenance payable would depend on the drafting of the top-up order. A refusal to supersede might equally have avoided the more substantial consequence, although King LJ regarded the scope for such discretion as too limited to provide a satisfactory safeguard.

The barrier between the CMS and the court

In *Dickson v Rennie* at [22], Holman J described the CSA 1991 as erecting a 'barrier, or shutter' between the functions of the CMS and those of the court. Section 8(6) provides a limited exception, permitting the court to award additional maintenance where the payer's income exceeds the statutory maximum.

At [98], King LJ observed that a payer whose circumstances no longer justified a top-up order could return to court for variation or revocation. That is an important qualification to the continuing effect of such orders, although it raises a further question about the court's jurisdiction.

Take a payer whose income falls below £156,000 following a change of employment. One course would be to apply directly to the court for relief from the existing top-up order. Another would be to obtain a revised CMS assessment reflecting the reduced income, and then return to court. On either approach, the top-up order remains in force unless and until the court intervenes. The question is what the court can then do.

Section 8(3) CSA 1991 prohibits the court from making, varying or reviving maintenance orders where the Secretary of State has jurisdiction, subject to the statutory exceptions. Section 8(4) expressly preserves the power to revoke, while the exception under s 8(6) depends upon the payer satisfying the statutory income threshold. Where the CMS has made a new assessment based upon income below that threshold, the power to revoke is clear. But does the court retain jurisdiction to vary the existing order?

King LJ touched upon the point at [87], referring to the court's conventional powers to suspend, vary or revive an order, subject to the requirements of s 8(6) continuing to be met. At [98], she contemplated variation or revocation where those requirements were no longer satisfied. The precise distinction between those powers was not a matter the court was required to determine.

It is worth considering the position where a payer's reduction in income is temporary. Revocation may bring an end to an order which would otherwise have remained appropriate once earnings recovered, requiring the receiving parent to seek a fresh top-up order. Suspension or downward variation might offer a more proportionate course. Yet if the statutory threshold is no longer met, is that course available? The distinction between varying an order and revoking it may be a rather important one for a payer whose income moves above and below the threshold.

Beyond the appeals

The central question is settled. A revision or supersession within an existing CMS case will not bring a top-up order to an end. A fresh maintenance calculation may be another matter, particularly where an earlier CMS case has been closed.

As to practical consequences, the judgment may affect historic claims for maintenance previously thought to have ceased, subject to the terms of the orders and any subsequent proceedings. Where a payer's income falls below the statutory threshold, the availability and extent of the court's powers of variation may also require further consideration.

James Pirrie's invitation has received an answer. The Court of Appeal has resolved the uncertainty surrounding subsequent CMS decisions without the need for elaborate drafting devices.

Notes

1 'Child Support, Sharing Care and the Problems in Top Up Orders (Out into the Open at Last)', 28 August 2025, https://financialremediesjournal.com/child-support-sharing-care-and-the-problems-in-top-up-orders-out-into-the-open-at-last/

2 N Wikeley, *Child Support: Law and Policy* (Hart Publishing, 2006), p 195.

Money Corner: Share Options – What Are They and How Do You Value Them?

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Why share options matter in financial remedy proceedings

Employee share options are increasingly encountered in financial remedy proceedings, particularly where one party works in a senior managerial, professional or executive role. While they may receive less immediate attention than a family home, pension or investment portfolio, share options can represent a substantial component of an individual's wealth.

The first challenge for practitioners is that the value of employee share options is rarely obvious. Unlike cash balances or quoted shareholdings, options derive their value from the possibility of future gains rather than ownership of an asset today. An option that appears worthless on an employee's most recent Equity Compensation Statement because its exercise price exceeds the current share price may nevertheless have significant economic value, as there remains time for the share price to appreciate before expiry.

The position can be further complicated by vesting conditions, performance targets, restrictions on transferability and uncertainty as to whether the employee will ultimately be able to realise the benefit of the award. As a result, the face value of an option grant, or even its current intrinsic value, may bear little resemblance to its true economic worth. An example of the challenges of valuing options can be seen in *GW v RW* [2003] EWHC 611 (Fam) where the accountants instructed by the wife made what Mostyn J called an 'unfortunate' and 'elementary' error in their calculation of the husband's options:

> 'They calculated them without taking into the account the option price which H would have to pay to acquire the assets. They attributed over £6m to these options when the correct figure, net of tax, would have been only about £640,000.'

Furthermore, the treatment of employee share options in financial remedy proceedings can raise difficult questions that extend beyond valuation. The court is often faced with arguments about the extent to which share options granted during the marriage but vesting (sometimes long) after separation should be treated to reflect post-separation endeavour.

Going further still, in *C v C (Post-Separation Accrual)* [2018] EWHC 3186 (Fam), Roberts J was persuaded that part of the value of restricted stock units (an employee incentive similar to options) both awarded *and* vested during the marriage could properly be characterised as non-matrimonial, because the awards were subject to a 'performance-based cancellation' provision and thus required ongoing endeavour to realise their full value. However, rather than characterising part of the asset as non-matrimonial, the more usual judicial response to this issue is to reflect post-separation endeavour through a reverse contingent lump-sum mechanism.

The authorities demonstrate that the court's focus is not merely on the existence of the award but on the reason it was granted and the extent to which its eventual value derives from efforts made during, as opposed to after, the relationship. In *Lawrence v Gallagher* [2012] EWCA Civ 394, the Court of Appeal was cautious about treating unvested and contingent elements of deferred remuneration as present capital available for immediate sharing, recognising that no clear entitlement had yet crystallised. *Lawrence v Gallagher* treated said remuneration as future income rather than capital. Interestingly, this approach has not been followed in the reported authorities at High Court level, which have invariably treated granted (but unvested) tranches of deferred compensation as capital assets, despite their deferred receipt and contingency (which may warrant departure from equal sharing and/or *Wells* sharing).

For family practitioners, understanding the principles behind option valuation and their treatment by the courts is important. A proper assessment can materially affect both the identification of matrimonial assets and the fairness of any eventual settlement. Before considering how such valuations are performed, it is useful to understand what share options are and why they exist in the first place.

The agency problem

The story of share options begins with the agency problem. In a company, particularly a large company, the people who own the company, i.e. the shareholders, are not usually the people running it.

Shareholders desire returns on their investment via an increase in the company's value and long-term profits. However, the managers they have hired to achieve those goals may sometimes make decisions that benefit themselves rather than the company's owners.

For example, shareholders might want management to focus on profitable projects, while a CEO or Managing Director might approve an expensive new headquarters or an uncommercial expansion because it increases their status and influence. In this case the shareholders bear the cost, while the CEO enjoys the prestige.

There are various methods of attempting to reconcile this apparent conflict of interests. One solution to this problem that companies use is to grant options to their employees to buy the company's shares in the future in order to align the incentives of their employees with those of shareholders. These are known as employee stock options, or 'ESOs'.

Naturally, shareholders benefit when the share price rises. Granting options to employees means that they too benefit from share price rises and are therefore motivated to work hard and to make smart decisions to achieve a sustainable appreciation in share price.

In addition to aligning employees' motivations with that of their shareholders, stock options enable companies to compensate employees without paying out cash, which is good news for companies' cashflows.

From a financial remedy perspective, this means that a significant part of an employee's remuneration package may not appear in the form of salary, bonuses, pension contributions or other employment benefits, even though it may represent substantial value. Furthermore, ESOs can be awarded so that they cannot be exercised for several years, helping to encourage longer-term decision-making. This built-in delay is known as the 'vesting period'. Only once an ESO has vested can any benefit be gained by the holder.

Questions surrounding vesting often arise in divorce proceedings because the court may need to consider whether unvested options represent a resource that should be taken into account when assessing the parties' financial positions.

What is an option?

An option contract gives the holder the right, but not the obligation, to buy or sell an underlying asset. In my explanation below, the asset will be a shareholding (also known as a 'stockholding' in the US), but it could equally apply to assets as varied as oil, Vietnamese dong or tulips.

The contract will specify:

- whether the holder has the right to buy, or sell, the underlying asset;
- the date by which the option may be exercised; and
- the price at which the option may be exercised, which is known as the 'Exercise Price' or 'strike Price'.

A *call* option gives the holder the right to buy an asset, while a *put* option gives the holder the right to sell an asset. Employee share options are naturally therefore call options. Company management would be foolish to issue put options to their employees as this would incentivise employees to decrease the company's share price.

Typically, ESOs have several features that distinguish them from publicly traded options, such as exchange-traded commodity options:

(1) First, ESOs cannot be sold or transferred by the employee like an exchange-traded option can.
(2) Second, employee stock options have a long period, typically 10 years, over which they can be exercised, as opposed to the shorter terms of publicly traded options.
(3) Third, most ESOs have vesting restrictions requiring employees to wait for a specified period before being able to *exercise* their options. This encourages the employee to remain with the company and supports longer-term alignment with shareholders, because the options may be forfeited for no value if the employee leaves before they vest or before the share price has adequately appreciated.

There are two main types of option contract:

- European-style options, which can *only* be exercised on the option's maturity date.
- American-style options, which allow option holders to exercise the option at any time prior to and including its maturity. This can increase the value of the option relative to a European-style option, particularly where early exercise may be optimal.

Most ESOs are best thought of as American-style options once vested, because they can usually be exercised before expiry, although they are subject to vesting and other contractual restrictions.

One important feature of options is that they have a minimum value of zero, because they are only a right, not an obligation, for the option holder. If the prevailing market price of the shares is less than the exercise price, any rational option holder will simply decline to exercise their right to purchase the shares as they could buy them for less on the open market.

The current market value of an option contract is known as the option premium. This premium comprises two elements:

- intrinsic value; and
- time value.

The intrinsic value of an option represents the value that would accrue if the option were to be exercised now, while time value represents the possibility that the option could be exercised for a greater profit in the future.

Consider a holder of an option on shares in a hypothetical company, Widget plc, with an exercise price of £1.00 that will expire in 3 months' time. Suppose that the current price of Widget plc shares is £0.90. The holder will not exercise the option currently since buying the stock at £1.00 is more expensive than the market price. The intrinsic value of the option is therefore £nil.

However, there is a probability that the spot price (i.e. the current price) of the underlying Widget plc shares will rise during the life of the option. If the share price rises

above the strike price of £1.00 before it expires, the option holder can exercise the option and make a profit. The probability of this happening gives the option *time* value.

This distinction between intrinsic value and time value is particularly important in financial remedy cases, as an option that appears to be worth nothing today may nevertheless have substantial economic value:

- When the price of an asset is less than the exercise or strike price of a call option written on it, then the intrinsic value is £nil and the option is said to be out-of-the-money.
- When the asset price equals the exercise price, the option has zero intrinsic value, and the option is said to be at-the-money.
- When the price of an asset is higher than the exercise price then it has an intrinsic value equal to the asset price less the exercise price, and the option is said to be in-the-money.

Options with longer terms to maturity are more valuable. This is because the longer a share is given the chance to rise in price, the higher the probability that the share price will rise above the strike price. This probability is reflected in the option's time value.

The duration to maturity of the option is one aspect that affects its value. Another significant factor is the volatility of the spot price of the underlying asset, in this case Widget plc shares. Volatility is a measure of how much and how quickly the share price fluctuates over time. If the share price is very volatile, then there is a higher probability that the option will be very deeply in-the-money by the time it expires, or indeed at some point before its expiry. Somewhat counterintuitively, the potential profit for an option holder over a volatile share is therefore greater than for a less volatile share. So, the time value of the option over a volatile asset will be higher, and therefore its overall value will also be higher.

Consequently, a cursory review of an employee's option awards may significantly understate their true worth where the underlying shares exhibit high volatility.

Investors value stability in asset prices as it reduces risk and uncertainty. However, option holders like volatility because the payoff is asymmetric: they don't care if the share price drops dramatically as it would not result in a significant loss like it would to a shareholder. In fact, their loss would be the same if the share price was just below the exercise price: £nil. However, if the share price *rises* dramatically the option holder stands to profit significantly. Due to this asymmetric payoff, option holders will happily risk a higher likelihood of the share price collapsing if it means there is a higher likelihood of it soaring.

When interest rates rise, the value of call options also rises. If interest rates rise, the cost of borrowing money to buy an investment rises, or alternatively the return on existing capital rises, making it more attractive to hold call options, which require little or no investment, compared with buying the underlying stock itself. Hence, call options become more valuable.

So, the value of options is sensitive to:

- the current market price of the underlying asset, for example, the current market price of Widget plc shares, say £14.50;
- the strike price of the option, for example, £17.80;
- the time until the maturity of the option, for example, an exercise date in 3 months;
- the volatility of the price of the underlying asset, for example, a relatively high volatility of 35%, which means the asset's returns can vary significantly around its expected value; and
- a change in interest rates.

How to value ESOs

Having defined what options are, the next consideration is how to value them. This can be an important issue in financial remedy proceedings, as the existence of an option award is usually apparent from disclosure, whereas its economic value is not.

One would assume that any valuation would inevitably require a prediction about the likely future share price of the underlying company.

This would create a complicated problem. While analysts can attempt with varying degrees of success to predict the future price of a share, no one can forecast it with certainty. If they could, option pricing would be trivial – and forensic accountants would be out of a job.

For example, if a stock were to trade at a price of £100 today and you knew with certainty it would be £150 in a year:

- the payoff of a call option with a strike price of £100 would definitely be £50;
- its fair value would be £50, discounted for the time value of money.

The challenge is that nobody knows whether £150 will be its future price.

Instead of a single forecast, option pricing first uses a distribution of possible outcomes. For example, let's assume there is a 20% probability of the share price being each of £60, £80, £100, £120 or £140. The corresponding payoffs would be £nil, £nil, £nil, £20 and £40. The *expected* payoff would be £12, as follows:

Future price (£)	Probability (%)	Option payoff (£)	Expected payoff
	[A]	[B]	[A x B]
60	20	–	–
80	20	–	–
100	20	–	–
120	20	20	4
140	20	40	8
Total			**12**

So, the option is worth £12 *if*:

(1) those probabilities are correct;
(2) investors are indifferent to risk; and
(3) we ignore discounting for the time value of money (i.e. the concept whereby £12 in the future is worth less than £12 now as I could invest £12 now and earn a return).

However, this is not yet a proper option-pricing model; it is

simply a way of showing why a range of possible future outcomes gives the option value today.

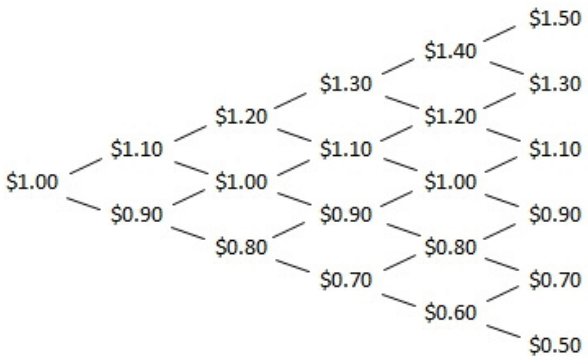
Furthermore, this example is a very imprecise method of calculation. Share prices do not move in leaps of £20. On the London Stock Exchange, for example, shares can move in increments (known as 'tick size') as small as 0.0001p, depending on the specific share.

Furthermore, there are a much wider range of possibilities of what the share price will be on the exercise date than merely five possibilities.

Therefore, we need to build a much more complicated model to consider the outcome of myriad possible future scenarios. We could do this with what is known as a 'binomial lattice'.

A binomial lattice model is based on a probability distribution in which the underlying event has only two possible outcomes (hence 'binary'). In the case of employee stock options, the underlying event is the change in the stock price and the resulting intrinsic value of the option.

During each time period, the stock price can move either up or down. When multiple periods are considered in sequence, a distribution of possible stock prices is created. This binomial distribution is referred to as a lattice (or tree), reflecting its appearance. It models how the underlying asset price may evolve over time. An example of a binomial lattice with a current share price of $1.00, increments of $0.10, and five time steps, can be seen below:



As can be seen in the example, after five time periods, be it years, months, weeks or days, the number of possible prices is six, each with its own probability. Each price in the binomial lattice is called a 'node', from which the next price stems.

But it would only result in a crude estimate of the option's value if we stopped at five time periods with its corresponding six price possibilities and increments as large as $0.10. To increase accuracy we need to add more steps and therefore more possibilities, each with smaller price changes.

What happens if we make the model finer and finer, like a master mason gradually hewing a rough block of stone into perfectly smooth masonry fit for use in the intricate tracery of Notre-Dame de Paris's rose window?

Eventually, we would have an infinite number of future price possibilities. This is a concept borrowed from calculus, which literally means 'small pebble' in Latin, and is a far cry from the lump of rough stone in the binomial lattice example above.

But one big problem remains: nobody knows what the probability is of a share moving up or down in price. So, what probabilities should we use in the model?

Enter stage left: Fischer Black and Myron Scholes

The Black-Scholes model (pronounced 'shoals') was developed in 1973 in the prosaically titled article, 'The Pricing of Options and Corporate Liabilities'.[1]

It is a mathematical model for the dynamics of a financial market containing derivative investment instruments, such as share options.

It gives a theoretical estimate of the price of European-style options and shows that the option has a *unique* price depending on the risk of the underlying security when replacing its expected return with the *risk-free or risk-neutral rate*, such as the rate of return on government bonds.

As explained earlier, European-style options can only be exercised on the option's maturity date, or expiry date.

Calculus had been used before to value share options, but the genius of Black and Scholes, and what ultimately led to the Nobel Memorial Prize in Economic Sciences being awarded to Myron Scholes in 1997 (Black having died in 1995), was not letting the number of possible future prices become infinite but showing that you did not need to know the true probabilities of future prices at all. By continuously hedging an option with its underlying share, they transformed a problem of forecasting into one of arbitrage, allowing a unique fair value to be derived.

Hedging involves investors adjusting their portfolios to eliminate or reduce risk. For example, suppose you own a house worth £500,000 and are worried that prices might fall before you sell it. If there were a market where you could sell a contract that gains value when house prices fall, you could use that contract to offset your risk. If the house loses £20,000 in value, the hedge might gain £20,000, leaving you largely protected.

On the other hand, arbitrage is the opportunity to make a profit with no investment, no risk and no uncertainty about the outcome. For example, if gold were trading at £2,500 per ounce in London and £2,510 per ounce in New York, an investor could buy in London, sell in New York and lock in £10 per ounce without taking price risk.

In other words, instead of asking, 'What will happen?', Black and Scholes asked, 'Can I build the option from other traded assets?'.

To see why this matters, imagine a share worth £100 and a call option that gives the right to buy that share for £100 in one year's time. If, in one year's time, the share is worth £120, the option will be worth £20, its intrinsic value. If the share is worth £80, the option will be worth nothing.

Black and Scholes showed that it is possible to construct a portfolio consisting of shares and borrowing or lending that produces exactly the same future payoffs as the option. Such a portfolio is known as a 'replicating portfolio'. If the option and the replicating portfolio have identical future cashflows, they *must* have the same value today. If they did not, an arbitrage opportunity would exist that would quickly be eliminated by an efficient market.

For example, if the option traded for more than the cost of creating the replicating portfolio, an investor could sell the expensive option, buy the cheaper portfolio, and lock in a risk-free profit. If the option traded for less, the reverse

trade would generate the same result. Competitive trading would quickly eliminate such opportunities, forcing both to have the same price.

The remarkable consequence is that the option's value can be determined without knowing the actual probability that the share price will rise or fall. The market's collective hopes, fears and forecasts become irrelevant. All that matters is the cost of constructing the portfolio that replicates the option's payoff.

This leads to one of the most counterintuitive ideas in finance: options can be priced as if investors are risk-neutral, i.e. indifferent to risk. The resulting probabilities are not forecasts of what will actually happen. Rather, they are the probabilities that make all assets earn the risk-free rate after accounting for risk. Under these risk-neutral probabilities, the value of an option is simply *the discounted expected value of its future payoff*.

This counterintuitive but genius leap led to Black and Scholes creating their famous equation. Nowhere in the equation is there a variable for the probability of the share price rising or falling. Instead, only five inputs are required:

(1) the share's current value;
(2) the option's exercise price;
(3) the option's time to expiry;
(4) the risk-free interest-rate, which is typically based on government bond yields; and
(5) the expected variability of the share price, known as its volatility.

The Black-Scholes model was designed to value options that can be exercised only at maturity. It was also designed to value options on underlying assets that do not pay dividends. But many shareholdings pay dividends. An adjustment was needed to the mathematics.

More problems require more mathematicians – enter stage right: Robert Merton

Although the original Black-Scholes model assumed that the underlying share paid no dividends, Robert Merton quickly extended the framework developed by Black and Scholes to accommodate dividend-paying securities and, more importantly, provided a more general and rigorous treatment of the arbitrage and continuous hedging arguments underpinning the model. As a result, the version used in practice today is more accurately known as the Black-Scholes-Merton model and led to Robert Merton sharing the Nobel Memorial Prize in Economic Sciences.

However, by extending the framework to assets paying dividends another problem arose. For options over non-dividend-paying shares, due to the possibility of the share price rising further than it might have already done, and because the downside risk remains limited, options should never be exercised early. For that reason, American-style call options over non-dividend-paying shares are no more valuable than European-style call options.

But this is not true for options over dividend-paying shares. While a shareholder is entitled to receive dividends, option holders are not. Therefore, it may be more profitable to exercise the option early and become a shareholder in order to receive the dividend an option holder would not have received. This creates an optimisation problem: is it better to exercise today or keep the option alive?

The standard Black-Scholes-Merton formula has no simple way to answer that problem; once early exercise becomes relevant, binomial lattices are usually more practical.

There are also other differences between the market-traded, theoretical options for which the Black-Scholes-Merton model is designed and the non-transferable, real-world options awarded to employees that may need to be valued in financial remedy proceedings.

These contractual, behavioural and market factors include:

- the risk of employee resignation or termination;
- how long after resignation or termination the options can be exercised;
- non-transferability of the options;
- blackout periods when employees may be prohibited from exercising share options to prevent trading on inside information such as the period before the company publishes its annual results; and
- the risk of sub-optimal exercise behaviour where employees exercise earlier than predicted by standard option-pricing models due to risk aversion or liquidity needs.

Many of these factors will require consideration of circumstances specific to the employee spouse and can therefore be particularly relevant when valuing options in a divorce context.

For that reason the Black-Scholes-Merton model is only relevant in certain circumstances, such as when:

- the risk of the employee exiting employment is low;
- there is a short period until the option vests – the longer the vesting period the greater the employee exit risk;
- the volatility of the share price is low meaning the impact on the time value of the option from exercising earlier than optimal due to risk aversion is mitigated;
- there are no unusual performance conditions such as price hurdles or profit targets – those features introduce path dependency for which the Black-Scholes-Merton model is not designed;
- the shares have a low dividend yield as large dividends may encourage early exercise.

For family practitioners, the significance is that the valuation methodology may materially affect the value attributed to an option award and, therefore, the overall asset schedule presented to the court.

When the off-the-shelf block does not fit

Outside those circumstances, the expert valuer will likely need to rely on our old friend the binomial lattice. While forensic accountants cannot create binomial lattices with infinite smoothness like the masonry in Notre-Dame's rose window, modern software can get very close. Under the same assumptions as Black-Scholes-Merton, a binomial lattice with enough time steps will converge very closely to the Black-Scholes-Merton value. Think of it like a piece of masonry fit for a gothic arch in a parish church: perhaps not perfect, but still very much beautiful.

The main benefit of binomial lattices is that they are much more adaptable than the Black-Scholes-Merton model. The real-world features of an ESO, such as a high risk of an employee leaving employment or risk-averse behaviour in response to volatile share prices, can be incorporated into a bespoke model. If the gothic arch is slightly off-plumb and not quite square, a binomial lattice can create a near-perfect masonry block for that specific church window when an immaculately precise off-the-shelf block made by Black, Scholes and Merton will not fit.

Trees with multi-dimensional branches do not bear fruit

Unfortunately, the machinations of a large corporation's remuneration committee know no bounds. While a standard ESO may incentivise most senior employees effectively, it might not suffice for certain high-ranking executives with greater decision-making powers.

Remuneration committees therefore sometimes add conditions to whether the ESOs vest, such as requiring the company's share price to outperform its peers, for example, '1 million options vest only if the company's share price exceeds the FTSE 250 median over a three-year performance period'.

This adds much greater complexity to the binomial model. Each variable introduced, such as the company's future share price and the future level of the FTSE 250 index means another dimension needs to be added to the binomial tree. The lattice quickly expands from a simple tree into a multi-dimensional grid of possible outcomes. While it is technically possible to create one of these multi-dimensional trees, it would require some very careful splicing of the tree's branches and the result would be very cumbersome.

Luckily, however, there is another tool in the mason's kitbag for such a commission: Monte Carlo simulation. The term was coined by a physicist during the Manhattan Project and references the famous casino because the method relies on randomness and games of chance like roulette or craps. It can provide approximate solutions that are far too complex for mathematical analysis, even for Black, Scholes and Merton.

Monte Carlo simulation avoids this 'curse of dimensionality' by generating thousands of complete future scenarios for all companies at once, based on random starting conditions and price changes, and then averaging the resulting outcomes. With enough simulations, and assuming the model inputs and structure are appropriate, Monte Carlo can produce a close approximation to the modelled value. This approach is particularly useful where vesting depends on performance conditions, a feature commonly encountered in executive remuneration packages disclosed within financial remedy proceedings.

In the masonry analogy, Monte Carlo simulation is like taking a large block of stone and using an automated chisel to decide whether thousands of random points should be chipped away or not. Do it enough times and the final shape becomes increasingly smooth and accurate.

From rough stone to reasoned value

In the end, valuing employee stock options is less about finding a single perfect formula and more about choosing the right tool for the stone in front of you. Black-Scholes-Merton may provide an elegant, finely cut block where the assumptions fit; a binomial lattice can be shaped to accommodate the awkward angles and contractual quirks of real-world ESOs; and where the structure becomes too complex for even that, Monte Carlo simulation allows the valuer to chip away at the problem through thousands of possible futures.

None of these methods removes uncertainty entirely. But, in financial remedy work, mathematical perfection is rarely the objective: the task is to produce a reasoned, supportable valuation that fits the facts, the evidence and the particular window the court is being asked to look through. Where employee share options form part of the parties' resources, valuation evidence may therefore assist the court and the parties in understanding their potential economic significance, even if that evidence is ultimately used as an analytical tool rather than as the basis for a specific asset schedule figure. On the other hand, valuation will not always be determinative. In many financial remedy cases, rather than attempt to attribute a precise present value to share options, the court may instead decide to *Wells* share such assets in specie, perhaps apportioned to reflect post-separation endeavour depending on the facts of the case. The fact that an asset is capable of being *Wells* shared does not necessarily render valuation evidence irrelevant. Rather, valuation and *Wells* sharing are often complementary tools directed towards the same objective: achieving a fair outcome in the face of uncertainty. Expert analysis may assist in identifying the nature of the awards, distinguishing between matrimonial and non-matrimonial elements, assessing tax implications, evaluating the range of potential outcomes and informing both settlement discussions and the design of any sharing mechanism ultimately adopted.

Why the valuation of share options should not be overlooked

For family lawyers, the key point is that employee share options should rarely be dismissed as an incidental employment benefit. Depending on the circumstances, they may represent a significant source of current or future wealth and can sometimes be worth considerably more than appears from a superficial review of the disclosure.

Equally, the complexity of the valuation process should not deter practitioners from obtaining expert assistance where appropriate. While sophisticated valuation techniques such as binomial lattice modelling and Monte Carlo simulation may sound daunting, the practical exercise of valuing many employee share option awards can often be undertaken efficiently and at a proportionate cost. The existence of a specialist valuation issue does not necessarily mean that a full-scale and prohibitively expensive expert exercise will be required.

The potential consequences of overlooking these assets are far more significant. If a valuable option holding is ignored, misunderstood or incorrectly valued, the resulting settlement may fail to achieve a fair division of the parties'

resources. In an adversarial environment where disclosure and asset identification are of central importance, practitioners who fail to investigate substantial share option awards adequately may find their approach subject to criticism.

The legal analysis does not end once a valuation has been determined. In financial remedy proceedings, the court may still need to consider what proportion of the award, if any, should properly be treated as matrimonial property. That exercise may require consideration of the purpose of the award, the vesting period, the timing of separation and whether the award was intended to reward past performance, incentivise future performance or both. While a valuation model may take account of factors such as forfeiture risk, employee departure rates and vesting conditions when determining the economic value of the award, the separate legal question of whether that value is matrimonial or non-matrimonial remains a matter for the court. The expert's role is therefore typically to assist the court with the valuation of the award, while its ultimate treatment for sharing purposes is a question of law and judicial discretion.

The prudent course is therefore straightforward. Whenever employee share options are disclosed, practitioners should consider at an early stage whether their value can readily be established from available information or whether specialist forensic accounting input is required. The extent to which a formal valuation exercise will be necessary will often depend on how likely it is that the court will adopt a *Wells*-sharing approach, since *Wells* sharing does not generally require a precise present-day value to be attributed to the options. That said, the question is not always whether the options need to be valued, but whether they need to be understood. Even where a *Wells*-sharing outcome is likely, expert analysis may assist the court and the parties in understanding the nature and potential economic significance of the awards, the extent of any matrimonial and non-matrimonial components, the relevant tax consequences, and the practical implications of any proposed sharing mechanism. Share options are not always valuable, but they can be. Ensuring that they are properly understood and, where appropriate, properly valued is often a small investment compared with the risk of getting the overall financial picture wrong.

Notes

1 (1973) 81(3) Journal of Political Economy 637–654, www.journals.uchicago.edu/doi/10.1086/260062

DR Corner: Private FDRs – The Client's Perspective

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It is a truth universally acknowledged that Private FDRs (pFDRs) have been a force for enormous good. We all know and laud the benefits, but in reality how much have pFDRs *really* improved the experience for clients and, in fact, have they in some ways made things worse?

I don't need to review the obvious benefits to clients of pFDRs: you don't get bumped owing to lack of judicial availability; your judge has read all of the papers; life-altering decisions are made in a comfortable room as opposed to perching in a corridor, not to mention the all-important provision of lunch. These benefits have gone a long way to improving the client's experience of the day itself, but there is still room for some improvement.

Most of us professionals deal with tens of pFDRs in any given year. In contrast, for most of our clients, it is the only such occasion that they will ever experience. They understand its importance and what rides on it, as well as the significant financial cost. We all roll out the statistics of how likely they are to settle and the dire alternative if they do not: many more months of litigation, spiralling costs and the risk and discomfort of a judge making a final order. The pressure of this can feel unbearable to someone unaccustomed to the rigours of daily hearings.

Moreover, the pFDR experience does not begin and end on the day of the hearing – it starts several weeks before, with the compliance (or non-compliance) with directions. We are all very used to that mad scramble in the final weeks when we are waiting for various valuations and reports to come in before we update our ES2s and advise the client on the proposals that they should be making. Years of experience tells us that however late all the moving parts may come together, they generally do. Clients tend to be, understandably, ill-equipped to deal well with this.

Carefully timetabled directions usually culminate in the exchange of proposals a week or two before the hearing but, hand on heart, how often can we say that these timetables are rigidly adhered to? And the 'professionally friendly' private element, knowing you are not going to be facing the wrath of an actual judge, does seem to make it feel like there is even less pressure to comply strictly. To compound the issue, how robust are pFDR judges towards solicitors about non-compliance with directions when those instructions are coming from a marketplace that may choose not to instruct you again? It seems to me that the consequence is a looser adherence to and respect for the court timetable in the approach to a pFDR.

Late compliance with directions certainly puts additional pressure on practitioners, but do we ever think about what this is like for clients?

It seems to me that the reasons for the prescriptive timetabling of directions have been somewhat lost. The timetabling is not meant to be primarily for our benefit, but rather for the benefit of our clients, so that they have time to ruminate on the proposals in a calm and measured way. They may use the time to work with a financial planner or other advisers in order to model the scenarios to give them confidence entering into negotiations. None of this is possible if the parties' positions are not known until 24 hours before the hearing.

The last-minute rush to approve proposals, ES1, ES2 and position statement does not help the client to be in the right frame of mind to make major decisions about their life. We often tell clients that this is their one opportunity to resolve what is likely to be the most important commercial decision of their lives. And yet we work within a system which could not be much less conducive to them being able to do this successfully and with confidence.

When reflecting on my years in private practice and more recently as a divorce consultant, I have come to appreciate that for those of us working in the legal profession, it is our job to process lots of information quickly and to make fast and informed decisions. We have years of practice making considered decisions, multiple times in every conversation, every letter, every email. However, I believe that we completely overestimate most individuals' ability to do the same, especially when it comes to their own affairs, with the heightened emotions this invokes. This applies equally to our clients who have been out of the workplace for 20 years as it does to clients at the helm of successful organisations. It is always a very different ballgame when it is your life, your home and your children which are on the line.

Our expectations of clients at the time of the pFDR is to process the information and advice that we provide them within a very short space of time and provide clear instructions in response. We can find it difficult and frustrating when they do not manage this or if they are overcome with emotion and need what feels to us like too long a time to talk things through, to think or to take time out.

I have recently worked with a client who, as a consequence of his difficult marriage, simply cannot retain information. His solicitor referred him to me as they were having to go over, and over, and over, the same advice, time and again. We deliberately drafted the directions in this case to

take the vulnerabilities of this particular client into account, giving him plenty of room and time. We should not be adopting a '28 days fits all' approach to timetabling. That is one of the beauties of the pFDR and yet I fear it is not being used as such anywhere near as much as it could be, to the cost of clients.

Just think about a lay client reviewing an ES2. These are documents that we work with day in, day out, but to a newcomer they take time to get your head around. Digesting them needs a clear and calm head – not something which, for understandable reasons, clients usually are able to summon up in the run up to a pFDR. Likewise, a position statement, the very culmination of their case, which they may have an hour or less to approve, sometimes late at night after putting the children to bed.

All of this is compounded by the fact that a great many of our clients will be suffering from the effects of trauma, which can impact every aspect of their experience of the family justice system. It can affect their whole ability to function, and principally their decision-making ability and judgement – which need to be at their optimum to make a pFDR work for them.

If your client is suffering from trauma they are likely to have one of the four main types of responses: fight – feeling angry, tense or on edge; flight – trying to avoid conversations, shutting down or feeling overwhelmed; freeze – feeling stuck, disconnected or unable to focus; and the less well-known fawn – saying 'yes' to everything, even if it is not what they want, just to keep the peace. None of these responses are conducive to successful pFDRs. The objective is to keep clients within their 'window of tolerance', which is the best state in which to make decisions and provide you with instructions. How can we, as professionals, help our clients to stay within their window of tolerance and away from these trauma responses? There are various methods and techniques, adjusted to meet that client's particular response, that can be deployed by us all in the run up to and on the day of the pFDR to try to avoid clients slipping into these responses. I fear that there is still too little knowledge and experience of these vital client-focused strategies.

I do not intend to repeat in detail our calls over the last 2 years for the profession, judiciary and Cafcass to be fully trained in trauma-informed practice, but there are some very simple, practical measures we can take to make pFDRs easier on clients.

An obvious and basic improvement would be to try to ensure that directions are adhered to on time as much as possible. I appreciate this is often outside everyone's control, but in cases where we can really see that our clients are suffering from trauma, or take time to process things, perhaps we can let them see early drafts of ES2s or position statements, even if not yet finalised, so they can sit with them for a while.

The reality is that pFDRs, the culmination of several months and sometimes tens of thousands of pounds of legal fees, are fast paced and clients can struggle to keep up. The days themselves are long and tiring even for the professionals involved – it is difficult to imagine what it is like for clients themselves.

As your clients tire, one of the big judgement calls of the day is the point at which to call time on the negotiations, either owing to lack of progress or your client's ability to give instructions. One possibility, where budgets allow, is to consider a hearing spanning 2 days: with submissions and the indication on the first afternoon and negotiations to follow the day after. It gives the client the benefit of time and the opportunity to sleep on things.

We will usually have prepared our clients very well in terms of the procedure on the day, but we can overlook the physical and psychological impact for a client of sitting in a small room with their former partner, while being expected to take a pragmatic 'compromising' approach, at a time when even seeing their face, let alone hearing the submissions of their barrister, might induce feelings which can feel impossible for the client to manage. The concern about seeing their husband or wife and how they will manage that is something that very many of my clients talk to me about, and a more psychologically informed preparation session prior to the hearing (much like a witness familiarisation session before final hearings) can really help.

I do wonder about the extent to which clients follow the negotiation tactics of the day. The strategy can change very quickly following the indication and clients do not always understand the rationale. This can lead to them feeling let down by their legal team and hard done by in relation to any settlement.

As we all know, even after a successful pFDR, there is a great likelihood that, despite euphoria on the day, buyer's remorse can quickly creep in. It is something that is worth warning clients to expect. We know that, following a successful negotiation, many clients will feel like they didn't ask for enough or have given away too much, but they are often not prepared for that feeling or the understanding that it is normal. Indeed, the period following the resolution of cases is, in my experience, often harder for our clients than the period during which they are litigating. Their expectation will be that once they have their sealed order, all will be hunky dory but it doesn't usually work like that – their nervous systems will often get them through the litigation only to find that they are hit by a tsunami of exhaustion and doubt in the months after.

It is difficult to talk about the post-pFDR period without mentioning the drafting of the order. We find that clients are ill-prepared for the fact that the deal is often not truly signed and sealed on the day. As we all know, it can still take several months to agree the wording of the actual order, during which the progress made on the day can quite quickly unravel.

If you are fortunate, a promptly listed directions hearing after the pFDR can put these issues to bed, but for cases that are outside financial remedy proceedings, or where the listing gods have been less favourable to you, this can go on for several months without resolution. Should we consider agreeing when committing to a pFDR that we will reserve the issues arising from any drafting back on paper to the original pFDR judge for assistance? I think this would help to avoid some of the most frustrating and difficult moments for clients.

Private FDRs were essentially developed to relieve our over-burdened court system, which happened to come with benefits to our clients. They were never created to address the client's experience of the FDR – and that gap is where our clients quietly struggle while we call it a success. Without minimising the significant improvement that pFDRs have brought for our clients, I believe that there is, perhaps excitingly, still room for improvement.

DR Corner: Why Private FDRs Work and How they Can Further Improve

Pauline Purcell

Senior Partner & Director, Purcell Solicitors



A decade ago, private financial dispute resolution appointments (Private FDRs) were a niche option, largely reserved for the wealthiest separating couples. Today, owing to increasing Family Court listing delays, plus the encouragement given to non-court dispute resolution by the 2024 amendments to the FPR, and a growing body of anecdotal evidence pointing to higher settlement rates than court proceedings, it is being increasingly used by couples wanting to resolve contested financial remedy claims that do not settle through negotiation or mediation.

As a Private FDR evaluator, I read the recent article, 'Private FDRs Under the Spotlight',[1] which outlined the results of a survey of practitioners and their experience with FDRs, with great interest, especially the point that clients sometimes had negative experiences of Private FDRs, using words such as 'stressful,' 'exhausting' and 'rushed' to describe them.

In particular, I noticed that the survey identified the following factors that led to clients feeling let down by the Private FDR process.

Lack of preparation

Family law consultants believe that many clients arrive at a Private FDR with little idea of what to expect. They believe clients can also feel overwhelmed with the amount of information they have to process and the speed of proceedings. Add a lack of sleep from nerves and meeting the evaluator for the first time, and clients naturally feel anxious and stressed on the day.

In my experience, much of the success of Private FDRs rests on how prepared the participants are, not only regarding the process, but also the possible outcomes. If clients are going to enter into an FDR, whether in court or a Private FDR, they must be prepared to settle. This often means compromising on certain issues, and you and your client should be alert to what could be compromised and what is a deal-breaker. As solicitors, we need to prepare our clients for a range of possible outcomes while negotiating for what matters to them. This gives clients a sense of control over their future. Statistics show that where people buy into an agreement, they are much more likely to stick with it. This is known as the IKEA effect: people value outcomes more highly if they put effort into creating them.

Family law solicitors also have to be clear about the emotional and financial cost of not reaching a decision in a Private FDR, and some of these are not initially obvious. For example, even if a case ends up in court, the longer that matters remain unresolved, the more likely fresh issues are to arise, leading to more phone calls, meetings and negotiations, all of which increase a client's overall costs. As far as the emotional cost, the uncertainty caused by unresolved disputes can affect the whole family, especially children. Sometimes we underestimate the impact that not knowing whether they can stay with their friends at their current school or come home to the house they feel safe in, or see grandparents who live close by, can have on young people, especially those who are neurodiverse. Once uncertainty is removed, plans can start being made. I also find that the relationship between children and an absent parent often improves once a financial resolution has been reached, because everyone knows where they are and things can move forward. The focus then often turns to the future rather than the past.

Private FDRs morphing into mini trials

The most persistent criticism levelled at the Private FDR process among practitioners is that it has, in some cases, drifted from a summary evaluation exercise towards something closer to a mini final hearing. Position statements for Private FDRs have lengthened well beyond the limits set out in paragraph 89 of the *Financial Remedies Guide 2026*,[2] which caps them at 12 pages. Oral submissions, similarly, have expanded to fill whatever time is available, since a private evaluator, unlike a judge, has no other case waiting and may be less likely to impose a strict time limit on any arguments.

I would argue, however, that although Private FDRs can mimic court hearings, especially in complex, high-net-worth cases, attending court is always going to be far more stressful for clients. The fact that an evaluator can provide parties an entire day of their time is most often an advan-

tage, as each person has the time to put their points across, hear the other party's point of view, and then hear what the evaluator thinks.

Another advantage of Private FDRs is that the evaluator will have had sufficient time to read the papers in advance of the hearing, which is unfortunately an increasingly rare occurrence for judges operating in our overstretched and under-resourced Family Court system.

Lack of safeguarding

Practitioners responding to the survey pointed out that the Private FDR model contains few formal safeguards. They expressed concern that the process could be 'weaponised' in relationships where coercive control is present. I would argue that if one party to a family law dispute is controlling, they will act accordingly in whatever resolution method they engage with, be it mediation, Private FDR or formal court proceedings. It is the role of family law barristers and solicitors to protect their client in these types of situations by preparing them properly, insisting that certain safeguards are in place, and managing proceedings to ensure a controlling or narcissistic party is kept in check.

In my experience, parties rarely talk to each other in Private FDRs. In addition, the process can be conducted in barristers' chambers with both parties sitting in separate rooms or even online. Unlike the Family Court, the parties and their legal advisers decide how the process is conducted, and they can put in whatever safeguards they agree to ensure both parties feel safe. If one party does not feel safe, the Private FDR cannot take place.

Concluding comments

Private FDRs give parties the choice of an evaluator, who can spend an entire day on their case in a place that suits them, including less formal locations where possible. No dispute resolution method is perfect, but given the pressure on the family courts at present, Private FDRs provide a genuinely positive alternative.

One change that could increase access to Private FDRs is appointing less experienced barristers and solicitors as evaluators. At present, most evaluators tend to be more experienced and thus more costly, which is suitable for complex matters. However, there are plenty of excellent junior solicitors and barristers who could act as evaluators at a lower rate for many clients, thereby reducing one of the main barriers for less wealthy couples who would like to engage in the resolution method. These barristers and solicitors regularly act for such clients and have experience of the issues they are facing, so are ideally placed to be the evaluator at a Private FDR.

Notes

1 https://financialremediesjournal.com/private-fdrs-under-the-spotlight/

2 The Financial Remedies Court of England & Wales: Financial Remedies Guide (March 2026), www.judiciary.uk/guidance-and-resources/financial-remedies-guide-2026/

Tech Corner: Only 11%. What Technology Can Do About the Pensions Gap on Divorce

Josh Gordon

Head of Digital Retirement, Octopus Money – Pensions on Divorce



Only 11% of divorcees with a pension not yet in payment made any arrangement to share it, according to the *Fair Shares* study led by Professor Emma Hitchings.[1] The same research found that over a third of divorcees did not know the value of their own pension, and nearly a quarter did not know whether they were in a defined benefit or defined contribution scheme.[2]

Then consider the second edition of the Pension Advisory Group's Guide (PAG2), which states, 'Ignoring the pensions or agreeing to ignore the pensions is not an option'.[3]

There is a consensus (but you already know this) that pensions must be dealt with properly, and divorcees overwhelmingly don't. That gap does not reflect a shortage of professional talent. The evidence points to cost, to time and to slow processes that still largely run on paper. Technology can address all three, which is why we are building a solution.

Why the gap exists

PAG2 is clear about the problem. It notes that persuading parties to pay for a pension on divorce expert (PODE) report 'can be challenging, especially where costs are escalating', while warning that the cost of guessing 'can be immense for either party'.[4] It also records that negligence claims against family lawyers involving pensions 'overwhelmingly relate to ill-considered offsetting agreements'.[5]

The trouble is that the median total asset pool in *Fair Shares*, including the matrimonial home, pensions and net of debts, was £135,000.[6] A PODE report fee of £2,000 plus VAT, which is not at the top of the range, is a material sum against a pool of that size, and it commonly falls due when finances are already stretched. Avoiding a further fee is easy to understand, but it is likely to prove more costly in the long run (for at least one of the married couples).

Add to that the fact that fewer than 40% of those divorcing in England and Wales each year use the legal system (even by consent) to reach a financial arrangement at all.[7] Of the 102,678 divorces granted in 2023,[8] most were settled by people who had no professional to tell them what their pension was worth, or why that mattered. The 60% of people who divorced without a financial order cannot, as it is not possible without one, have shared their pensions.

This is the advice gap, wearing different clothes

Octopus Money's goal is to address the advice gap, and the pattern here is familiar. The FCA's 'Financial Lives 2024' survey found that 8.6% of UK adults, some 4.6m people, had received regulated financial advice on investments, pensions or retirement planning in the previous 12 months, while 29%, around 15.8m, had not received advice but may have had a need for support.[9] Our own research among 203 advisers, with fieldwork in July 2024, found that the average minimum asset threshold for taking on a client had risen 12% in a year to £214,000, with 45% of firms having already shifted focus to higher-asset clients.[10]

We believe that providing better access to financial advice and guidance leads to better client outcomes, and this is no different. We want to increase access to support on pensions on divorce, which will lead to better long-term outcomes for the individuals involved.

This is not a criticism of the businesses already in this market. They are not responsible for the gap between those who access their service and those who do not, just as it is not for existing financial advice businesses to solve the advice gap on their own. If your business is performing well, by helping your clients in the way you intended, then congratulations, it is (and you are) doing well. Change often comes from outside.

What we are trying to achieve

Our team produces PODE reports for a fixed fee, intentionally priced at the lower end of the market, with the aim of reducing price as a barrier. Working for a lower flat fee requires the mechanical parts of report production to be as smooth as possible. We have automated wherever we can, so that the team can concentrate on the points where human judgement and interaction matters most.

The journey starts with an online eligibility check and instant quote, a digital letter of instruction, and a shared dashboard that both parties and their solicitors can see. The result is a report at a fixed fee of £1,200 including VAT for defined contributions pensions, rising to £1,800 where defined benefit schemes are included. The purpose of the automation is to reach a price at which a couple with a £135,000 pool can say 'yes' rather than 'no'.

Next, the client submission, letter of instruction and scheme documentation are reviewed and assessed for completeness. Our system automatically checks the information provided against our checklist. Where information is missing, letters of authority are produced alongside an email to keep clients informed. Before anything is sent to clients, the output is reviewed by the team. This step alone has materially reduced the time spent on cases. Any additional information received is reviewed in the same way, and once the case is complete it is reviewed again by a member of the team before it moves to the next stage. This is not revolutionary, but streamlining allows us to deliver the service for less and to more people.

Once deemed ready, we feed the data into our bespoke system. Avoiding manual entry saves time and reduces input errors. The tool embeds public sector pension factors for the schemes we cover. Where a scheme has not yet issued a cash equivalent transfer value (CETV) figure, the tool derives an indicative cash equivalent so that a case can be scoped and progresses immediately. Every such figure is labelled as indicative on screen and in the report, with an instruction to obtain the confirmed value from the administrator before any final order. The technology accelerates the conversation. It does not replace the scheme.

The pension expert then runs the equalisation calculations. Equalisation of income at a chosen target date, capital equalisation and offsetting scenarios all sit in one place. Scheme factors are used so that the sharing calculation aligns with the scheme's own approach.

Once the pension expert is happy with the calculations, the tool produces a client-facing report; we have kept this as simple as possible so clients can easily understand it. It turns out that not everyone enjoys or understands pension industry terminology. Additionally, every input, factor and intermediate figure is exportable as an audit report.

We haven't automated personal responsibility; every report is signed off by qualified humans. The technology does the arithmetic and the typing.

The industry has to move

Technology alone won't fix this problem, but it is the best lever we have to address what is within our control.

Pension schemes must get better. A great deal of time is wasted on requesting information from schemes that should either be included when a client requests a CETV or be publicly available. Improving this would save time (and money) on report production, allow clients to receive the support they need sooner, and reduce demands on the schemes themselves. In general, the public sector schemes are pretty good, time delays apart. If the schemes provided accurate data the first time, we could produce reports in a matter of days, more likely hours, and time saved on unnecessary admin would mean lower costs – helping to reduce that barrier and open up the service to more people.

Nor will dashboards rescue this. At the time of writing, the connection deadline for in-scope schemes is 31 October 2026, but the Money and Pensions Service expects the first public dashboard during the 2027 to 2028 financial year.[11] Nothing in that timetable helps anyone divorcing now.

What's next?

With the Ministry of Justice's 'A Fairer End to Relationships' consultation, which closed on 14 August 2026, considering extending financial claims to qualifying cohabitants, this puts pension needs into the needs hierarchy for both divorcing couples and separating cohabitants.[12] That is a large increase in the number of people with a pension question and no obvious route to an answer. Demand is only going to grow!

The 11% level is not a technology problem on its own. But every pound and every week we can take out of getting a pension properly valued moves the number in the right direction.

Notes

1 Hitchings, E, Bryson, C, Sefton, M and Barlow, A, *Fair Shares? Sorting out money and property on divorce*, University of Bristol and Nuffield Foundation, November 2023 (*Fair Shares*), www.bristol.ac.uk/media-library/sites/law/news/2023/Fair%20Shares%20report%20-%20final.pdf

2 *Fair Shares*.

3 Pension Advisory Group, *A Guide to the Treatment of Pensions on Divorce* (2nd edn, 2024), key messages (Pension Advisory Group), www.nuffieldfoundation.org/wp-content/uploads/2023/A-guide-to-the-treatment-of-pensions-on-divorce-2nd-edition.pdf

4 Pension Advisory Group, para 1.7.

5 Pension Advisory Group, key messages, Part 7.

6 *Fair Shares*.

7 *Fair Shares*.

8 Office for National Statistics, 'Divorces and dissolutions in England and Wales: 2023,' 2 July 2025, www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/divorce/bulletins/divorcesinenglandandwales/2023

9 Financial Conduct Authority, 'Financial Lives 2024 survey: Financial advice & support', May 2025, www.fca.org.uk/publication/financial-lives/fls-2024-financial-advice-support.pdf

10 Octopus Money/Censuswide survey of 203 UK financial advisers, fieldwork 4 to 11 July 2024, published 31 July 2024, octopusmoney.com/consumer-duty-research

11 Pensions Dashboards Programme, connection deadline, www.pensionsdashboardsprogramme.org.uk/connection/deadline; on the expected public launch in the 2027/28 financial year see Professional Pensions, 'MoneyHelper dashboard expected to launch in 2027/28', 20 May 2026, www.professionalpensions.com/news/4529973/pp-live-26-moneyhelper-dashboard-expected-launch-2027

12 Ministry of Justice, 'A Fairer End to Relationships', consultation opened 5 June 2026 and closed 14 August 2026, www.gov.uk/government/consultations/a-fairer-end-to-relationships; see also Graeme Fraser, 'Summary of Government's Consultation on Fairer End to Relationships', *Financial Remedies Journal*, 5 June 2026, financialremediesjournal.com/summary-of-governments-consultation-on-fairer-end-to-relationships/

Important Recent Case Developments

May 2026 to September 2026 inclusive

Professor Polly Morgan

Case Editor, Professor of Family Law, and Director of UEA Law Clinic, University of East Anglia



These are the noteworthy case law developments since the last issue went to press in the early autumn. Not all of them are citable as precedent, but they are all useful in some way.

Prenups and preliminary hearings

In *EC v EC* [2026] EWFC 275, Peel J clarified whether or not the validity of a prenuptial agreement should be addressed at a preliminary hearing or dealt with at a final hearing. His view was that while it is an option to hold a preliminary hearing for this purpose, it will be the exception rather than the rule. It is, he said, it is typically faster, cheaper and more conducive to a holistic assessment of the evidence to consider the agreement alongside all of the section 25 factors at a final hearing. This makes sense given that most successful challenges to prenups are on the basis that they don't meet needs, rather than that of, for example, insufficient disclosure or undue pressure. In *IC v AD* [2026] EWFC 224, neither of the counsel appearing before HHJ Hess could identify any case in which there had been a departure from the terms of a valid prenuptial agreement other than to meet need.

Death and financial remedies

I knew a solicitor who moved from practising family law to wills and probate and pronounced it lovely, as everyone was dead. This was, evidently, before the rise in contested probate. Now, one can conveniently combine a practice in financial remedies with death, as the following cases demonstrate.

Kanabar v Maganal Kanabar (Deceased) & Anor [2026] EWCA Civ 582 asked what the court should or could do when an appellant, to whom permission to appeal has been granted, dies intestate with no person willing to apply for letters of administration. The Court of Appeal held that the appeal has to be struck out under FPR 30.10 for want of someone to prosecute it. The court did not deal with the equally interesting issue of whether an appeal survives the death of the appellant anyway, nor what the court might do given the usual rule that financial remedy claims are personal rights which end on death (see *Unger & Anor (in substitution for Hasan) v Ul-Hasan (Deceased) & Anor* [2023] UKSC 22), and the limited exception *Barder v Caluori* [1988] AC 20 provides to this.

In *KC v CO (Deceased) (Orders for Sale after Death of a Party)* [2026] EWFC 165 (B), the family home was subject to a *Mesher* order. When the wife died, the ex-husband applied for an order of sale, the wife's death being a trigger event. Deputy District Judge Harrop struck out the claim, holding (again, because of *Unger*) that it did not survive the death of the wife. The route forward was to bring an application under the Trusts of Land and Appointment of Trustees Act 1996.

Invading non-matrimonial inheritances

P v P (Inheritance at the End of a Long Marriage) [2026] EWFC 209 (B) is a decision of Deputy District Judge Hodson. The parties were of very modest means, having about £330,000 between them plus pensions. There was, therefore, insufficient to rehouse them. Then, 6 months before the parties' separation, the husband's father died and, after separation, the husband inherited some £310,000.

The wife's position was that she should receive all the non-marital pension assets, leaving the husband with his inheritance by way of capital. This was not fair, said the judge. The inheritance was not a marital asset. It formed no part of the parties' standard of living. The husband was ill and had a shortened life expectancy. His father would have had in mind the husband's lifelong health needs when deciding to leave him that money. The wife's needs could be met by working more hours and by half the equity in the family home plus a mortgage. It was therefore unnecessary to invade the inheritance to meet needs, the only justification for that.

However, in this case there was a practical reason for invading the inheritance and that was to give the wife an offsetting lump sum in lieu of a pension share. The husband had drawn his pensions due to his ill health, and argued that he needed this income to supplement his reduced earning capacity. After considering the PAG guidance, *Martin-Dye v Martin-Dye* [2006] 2 FLR 901 and *W v H* [2020] EWFC B10, Deputy District Judge Hodson held that while offsetting is not to be adopted casually, it may be justified where fairness demands it. This was one such case.

A primer on *Wells* sharing

Culligan v Rosemin-Culligan [2026] EWCA Civ 948 is a Court of Appeal decision (Moylan, Coulson and Arnold LJJ) on when *Wells* sharing is appropriate. It contains a very helpful overview of the relevant law at [54] ff. Moylan LJ, who gives the court's judgment, holds that, 'there is no principle that *Wells* sharing is only to be included as part of an award as "a last resort" nor, indeed, that it should only comprise a minority element'. He continues, 'there is, equally, no principle that it should be "standard fare" having regard to the well-recognised disadvantages of *Wells* sharing and to the potential for it to be inconsistent with a clean break … Much will, of course, depend on the facts of the particular case'.

Global orders

In *P v M (Appeal: Unfair Hearing: Variation of Periodical Payments: Global Orders)* [2026] EWHC 1330 (Fam), a decision of Harrison J, the wife appealed an order reducing her periodical payments award as a result of changes in the husband's income.

The original order provided for staged decreasing periodical payments to the wife, and separately for child maintenance. Both sets of periodical payments were linked to RPI. Although not child maintenance, the points at which the spousal payments decreased were at key ages for the child – aged 5; aged 11; aged 18; and then the end of tertiary education – and the precise apportionment between wife and child had been given little consideration.

The case reached Harrison J by way of appeal from a subsequent variation order that reduced the periodical payments and removed indexation, meaning a cumulative loss to the wife of some £134,538 over the life of the order; and because of some startling procedural irregularities in the judge's conduct of the variation hearing. The CMS had somehow also assessed the husband at a modest amount, notwithstanding his admission that his income exceeded their cap.

On appeal, the wife sought a global order to mitigate the effects of the reduction in child maintenance, which was awaiting a child support tribunal hearing. As Harrison J noted, global orders have only ever been used where there is no CMS assessment but the potential for one. They have not been used in circumstances in which there had been a CMS assessment already. There was no reason why they could not be used in this way, said Harrison J, suggesting that:

> 'a self-adjusting spousal order could be crafted as follows (with further insertions in accordance with the latest edition of the Standard Orders depending upon, amongst other things, whether it was to be a joint lives or term order):
>
> > "The [applicant]/[respondent] shall pay to [applicant]/[respondent] maintenance pending suit until the date of [decree absolute] [the final [divorce] [dissolution] order] and afterwards periodical payments.
> >
> > Payments shall be at the rate of £[amount] per month annum less the amount of any annual sum which the [applicant]/[respondent] is required to pay to the [applicant]/[respondent] for the benefit of the child[ren] of the family, whether pursuant to an order of the court or an assessment of the Child Maintenance Service. The payments shall be payable [weekly]/[monthly] [in advance]/[in arrears] by standing order."'

'Framed in this way', Harrison J continued, 'such an order could not offend the scheme of the 1991 Act. It would ensure that there was no double-counting between the elements of spousal and child maintenance which overlap'.

This article draws on the case summaries prepared by the FRJ summariser team. As ever, I am grateful to the team.

The Summary of the Summaries

Liam Kelly

Deans Court Chambers



Ferrara v Ferrara [2026] EWCA Civ 512 (Moylan LJ giving the lead judgment with Arnold and Miles LJJ agreeing)

Appeal from a decision by Garrido J. Domicile in England retained after relocation to Italy, and stay in favour of Italian proceedings refused. *Keywords: forum conveniens; domicile*

KMR v AER [2026] EWFC 10 (B) (Deputy District Judge Benjamin Rose)

Judgment considering high-value assets, non-disclosure, jurisdictional questions, issues surrounding the authenticity and effect of an alleged ante-nuptial agreement and general conduct of proceedings. *Keywords: add-backs; conduct; disclosure*

Re A and Z (No 2) (Interim Third Party Debt Order) [2026] EWFC 90 (McKendrick J)

Decision concerning an application for a third-party debt order by one spouse against the solicitors acting for the other spouse after a failure to comply with previously made orders. Application abandoned at the return hearing. *Keywords: enforcement; costs*

Gohil v Gohil & Ors [2025] EWHC 3646 (Fam) (Williams J)

The High Court considered the impact of a £28m confiscation order, disputed beneficial ownership claims, and criminally tainted assets in a restored financial remedy claim following the Supreme Court's decision in *Gohil v Gohil* [2015] UKSC 61. *Keywords: non-disclosure; conduct; criminal confiscation and restraint orders*

AGS v RKS [2026] EWFC 104 (B) (District Judge Guirguis)

Unsuccessful application for a legal services payment order where the applicant husband's financial remedy claim appeared weak, his disclosure was inadequate, and he remained subject to substantial outstanding liability under a Proceeds of Crime Act 2002 confiscation order. *Keywords: LSPO; criminal confiscation and restraint orders*

Kanabar v Maganal Kanabar (Deceased) & Anor [2026] EWCA Civ 582 (Baker LJ giving the lead judgment with Lewison and Yip LJJ agreeing)

Appeal against the order of HHJ Rogers, in which he allowed an appeal against a financial remedy order made by District Judge Birk in circumstances where the appellant had died intestate after being granted permission to appeal and where no one was willing to apply for letters of administration. *Keywords: appeals; death of a party*

P v M (Appeal: Unfair Hearing: Variation of Periodical Payments: Global Orders) [2026] EWHC 1330 (Fam) (Harrison J)

Harrison J allowed W's appeal against HHJ Wright's order reducing the periodical payments previously ordered by Deputy District Judge Butler. The hearing was procedurally unfair, and the judge's treatment of H's income and the available maintenance jurisdiction was flawed. *Keywords: periodical payments; appeals; qualified legal representative*

B v B (Declaration as to Marital Status) [2026] EWHC 1317 (Fam) (David Rees KC (sitting as a deputy High Court Judge))

The husband sought a declaration of marital status under s 55 Family Law Act 1986, asserting that the parties' customary marriage under Cameroonian law had been dissolved by a customary divorce. The court found that no customary divorce had taken place and that the marriage was in any event void under English law. *Keywords: validity of marriage; void marriage*

Broadfield Law UK LLP v Barnes [2026] EWCA Civ 698 (Andrews, Lewison and Warby LJJ)

The appeal concerned whether a solicitor's retainer, charging by hourly rates for litigation work, qualified as a Contentious Business Agreement under s 59 Solicitors Act

1974, despite not clearly telling the client what costs they were committing to. *Keywords: appeals; costs*

McGregor v Smith (Domicile/Misuse of Divorce Portal) [2026] EWFC 128 (B) (HHJ Farquhar)

Judgment on the jurisdiction of the courts in domicile disputes, dealing further with applications making fraudulent use of the divorce portal. *Keywords: domicile; divorce*

Bartok v Brunner [2026] EWFC 146 (McKendrick J)

A hearing dealing with two distinct matters: a contested divorce application, and disputed applications for financial remedies, including forum conveniens issues, and successful applications for a *Hadkinson* order and *Hemain* injunction. *Keywords: Hadkinson orders; divorce orders; jurisdiction; anti-suit injunctions inc Hemain; service; non-compliance; forum conveniens*

Thirsk v Thirsk & Ors [2026] EWHC 1501 (Ch) (Cusworth J)

The claimant sought reasonable financial provision under the Inheritance (Provision for Family and Dependants) Act 1975 following the death of her husband. *Keywords: Inheritance Act applications; Duxbury capitalisation; matrimonialisation*

BY v GC (No 4: Indemnities) [2026] EWFC 173 (Nicholas Allen KC (sitting as a deputy High Court Judge))

Dispute about whether W's responsibility to indemnify H extended to indemnifying a company. *Keywords: companies*

WK v HN [2026] EWFC 169 (B) (HHJ Owen)

Final hearing in financial remedy proceedings involving allegations of add-back, wanton and reckless dissipation, and alleged warehousing of funds through pharmacy businesses not made out. *Keywords: cases*

BC v BC (No 2) (Matrimonialisation; Division of Shareholding; Provision for Debt) [2026] EWFC 37 (Garrido J)

Final hearing in financial remedies proceedings, considering matrimonialisation and whether there should be a departure from equality due to the shares' original non-matrimonial character. *Keywords: matrimonial and non-matrimonial property; cohabitation (pre-marital)*

N v N (Appeal: Setting Aside of Decree Nisi) [2026] EWHC 1593 (Fam) (Henke J)

Appeal against a final divorce order made without consideration of W's outstanding application to rescind the conditional order. The procedural irregularity required remission for that application to be considered before the final order. *Keywords: setting aside a decree nisi*

JC v MC (Refusal of Relief from Sanctions) [2026] EWFC 145 (MacDonald J)

Refusal of relief from sanctions for deliberately failing to comply with length of evidence in H's application to vary the maintenance he had agreed to pay W. H's s 37 Matrimonial Causes Act 1973 injunction application also failed. Keywords: *maintenance pending suit; case management*

KC v CO (Deceased) (Orders for Sale after Death of a Party) [2026] EWFC 165 (B) (Deputy District Judge Harrop)

The husband's application for an order for sale under s 24A(1) Matrimonial Causes Act 1973 was struck out under FPR 4.4(1)(a), in that its availability had not survived the death of the wife. *Keywords: Mesher orders and deferred charges; death of a party*

Odulate v Odulate [2026] EWFC 159 (HHJ Hess (sitting as a deputy High Court Judge))

Committal proceedings following husband's non-compliance with a financial remedy order made almost 4 years previously. Six months' immediate term of imprisonment imposed. *Keywords: committal applications and judgment summonses*

AB v CD [2026] EWHC 1504 (Fam) (Cusworth J)

An application for a legal services payment order to pursue Children Act 1989 and Matrimonial Causes Act 1973 proceedings, and maintenance pending suit. *Keywords: legal services payment orders; maintenance pending suit*

Potanina v Potanin (No 3) (Video Evidence from Abroad) [2026] EWHC 1738 (Fam) (MacDonald J)

Hearing concerning the husband's application for Letters of Request under the Hague Convention 1970. *Keywords: attendance from outside the jurisdiction; letters of request*

Culligan v Rosemin-Culligan [2026] EWCA Civ 948 (Moylan LJ giving the lead judgment with Coulson and Arnold LJJ agreeing)

The Court of Appeal gives clarity on *Wells* sharing. *Keywords: Wells sharing; sharing*

Re A and Z (No 4) (Forum Non Conveniens) [2026] EWFC 203 (McKendrick J)

The applicant's opposed and unsuccessful application to stay the determination of the divorce and financial remedy proceedings on the grounds it would be more convenient for the issues to be litigated in the state of Florida. *Keywords: forum non-conveniens*

TH v AR & Anor (No 1: Financial Remedies: Antisuit Injunction) [2026] EWFC 220 (Nicholas Allen KC (sitting as a deputy High Court Judge))

The husband obtained an interim anti-suit injunction, pending judgment in financial remedy proceedings, to prohibit the wife from pursuing foreign proceedings. *Keywords: anti-suit injunctions inc Hemain*

IC v AD [2026] EWFC 224 (HHJ Hess (sitting as a deputy High Court Judge))

Final hearing to consider the extent to which the terms of a pre-nuptial agreement should be upheld following an assessment of the parties' needs. *Keywords: nuptial agreements; needs; Duxbury capitalisation; Mesher orders and deferred charges; sharing principle*

Pool v Pool [2026] EWFC 226 (B) (Deputy District Judge Hales)

Competent conduct of legal professionals is not negotiable. Judgment criticised both firms' conduct following a withdrawn wasted-costs application, including unsupported assertions about H's instructions and capacity. *Keywords: costs*

Doweck v Doweck [2026] EWFC 238 (B) (District Judge Hammond)

The court was concerned with an application for committal by W to commit H to prison. *Keywords: contempt of court; disclosure; non-compliance*

EC v EC [2026] EWFC 275 (Peel J)

Preliminary issue hearing concerning the validity of a pre-nuptial agreement. Peel J emphasised that considering a nuptial agreement at a preliminary hearing is an available option but will be the exception rather than the rule. *Keywords: nuptial agreements*

Interview with His Honour Judge Stuart Farquhar

Anita Mehta

4PB

Charlotte John

Gatehouse Chambers



Financial remedy practice in the South-East is not going to be the same

His Honour Judge Farquhar was the dynamic lead Judge for financial remedy work in Kent, Sussex and Surrey from 2019 to June 2026. His Honour was called in 1985 and practised from what is now St Mary's Chambers in Nottingham. He began life with a mixed practice but was drawn to family work, and the 'simplicity' of numbers.

His Honour was interviewed by Charlotte John and Anita Mehta in July 2026, who said that what our audience really want to know from the judiciary is what they can do better to assist their client and the court.

Stuart Farquhar is now offering Private FDR evaluation as an associate member of 1KBW. Please contact clerks@1kbw.co.uk.

What makes a persuasive advocate?

It is a cliché, but there is no substitute for preparation. Knowledge of all of the case is vital, both the points in your favour and even more importantly your weak points. It is always impressive if the advocate has full command of where things are in the bundle and makes reference to page numbers whenever any point is made (it speeds things up when considering our judgments).

An argumentative, bombastic presentation is rarely helpful, and it is generally the more understated approach that is more persuasive. Your client's unfiltered arguments should not simply be put forward, and over-pitching your case starts to undermine your credibility.

It is staggering how often the advocates appear to fall out with each other in FRC cases (it rarely happens in other fields) and there seems to be little understanding among advocates about how incredibly annoying and unimpressive it is when this occurs.

When I started in practice, we were specialist advocates rather than specialists in a particular field and it really did help to have greater experience of cross-examination that you obtained in the criminal courts, for example. There was a good article on it recently.[1] That is not to say that there are not good young advocates these days, some of them are absolutely brilliant, but I do think that it is a shame with fully specialised sets that advocates do not have early exposure to a wider range of cases.

What irritating things would judges like solicitors and barristers to stop doing?

Where to start?! The simple answer is to be reasonable at all times and follow the rules. That is a simple statement but it appears to be very hard to follow.

It would take too long to set out all issues today (Do I feel an article coming on?[2]) but I would set out the following to start:

(1) Only put something in correspondence if you would be happy to hear it being read out in court at a hearing. Always read what has been written, especially if you have written it when you are not necessarily feeling at your best!

(2) Stick to the page limits on documents. You may think just four or five pages extra cannot do any harm and it will enable you to get more information into your document, but think of your audience. If a District Judge/Deputy District Judge is in an FDR/first appointment list then they will have five cases. If each document is five pages longer than permitted then that would amount to an extra 50 pages to be read. They will simply not have the time.

(3) Follow the rules on witness statements – it is so annoying to be reading a document that contains legal arguments or evidence on conduct when it had been agreed (or ordered) that conduct is not to be pursued. The whole purpose of instructing a lawyer is to put your case in the best possible light and not to annoy the judge. I appreciate that clients might want such things to be included in their statements, but tell them that it would annoy the judge and ensure it is excluded.

(4) Make realistic offers. I appreciate it is an adversarial process, but that does not mean that all legal principles can be ignored when making offers. This is especially true at final hearings, where parties appear to have abandoned their more reasoned approaches at FDR and simply gone for broke, however unrealistic that may be. It weakens the case overall.

The most important thing that lawyers can do is give their client realistic advice at an early stage so that the case, and the costs, are not driven by a client with unrealistic ambitions. It means an early conference to consider the merits.

Not least because there are cases where everyone can re-house and manage if they reach an early settlement, but that becomes much harder once costs have eaten up their assets.

It surprises me that there are still final hearings being run by lawyers where they are seeking an award that is outside the spectrum of outcomes. I ask them whether the High Court would uphold my judgment if I made an order in line with their proposals.



What causes most of the money appeals that you have been dealing with?

The majority of appeals are from litigants in person who are simply disgruntled with the outcome. These applications rarely receive permission to appeal but they consume a lot of the judicial time. I was probably dealing with around 40 appeals a year. One point that did occur when only one side was represented was for judges to simply follow the order that was sought by the represented party with little thought being given to the impact upon the unrepresented party. There were a number of appeals when the order was unfair to the self-representing party and no net effect calculation had been performed to highlight the situation. It may be seen as a 'good result' for the client, but it left them open to it being overturned on appeal with a risk of costs orders being made. It is vital to ensure the order you seek is reasonable.

And what about when lawyers are involved?

One regular problem is simply a mistake as to the numbers by the judge at first instance. This is nearly always due to a shortage of time as the time estimate did not provide a sufficient period for the judge to give full consideration to the issues in the case, which leads to rushed judgments. This is particularly so when the assets are held in complex structures that require time to understand and consider. It is easier as a Circuit Judge as you can ensure there is time to be able to deliver a written judgment. The District Bench need to deliver the judgment immediately and avoid reserved judgments because of the pressure of their workload. This would be improved if there were more sitting days and the judges could have some thinking time.

There seem to be even greater problems and increasing issues with enforcing financial remedy orders and compliance with orders. What can lawyers and judges do about that?

This is a real problem. A judge considers their job is done once they reach a decision and it is not overturned on appeal, but that is only half the story in many cases.

The problem with enforcement is really one of listing. When I was a District Judge, I was always able to list such matters at short notice. Enforcement requires the ability to hear the applications swiftly as well as judicial continuity. It is almost impossible for this to occur now due to the overwhelming amount of work faced by the District Bench. In Kent, Surrey and Sussex, we set up two remote Application Courts per month but they too soon became fully listed. The answer is there needs to be more listing available for such applications, but there is simply no appetite for this to occur. I do not think I have ever heard anyone from outside the FRC world advocating for greater time being devoted to such work, yet we all know the real anguish that is caused by a failure to implement orders.

Judicial career

What advice would you give anyone thinking about whether a judicial role is right for them?

The answer is to give it a go. It is extraordinarily helpful to practitioners to see what it is like 'on the other side'. Make an application to shadow a judge to see how it differs from your perception. I suggest that most practitioners have their perceptions about life behind 'that door' but it rarely fits with the reality. I was genuinely surprised at how much I enjoyed my days sitting as a Deputy District Judge (even hearing small claims) and it certainly helped me in my work as a barrister. It caused me to shorten my written submissions as well as to focus my cross examination and submissions, as I could instantly see that a lot of what I was doing previously would not have been helpful.



What are your thoughts on the role of AI in judicial decision-making?

As with all other IT, it is a useful tool when used correctly. The Judicial College has provided training on the use of AI in financial remedy cases and it is endorsed by the senior judiciary. I am no expert in the field but I have found it incredibly helpful in preparing judgments. One of the most time-consuming elements of judgment preparation is simply finding the relevant parts of the evidence that deal with specific points. If AI has the bundle, my notes and the position statements then it usually is able to pinpoint the

relevant passages fairly swiftly and this enables the judge to spend more time on the truly discretionary considerations. I would add that the version of AI provided to the judiciary is 'closed', meaning that any information that is provided cannot leak onto the internet. It is also vital to double check the information with which you are provided.

Having used AI for some legal research, I would agree with others that it is certainly not reliable, although it is a reasonable first step. The big concern would be one of over-reliance upon AI. It is important to remind oneself that it is no more than a tool to assist and can never take the place of the true judgement of the judge in assessing witnesses and considering whether any point is proved or not.

Do we need more specialist FRC Circuit Judges?

Yes. And they need to be sitting more frequently in FRC work. Prior to my retirement, my understanding is that HHJ Hess and I were the only two Circuit Judges sitting more or less permanently in the FRC (I still sat in the MHT and CoP occasionally). I am of the view that each FRC zone should have a full time CJ to deal with the work. There are some zones which would not be large enough to provide full-time work, but I consider the zones should be enlarged to ensure that there is sufficient work available. This would create a structure whereby it was known that there was an experienced specialist judge to deal with all FRC cases and appeals. It would be helpful if such judges all received section 9 authorisation so that, like me and HHJ Hess and some others, they could also hear cases at High Court level if appropriate. This enables the larger cases to remain at local level and avoid the need for everyone to travel to the RCJ. There are a number of my former colleagues who were Lead FRC Judges who were extraordinarily able FRC practitioners but still sat the majority of their time in public law. I have no doubt that they are very capable judges in all fields, but a strengthening of the FRC work would be helpful to ensure money practitioners felt more able to apply for appointment in due course.

I always restricted the number of CJs dealing with FRC work in the Kent Surrey and Sussex zone to two. This was to ensure that any judge who heard an appeal was also dealing with sufficient first instance cases and was fully up to speed on all matters FRC. If there were more than two CJs dealing with the work then they would not be doing a sufficient amount to keep abreast of the ever-changing law in this field. This follows the scarring experiences I underwent at the Bar when appeals could be heard by a CJ who had not heard any FRC cases that year which created a lottery in terms of outcome.

What is the highlight from your judicial career?

The highlight of my judicial career – that would probably be chairing the committee (which Nick Mostyn subsequently coined 'the Farquhar Committee') looking into remote hearings, practices in the FRC and transparency. I can claim very little credit for the output of the reports as it was genuinely a team effort, but I was careful to ensure that the team members were representative of all levels of practice and all regions, and not just London-centric. They were a hugely impressive team which has provided a significant legacy in terms of remote hearings, the efficiency statement (it is now mind-boggling to think that we used to permit two separate schedules of assets) and improved understanding in relation to transparency, although I accept that there are still some arguments to be resolved on anonymity.

What has been your experience of the greater transparency flowing from the Farquhar Committee recommendations?

I appreciate the concern of judges (especially part-time judges) with transparency and others commenting upon the decisions that you reach, but this is something that comes with the job. Judges make hugely important decisions in people's lives on behalf of the state (in its widest sense) and it must be right that others can comment upon such decisions. This can be difficult, especially for fee paid members of the judiciary who also have their own practice to consider.

I dealt with a case (*JY v KF* [2025] EWFC 195) in which one of the issues was how to treat the costs of gender reassignment surgery of the former husband. I decided that it was a 'need' and as such the costs should be met from the joint assets rather than from the former husband's share. This was not the main issue in the case, the costs of the surgery being £160,000 out of total assets of close to £3m. The press picked up on this element only and it would appear that the readers of the *Daily Mail* were not in full agreement with my decision! There were over 300 comments on the story and nearly all were of the view that I was wrong, with me being referred to as 'disgraceful', 'woke' as well as 'the judge should be stacking shelves' and one even offered to set up a JustFundMe page for the appeal! The article did not set out the real issues in the case or the basis upon which the overall decision was reached, even though the judgment was obviously published in full. The people who really matter are other judges and practitioners as they will consider the judgments as a whole and not be sidetracked by elements which are 'press worthy'.

I have not met a judge yet who has made a decision which they did not genuinely believe was correct and reasonable. It is our role to make decisions, which by definition will upset some people. The reality is that in factual disputes, it cannot be that both sides are telling the truth. But we cannot stop making such decisions just because there will be some or many who disagree. When there is press attention then the judge cannot make comment, although you can seek support from the secretariat and there are always helpful colleagues who are willing to offer their support – they are just glad it was not them who had to make the decision!

Government consultation

What are your views about the consultation?

It would be difficult to argue that the system did not need change and I am pleased to see that the government is taking the opportunity to look at it all.

Financial remedies – there can be no harm in codification, so long as it is carried out well, but I do not see that it will lead to a significant change in the way that cases are considered. I do not consider it likely that there will be a sea change in the approach of parties simply due to the law as it stands being codified, and therefore the assumptions relating to an increase in early settlement seem to be optimistic.

Nuptial agreements – the suggestions relating to nuptial agreements seem in principle to be sensible, but the direction of travel was already along the lines that are now being set out so, again, I do not see this will cause a substantial alteration to the present position. That is not say I do not welcome the proposals.

Domestic abuse – this seems to be the area where the government is least certain about the way ahead as no settled solution is put forward. In my former role as a Lead Judge, I had serious concerns about the real life consequences of a broadening of this view of conduct. Again, this is not to say that I do not see the strength of the arguments in support, but I fear the impacts. We are all aware that abusers rarely admit their actions and this will be even more so if they think it will result in them being awarded less money and their spouses receiving a greater share. This could also have a knock-on impact on applications for injunctions and Children Act proceedings. There may be less candour on the part of an abusive partner if they were aware that this would ultimately hit them in their pocket at a final financial remedy hearing.

It would undoubtedly cause an increase in the hearing times in the FRC as well as an increase in the emotional pressure on the victim, having to relive their experiences. As I stated previously, I have never heard anyone outside the FRC world support more listing time for the work. The proposals are working on the basis that there will be more settlements so there will be no need for greater sitting days. That is simply unrealistic and I fear that the delays that are presently experienced would only increase substantially.

As ever, it is a balancing exercise. In how many cases will an increased award be made following findings of domestic abuse/coercive control and what would the increase be? That needs to be balanced against the increase in delays for the abuse victims and all other FRC users which seem to be certain to occur. It is an unpalatable decision to be made either way.

The only easy answer would be for there to be a substantial increase in sitting days, but I do not see that occurring. At the time of my retirement, it was taking almost a year to find a listing for a 2-day final hearing in front of a DJ in my FRC zone and that would only get worse. I also note that it is suggested that the reforms will be neutral in terms of sitting days, which does not suggest that further sitting days will be an option.

Cohabitants reform – there are undoubtedly several points that need to be ironed out but, again, in principle, I consider all of the proposals to be moving in the right direction. It is difficult (impossible?) to see how this is not going to cause a huge increase in work levels in the FRC and I see no slack available to take this up. If these applications are not to be bogged down in delay from the start, there will need to be further investment in sitting days.

Notes

1 https://financialremediesjournal.com/cross-examination-in-financial-remedy-claims/
2 We naturally encouraged this.

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