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Chair's Column

HHJ Edward Hess

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

Duxbury

For more than three decades the *Duxbury* tables have held a strong position in the determination of outcomes in financial remedies cases involving the capitalisation of maintenance obligations. In the Spring 2023 edition of the FRJ, we published 'Looking Back at *Duxbury* 30 Years On' by Michael Allum et al. This article reflected on the outcomes of some cases in which the court had used *Duxbury* assumptions and concluded that a fresh look was needed. It recognised the 'significant benefits associated with having a universal formula' but argued 'that the process by which the calculations are determined could be improved' and suggested a greater degree of transparency in the methodology of determination. At least in part spurred on by this article, a review process was duly set up, led by Lewis Marks KC, and incorporating a distinguished group of experts in this area, including Michael Allum in recognition of his contribution to the subject. The impressive interim report of this group has recommended some very significant changes to the operation of the *Duxbury* tables. The mathematics should now include an estimate of management charges. The computation should not default to the life expectancy of the recipient, but instead to the likely duration of the maintenance obligation being capitalised. Nor should it default to the inclusion of the state pension. There should no longer be any distinction between male and female recipients. These welcome changes, if adopted in the final report, will bring the *Duxbury* tables up to date and seem likely to strengthen their position of importance in cases where these issues arise.

Non-court dispute resolution

In May 2024 the Pre-Action Protocol annexed to FPR 2010 PD 9A was significantly amended. This made clear the obligation for couples in almost all cases, before making any application to the court, to attend at least one form of NCDR. There are options for the parties as to which method to try – it may be mediation, arbitration, a private FDR, the collaborative process, the single lawyer scheme or even a round table meeting. Paragraph 15 of the Protocol warned parties that a failure to comply with this might cause the court to decline to commence the court timetable or to suspend it. It may be that these new provisions have not changed practice as much as they should have done, and two articles in this issue of the FRJ – 'Early Reflections on Pre-Application Protocol – Seismic Shift or Damp Squib?' by Harry Gates and Samantha Woodham and 'Non-Court Dispute Resolution and the New Protocol – Don't Look a Gift Horse in the Mouth…' by Katharine Landells – discuss why this may be the case. It may be that the best way of moving this forward would be for judges and practitioners to find a way of identifying very shortly after a Form A is issued (and before the often combative and expensive early stages of a court battle have taken place) that no NCDR has been pursued as, if this is only discovered at the First Appointment, there may be a tendency of judges to regard it as too late to divert from the court timetable or, as Katharine Landells puts it, 'judges will find themselves unable to resist the temptation to solve the problem that's in front of them'.

Procedure and the importance of being aware of, and complying with, rules and guidance

The National Lead Judge of the FRC, Peel J, has taken the lead in promoting the knowledge and implementation of the rules and guidance which govern practice, or should govern practice, in the FRC. In *GA v EL* [2023] EWFC 187 Peel J said:

> 'I have said before on countless occasions, in court and publicly, that breaches of the two Efficiency Statements (one for High Court allocated cases, and one for cases allocated below High Court Level) are wholly unacceptable … I make no apology for speaking out in strong terms on this subject once again. Case management is a vital part of the financial remedies process, and legal representatives have a duty to assist the court in managing the cases efficiently and fairly. If counsel and solicitors are unfamiliar with these basic, essential requirements contained in the two Efficiency Statements (as seems to have been the case here), they should swiftly put that right.'

For practitioners wishing to follow this lead (and surely this is *all* practitioners!) they could do worse than mastering the excellent summary of the rules and guidance (sourced where appropriate) which has been produced below by Alexander Chandler KC under the title 'The Winds of

Change: Case Management and the Financial Remedies Court'.

A warm welcome to the next generation of financial remedies practitioners

We are delighted to announce the winners of the *Financial Remedies Journal's 2024 Undergraduate Essay Competition*. Essays submitted were for the title: 'Fifty years on, do the financial remedy provisions in the Matrimonial Causes Act 1973 provide fair outcomes?' Thank you to all participants for their hard work, and many congratulations to Vasilisa Skorokhod and Theo Corbett, whose insightful and thought-provoking essays stood out amongst a number of excellent entries. Their essays have been posted on the FRJ blog and they will be given the opportunity to do some work experience in the financial remedies world.

Edward Hess congratulating Vasilisa Skorokhod, one of our 2024 Undergraduate Essay Competition winners, after a day's work experience marshalling with him

The Winds of Change: Case Management and the Financial Remedies Court

Alexander Chandler KC

1 King's Bench Walk

Introduction

Once upon a time, not so long ago, 'ancillary relief' was something of a legal backwater. Cases were determined solely by reference to 'reasonable requirements'.[1] Procedural rules, to the extent they existed,[2] were short and loosely applied. Parties filed narrative affidavits of means and answered requests for further and better particulars. As a junior tenant, I experienced the tail end of this *ancien regime*: the pilot scheme which introduced Forms E and the FDR coincided with my first day as a pupil (1 October 1996), and was adopted nationwide on 5 June 2000.

In a single generation, all this has changed. The legal principles, post-*White* and *Miller; McFarlane*, have developed from the pragmatic (the 'discipline of the budget'[3]) to the more theoretical, with the identification of three distribute principles, weighed against the increasing respect for individual autonomy and nuptial agreement. We now have the Financial Remedies Court (FRC) with its own specialist judges. The growth of procedural rules, practice directions, forms and guidance has been little short of exponential.

The theme of this article is the court's growing expectation that parties and their advisers should be aware of, *and comply with*, the growing corpus of procedural rules and guidance. This is set out most clearly in a series of judgments from the National Lead Judges of the FRC, Mr Justice Mostyn (2018–2022) and Mr Justice Peel (2022–), i.e.:

> 'Court Orders, Practice Directions and Statements of Efficient Conduct are there to be complied with, not ignored … Why is it fair for one party to follow the rules, but the other party to ignore them? Why is it fair for the complying party to be left with the feeling that the non-complying party has been able to adduce more evidence to his/her apparent advantage?', Peel J, *WC v HC (Financial Remedies: Agreements)* [2022] EWFC 22 at [1(i)] (22 March 2022)

> 's25 statements must only contain evidence, and "on no account should contain argument or other rhetoric". In this case, W's over long statement crossed the line and descended into a number of personal, and prejudicial matters, directed at H which, in my view, were irrelevant to the matters at hand. Parties, and their legal advisers, may be under the impression that to describe the other party in pejorative terms, and seek to paint an unfavourable picture, will assist their case. It is high time that parties and their lawyers disabuse themselves of this erroneous notion. Judges will deal with relevant evidence, and will not base decisions on alleged moral turpitude or what Coleridge J once famously described disapprovingly … as a "rummage through the attic"', Peel J, *WC v HC (Financial Remedies: Agreements)* [2022] EWFC 22 at [1(ii)] (22 March 2022)

> 'This utter disregard for the relevant guidance, procedure, and indeed orders is totally unacceptable. I struggle to understand the mentality of litigants and their advisers who still seem to think that guidance, procedure, and orders can be blithely ignored. In *Re W (A Child) (Adoption Order: Leave to Oppose)* [2013] EWCA Civ 1177, paras 50–51, Sir James Munby P, having referred to "a deeply rooted culture in the family courts which, however long established, will no longer be tolerated", continued:
>
> > "I refer to the slapdash, lackadaisical and on occasions almost contumelious attitude which still far too frequently characterises the response to orders made by family courts. There is simply no excuse for this. Orders, including interlocutory orders, must be obeyed and complied with to the letter and on time. Too often they are not. They are not preferences, requests or mere indications; they are orders."
>
> That was nine years ago. But nothing seems to change', Mostyn J, *Xanthopoulos v Rakshina* [2022] EWFC 30 at [3] (12 April 2022)

> 'I have said before on countless occasions, in court and publicly, that breaches of the two Efficiency Statements (one for High Court allocated cases, and one for cases

> allocated below High Court Level) are wholly unacceptable … I make no apology for speaking out in strong terms on this subject once again. Case management is a vital part of the financial remedies process, and legal representatives have a duty to assist the court in managing the cases efficiently and fairly. If counsel and solicitors are unfamiliar with these basic, essential requirements contained in the two Efficiency Statements (as seems to have been the case here), they should swiftly put that right.', Peel J, *GA v EL* [2023] EWFC 187 (18 October 2023)

I do not mean to suggest that family lawyers should magically transform into civil litigators and seek relief from sanctions every time a deadline is missed. Similarly, in many cases, individual judges will, quite properly, continue to roll up their sleeves and hear the case, rather than itemise the procedural breaches and paragraphs of evidence that play to the gallery. But the direction of travel (the 'winds of change') is clear, in terms of an increasingly rule-based approach to financial remedy (FR) claims, which to some extent, reflects the tightening up of civil procedure instituted by the Jackson Reforms.

This article is not intended as a counsel of perfection but rather an identification of the detailed provisions that exist which could impact upon the court's approach to case management, in terms of how the court might look at a draft questionnaire, witness statement or deal with questions of expert evidence and conduct.

This article assumes a working knowledge of FR procedure and does not deal with every single step such as filing Forms E, etc. Its purpose is to cover the lesser- known rules and authorities, structured around the stages of a typical FR claim.[4] The key provisions are as follows:

- FPR Part 9 and FPR 9A
- FPR PD 27A aka 'the Bundles Practice Direction'
- 'Primary Principles' dated 11 January 2022
- 'The Efficiency Statement' dated 11 January 2022[5]

Some of the points in this article are expanded in my blog ('Familybrief'[6]).

Preparation before the first appointment

(1) Steps that should be taken '14 days before First Appointment'[7]

(a) Joint valuation of family home

Parties shall file a jointly obtained market appraisal of the family home. If a joint appraisal isn't possible, each party should file a market appraisal 'and must be expected to explain the reason for the impossibility to the court': Efficiency Statement, § 10a.

(b) Property particulars and mortgage capacity

Each party should 'use their best endeavours' to file (i) 'no more than 3 sets of property particulars' setting out housing need for themselves and the other party, and (ii) indicative material as to borrowing capacity: Efficiency Statement, § 10b.

(c) Exchange of concise statements of issue, chronology, Form C, service of mortgagees and draft questionnaires (as to which, see below).

(2) Proposed instruction of experts

'Wherever possible' this should be on a single joint expert (SJE) basis: FPR PD 25D, para 2.1. The application should generally be made 'no later than the first appointment': FPR 25.6(d):

(3) Accelerated Procedure

Where directions can be agreed, the costs of a First Appointment can be avoided by the parties using the 'Accelerated Procedure', which involves agreed directions (etc) being sent to the court for its approval, so that the hearing can be vacated: see 'Primary Principles', Sch 4. Please bear in mind that most judges will not approve a draft directions order which provides for 'replies to questionnaire saving just exception' (see below).

(4) Non-court dispute resolution (NCDR)

Since April 2024 the court has had the power to stay an FR claim so that NCDR can take place. FPR 3.3(1A) provides that parties will be required to complete a form 'setting out their views on using non-court dispute resolution as a means of resolving the matters raised in the proceedings', and FPR 3.4(1A) enables the court to adjourn proceedings to encourage NCDR without the parties' consent. This follows the Court of Appeal's decision in *Churchill v Merthyr Tydfil CBC* [2023] EWCA Civ 1416, which disapproved *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, and was cited with approval by Knowles J in *Re X (Financial Remedy: Non-Court Dispute Resolution)* [2024] EWHC 538 (Fam).

(5) Court bundle

The 'bundles practice direction' is currently under review by the Rules Committee. The current position is that an index should be agreed 4 days before the First Appointment, with the bundle lodged 2 days beforehand (FPR PD 27A, paras 6.1, 6.3). The guidance relating to the content of the bundle is well known (FPR PD 27A, paras 4–5). The guidance of 19 April 2022 confirms that the obligation to produce ES1 and ES2 applies as much to litigants in person as to represented parties and where a case involves two litigants in person, the court would still ordinarily expect that an electronic bundle is lodged.

The pagination of an e-bundle *must be sequential* (i.e. no A1, B1, C1, etc), and follow the PDF numbering: see General Guidance on E-Bundles dated 29 November 2011. Bookmarks should be added. Speaking as a part-time judge, I cannot underline how aggravating it is to conduct a hearing where every single reference has to be given twice 'page C10 and for your honour it's PDF page 64', particularly where evidence is heard.

(6) Complexity

Where a case is said to be complex (warranting allocation to the 'Complexity List'), a certification to that effect should be made in the Allocation Questionnaire, identifying the applicable issues relied upon. Where a case is said to be 'exceptionally complex', requiring allocation to a High Court Judge, an early request to this effect should be made, pursuant to the guidance of 21 May 2024.

The First Appointment

(1) Top tips

Four 'top tips' for advocates preparing to attend a First Appointment for the first time: (i) keep your note short (see below); (ii) attach draft directions, based on the Standard Order templates (see 'Position statements', below), which unlike private law orders, should *not* summarise what happened at a hearing or recite the parties' positions, but should only 'record, shortly and neutrally, those essential background matters which are not part of the body of the order': Efficiency Statement, § 32; (iii) email a copy of their note (and an Excel version of the ES2) directly to the court in the eventuality that there has been a problem with the portal; (iv) if you want to appear knowledgeable, describe the hearing as a 'First Appointment' and NOT a 'First Directions Appointment'.[8]

(2) Listing to FDR

Every FR claim should be listed for FDR unless there are 'exceptional reasons which make a referral to an FDR appointment inappropriate' (FPR 9.15(4)). Just as this article was going to press, Peel J handed down judgment in *GH v GH* [2024] EWHC 2547 (Fam), which underlines the point (at [6]) that 'It is very hard to envisage a situation where the FDR should be dispensed with':

> '[5] … It is not only relatively straightforward cases which are susceptible to settlement at FDR. So, too, are complex cases. In my personal experience, even the most intractable case can yield to settlement at the FDR. The purpose of it is to enable the parties to hear (probably for the first time) an independent evaluation of the likely outcome, and the risks (in terms of costs, uncertainty, delay and emotional toll) of continued litigation. The FDR judge is there to tell the parties if their proposals are sound or devoid of merit, or if particular points or arguments are or are not likely to find favour at trial. It is often those hard cases where one or other party appears utterly intransigent that the FDR judge's indication and observations can be of greatest utility. The FDR judge is well able to deal with factual issues (such as, in this case, W's earning capacity), not by determining them but by expressing a view as to how they appear on the available evidence and how relevant they are. The FDR judge is also well able to give a clear overview even if (as the judge assumed to be the case here) one or other party's position is not fully crystallised.'

At the risk of making an obvious point, the FDR judge should not be dealing on the same day with other applications in the case, such as an application for interim maintenance or a costs allowance.

(3) Questionnaires

One of the most welcome pieces of guidance contained in the Efficiency Statement, § 10c is the provision that a draft questionnaire:

> 'should not exceed four pages of A4 in length (using not smaller than a 12-point font with 1.5 spacing). The court is likely to approve a questionnaire in excess of 4 pages in a case where complexity (including alleged non-disclosure) justifies a longer set of questions'

My long-held view is that questionnaires normally generate more heat than light. The litmus test for the usefulness of a questionnaire is how often one refers to the replies in preparing cross-examination: generally, the answer is, very rarely.

There is no 'one size fits all' guidance for how to prepare a questionnaire. Strictly speaking, although this is almost never done in practice, a questionnaire should be structured around a concise statement of issues and not the paragraphs of a Form E (FPR 9.14(5)(c)) – the significance being that a questionnaire should be focused on the issues, not a general audit of the Form E.

Drafted questions need, first, to pass muster with a court; secondly, to be directed at adducing something useful by way of an explanation or documentation, e.g. relating to gaps in the disclosure (e.g. missing bank statements), or seeking narrative responses in relation to issues such as earning capacity or housing need. When it comes to probing unexplained entries on bank statements, a good rule is 'less is more', i.e. zero in on the half dozen or dozen most egregious examples rather than interrogating hundreds (and avoid the general trawl, e.g. 'please explain all credits and entries over £500'). Generally speaking, it is helpful (as with preparing cross-examination) to project forwards to what would be the main issues at a final hearing, and plan accordingly.

Examples of questions that most judges will strike out are:

- questions about schedules of outgoings, frequently on the basis that the questions amount to a challenge (early cross examination) rather than a genuine attempt to seek clarification;
- repetitive questions from the Form E ('please confirm you have no other bank accounts');
- questions that duplicate directions, relating to property particulars, mortgage capacity;
- questions that seek chapter and verse about the operation of a company in circumstances where a forensic accountant is being instructed to prepare a report (i.e. the expert will make his/her own enquiries and will seek relevant documentation).

The court does not normally permit replies 'saving just exception' as this would derogate from the judicial task to actively case manage: FPR 9.15(2)(a) and it stores up problems in the future, since the status and enforceability of a question which allows for just exception is moot.

As to schedules of deficiency, bear in mind the difference between a deficient answer, which arguably can be resolved without a specific direction or permission, and a follow-up or supplemental question which, strictly speaking, cannot without the court's permission: FPR 9.16(1) provides that:

> '(1) Between the first appointment and the FDR appointment, a party is not entitled to the production of any further documents except –
>
> (a) in accordance with directions given under rule 9.15(2) [i.e. answering the questionnaire]; or
>
> (b) with the permission of the court.'

(4) Experts

The test for permission, as everyone knows, is necessity (FPR 25.4(3)) which, as Sir James Munby explained, means

'necessary'.[9] The court must have regard to checklist of factors at FPR 25.5(2) including (e) cost.

The *President's Memorandum on Experts* (4 October 2021) sets out four governing criteria: (i) will the proposed expert evidence assist the court; (ii) does the witness have the necessary knowledge and experience; (iii) is the witness impartial; and (iv) is there a reliable body of knowledge to underpin the expert's evidence, applying *Kennedy v Cordia (Services)* LLP [2016] UKSC 6.

The maximum length for an expert report is 40 pages (not including exhibits): FPR PD 27A, at para 5.2A.1; subject to court specifically directing otherwise. When it comes to the detail of directing an SJE, a cap may be imposed on the proposed expert's fees: FPR 25.12(5), *Loggie v Loggie* [2022] EWFC 2. When it comes to clarification questions, these 'must' be for that purpose alone, copied to the other side, and put 10 days after the report is received: FPR 25.10(2).

(4a) Expert pensions actuaries/PODE

Pension reports range from being very useful in some situations, e.g. equalising incomes in retirement, particularly where there are Armed Forces or services pensions which are notoriously difficult to value; to being of limited utility in a case where the parties are some way off retiring and there is going to be a clean break (e.g. where pensions can be divided by reference to notional capital/cash equivalent value).

Bear in mind proportionality. According to the latest PAG2 report, a PODE report is rarely justified where the parties are under 40 or combined pensions are under £100k (see pp 31–32). PAG2 also reflects the line of cases that PODE reports may not be required in bigger money cases, e.g. Moor J in *CMX v EJX (French Marriage Contract)* [2022] EWFC 136, who commented as follows:

> '[50] … If assets are to be divided equally, they should be divided equally. In general, there is no justification for awarding more to one party because they are younger or have a longer life expectancy. Both parties should share the fruits of the marriage equally. Moreover, in my experience, the only thing that can be said is that life hardly ever goes to plan, whether it be one party living far longer than expected or another remarrying immediately. It follows that I have become very troubled by directions that ask a pensions actuary to calculate a division on the basis of equality of income in retirement. Apart from the fact that such reports tend to be very expensive, the simple fact is that such a direction almost enshrines the Duxbury paradox into practice. It cannot be right, in general, that the younger you are, the greater your award. In any event, it has no place whatsoever in equal division cases.'

The above guidance needs to be read with some caution, i.e. it related to a substantial asset case where the assets were £24m. But if the outcome is going to be based on equal sharing (as opposed to a needs-based outcome) query if there's any need in a detailed report.

(4b) Forensic accountants/company valuations

A forensic accountant will typically be directed to address the following: the value of company/shareholding, liquidity (i.e. can any surplus funds be withdrawn, and if so when), tax and sustainable level of remuneration. Issues of discount (whether held as quasi partnership) are factual matters for the court. Only rarely will a forensic accountancy report involve a detailed audit (i.e. checking the veracity of the accounts) due to issues of proportionality.

If there is to be an SJE report relating to the business, this might militate the need for the shareholding spouse replying to a lengthy questionnaire seeking disclosure of company documents – since the SJE will be making his/her own enquiries.

In *HO v TL* [2023] EWFC 215 Peel J set out seven legal principles relating to the court's treatment of company shareholdings (see [21]–[27]), including (ii) that 'valuations of private companies can be fragile and uncertain'.

(4c) Employment consultant

Occasionally one party might seek permission to adduce a report from an employment consultant, in relation to the other's earning capacity, in which case they will need to deal with the strong condemnation of the practice by Moor J in *Buehrlen v Buehrlen* [2017] EWHC 3643 (Fam):

> '[20] On any application for financial remedies, the judge has to apply s.25 of the Matrimonial Causes Act and has to make an assessment of the earning capacity of both parties, including any increase in such earning capacity as it would be reasonable for the litigant to take steps to acquire in the foreseeable future. That is what judges do every single day of the week. How do they do it? They do it by listening to cross examination; by the provision of advertisements for suitable jobs; by the results of job applications; by considering the CVs of the parties; and the like. They assess all this evidence. It is extremely rare for an expert to be called. Indeed, that was the case before the rules changed to require necessity.
>
> [21] Is it necessary for a judge to hear evidence from an expert? I have already indicated in this judgment that I take the opposite view to Mr Buehrlen. I fear that giving permission to rely on this evidence will make it less likely that this case will settle rather than more likely. Such evidence tends to polarise parties. The evidence is then challenged whether by questions to the expert or an alternative report.'

(5) Litigants in person and filing documents

It is important to bear in mind that litigants in person have no access to the portal (aka the Judicial Case Manager). Instead, litigants in person are expected to send hard copies of their documents to the bulk scanning centre at HMCTS Divorce and Dissolution Service, PO Box 13226, Harlow CM20 9UG, with a covering letter that **must** give the 16-digit case number and identify the case as 'Financial Remedy'. Given the problems faced by self-represented parties it may be helpful to include these details on the First Appointment order.

(6) Joinder

Where it is 'desirable' to join third parties, directions should be made with a view to dealing with any potential intervenor claim (see FPR 9.26B, *TL v ML* [2005] EWHC 2860 (Fam) at [34]–[36]).

(7) Vulnerable parties

See below. While the need for participation directions may be more pressing at a final hearing, questions of vulnerability have to be considered at every stage and provision may have to be made for a Ground Rules hearing.

Conduct

In *OG v AG* [2020] EWFC 52 Mostyn J described how conduct arises in four distinct scenarios: (1) gross and personal misconduct which only arises very exceptionally, (2) add back, (3) litigation misconduct, (4) drawing adverse inferences – where the exercise relates to the process of computation rather than distribution.

More recently, Peel J has provided comprehensive guidance about the procedure of raising conduct in *Tsvetkov v Khayrova* [2023] EWFC 130, concluding that the court at First Appointment may exercise powers, pursuant to FPR 4.1(l), to exclude that from consideration. Bearing in mind the significance of such a step (and the potential unhappiness of a lay client, being told that they cannot even raise the allegation) it is necessary to cite at length the following passage:

> '[43] A party asserting conduct must, in my judgment, prove: (i) the facts relied upon; (ii) if established, that those facts meet the conduct threshold, which has consistently been set at a high or exceptional level; and (iii) that there is an identifiable (even if not always easily measurable) negative financial impact upon the parties which has been generated by the alleged wrongdoing. A causative link between act/omission and financial loss is required. Sometimes the loss can be precisely quantified, sometimes it may require a broader evaluation. But I doubt very much that the quantification of loss can or should range beyond the financial consequences caused by the pleaded grounds. This is stage one.
>
> [44] If stage one is established, the court will go on to consider how the misconduct, and its financial consequences, should impact upon the outcome of the financial remedies proceedings, undertaking the familiar s25 exercise which requires balancing all the relevant factors. This is stage two.
>
> [45] I have noted an increasing tendency for parties to fill in Box 4.4 (the conduct box) of their Form E by either (i) reserving their position on conduct or (ii) recounting a litany of prejudicial comments which do not remotely approach the requisite threshold. These practices are to be strongly deprecated and should be abandoned. The former leaves an issue hanging in the air. The latter muddies the waters and raises the temperature unjustifiably.
>
> [46] In my view, the following procedure should normally be followed when there are, or may be, conduct issues:
>
> i. Conduct is a specific s25 factor and must always be pleaded as such. It is wholly inappropriate to advance matters at final hearing as being part of the general circumstances of the case which do not meet the high threshold for conduct. That approach is forensically dishonest; it impermissibly uses the back door when the front door is not available: para 29 of *RM v TM* [2020] EWFC 41.
>
> ii. A party who seeks to rely upon the other's iniquitous behaviour must say so at the earliest opportunity, and in so doing should; (a) state with particularised specificity the allegations, (b) state how the allegations meet the threshold criteria for a conduct claim, and (c) identify the financial impact caused by the alleged conduct. The author of the alleged misconduct is entitled to know with precision what case he/she must meet.
>
> iii. Usually, if relied upon, the conduct allegations should be clearly set out at Box 4.4 of a party's Form E which exists for that very purpose.
>
> iv. The court is duty bound by FPR 2010 1.1 to have regard to the overriding objective
>
> v. In furtherance of the overriding objective, it is required to identify the issues and empowered to determine which issues should be investigated. At FPR 2010 1.4 […]
>
> vi. The court should determine at the First Appointment how to case manage the alleged misconduct. In my judgment, in furtherance of the overriding objective and FPR 2010 1.4, the court is entitled at that stage to make an order preventing the party who pleads conduct from relying upon it, if the court is satisfied that the exceptionality threshold required to bring it within s25(2)(g) would not be met. The court should also take into account whether it is proportionate to permit the allegation to proceed, for a pleaded conduct claim usually has the effect of increasing costs and diminishing the prospects of settlement. Finally, the court should take into account whether the allegation, even if proved, would be material to the outcome.
>
> vii. Of course, in some instances alleged conduct may rear its head after provision of Forms E. One obvious instance is where a party wantonly dissipates monies in the lead up to trial. Should a party seek to advance a conduct claim, this must be brought before the court as soon as possible so that it can be case managed appropriately.
>
> viii. Wherever conduct is relied upon, and the court permits it to be advanced at trial, it should be pleaded. It will be for the court to decide how best to manage the issue. Usually, an exchange of short, focussed narrative statements will suffice (page limits are an indispensable tool in the judicial armoury and should be deployed) but such statements must set out in particularised detail (a) the facts asserted, (b) how such facts meet the conduct threshold, and (c) what consequential financial loss or detriment has occurred.
>
> [47] Finally, and for the avoidance of doubt, this suggested procedural route will not be necessary or appropriate where a party relies only on litigation misconduct. The court will ordinarily be able to deal swiftly with costs at the hearing in time honoured fashion.'

What about coercive control?

Conduct has traditionally involved an extremely high hurdle (i.e. 'the gasp factor'[10]), and attempts thus far to bring 'coercive control' into account (at a level that does not meet the conventional s 25(2)(g) standard) have thus far been unsuccessful: see *Traharne v Limb* [2022] EWFC 27, where the allegations were found not proven.

In light of developments in other areas of family law (e.g. FPR PD 12J, the enactment of the Domestic Abuse Act 2021[11]), some have questioned whether the FRC's restrictive approach to conduct should be reviewed. To date, the high water is a Northern Irish case, *Seales v Seales* [2023] NIMaster 6, which draws from the Court of Appeal's deci-

sion in *Re H-N & Ors* [2021] EWCA Civ 448, in which Master Bell opined at [42] that 'expressions used by lawyers, such as "the gasp factor" … should now be regarded as overstating the position and raising the high threshold above what Parliament actually intended … [there is] a clear obligation on the court in ancillary relief proceedings to recognise cases of coercive control because it would be inequitable to disregard that coercive control'.

However, in *N v J* [2024] EWFC 184 Peel J exercised case management powers to exclude allegations of conduct, and re-confirmed the 'high bar' that a party raising conduct must overcome; at [39]:

> 'i) The high bar to conduct claims established in the jurisprudence (cases referred to in this judgment are examples) is undisturbed by the recent focus on domestic abuse in society and the family justice system.
>
> ii) I accept that the statute does not specifically refer to a financial consequence, and it is therefore wise not to rule out completely the theoretical possibility of conduct being taken into account absent such a financial impact. Nevertheless, as the review of authorities above suggests, such cases will be vanishingly rare.
>
> iii) The preponderance of authority clearly militates firmly in favour of financial consequences being a necessary ingredient of a conduct claim. This applies as much to domestic abuse allegations as to other types of personal misconduct.
>
> iv) The alleged conduct (even if it reaches the threshold and has a financial consequence) must be material to the outcome. In the vast majority of cases, a fair outcome is ascertained by reference to the other s25 criteria (including needs and impact on earning capacity) without requiring the court to examine conduct.
>
> v) To inquire into conduct must be proportionate to the case as a whole.
>
> [40] In short, the dicta in both *OG v AG (supra)* and *Tsvetkov v Khayrova (supra)* which attempt to distil the learning on both the law and procedure, remain, in my judgment, sound. Courts should continue to case manage conduct allegations robustly at the earliest possible opportunity.'

The FDR

There probably isn't much to say about preparing for an FDR, save that the Efficiency Statement confirms that 'it is unacceptable for the court to be presented at the FDR or final hearing with competing asset schedules and chronologies' (§ 13). Given the layout of the ES2, which is all but impossible to read in hard copy, it is generally a good idea to send the court the Excel spreadsheet as a separate file.

As a matter of good practice, where there is an issue about housing need, which invariably there will be, it is good practice to: (a) ensure that the particulars relied upon are actually consistent with one's own case; (b) produce a map which identifies where the properties are located; (c) include full particulars which have a floor map – so the court can actually see the size of the properties; and (d) think about *objective* factors (such as catchment areas for local schools, drive time to work, etc) so the FDR tribunal isn't faced with each advocate giving what amounts to evidence by proxy (my client says this is a rough area, my client would lose her support network, etc). I have provided further thoughts on this perennial evidential issue in a blog on housing need ('Housing Need: A Plea for Change'[12]).

Private FDR

If the parties propose a private FDR, and the court agrees to this course, the order permitting this course should: (a) identify who is being instructed as tribunal; (b) dispense with the in-court FDR; (c) state that the private FDR once fixed may only be adjourned by agreement or pursuant to an order of the court; and (d) provide that the matter shall be listed for a mention shortly after the private FDR, with this hearing to be vacated if a consent order is filed and approved by a judge in advance of the hearing. The order will normally be made at the first appointment. If the identity of the private FDR evaluator has not been agreed by that point the parties must bring to the appointment details, including the fees, of their proposed evaluator. If the identity of the evaluator cannot be agreed at the appointment the court will resolve the issue: Efficiency Statement, § 15. Also see guidance in *AS v CS (Private FDR)* [2021] EWFC 34, e.g. where one party seeks to back out of a private FDR (not without consent or the court's permission) – see Mostyn J at [16].

Directions after the FDR

A key difference between a court FDR and a private FDR is that, with the former, the court will be making directions, whereas in the latter the tribunal has no power to deal with directions at all. The FDR judge can have no further involvement in the case, save to make '… a further directions order' (FPR 9.17(2)). There remains some doubt as to the propriety of an FDR judge dealing with contentious directions such as an application to instruct a second expert (i.e. a *Daniels v Walker* application). See the recent blog of Nicholas Allen KC on the FRJ website ('*Myerson No 1* and FPR 9.17(2): What *Can* the FDR Judge Actually Do?'[13]).

(1) Open proposals

Unless a specific direction is made to the contrary, the rules provide for two rounds of open proposals: (1) first, after FDR, normally 21 days (FPR 9.27A); and (2) before the final hearing, 7 and 14 days before the final hearing (FPR 9.28).

(2) Listing to final hearing and PTR

As a general rule of thumb, listing a final hearing for 1 day will place the court under significant pressure unless the oral evidence can be heard in the morning. If the court is still hearing evidence after 2 pm, there will probably be insufficient time for closing submissions, consideration and delivery of judgment.

Where the final hearing is to be a PTR it must be listed, ideally before the trial judge, where the final hearing is listed for 3 days or more (Efficiency Statement, § 17). Where a party is relying on auditing spreadsheets (i.e. showing how a party has spent capital), this must be dealt in advance (i.e. at the PTR) and not on the morning of the final hearing:

> '[1(v)] … I deprecate the practice, which appears to be

> prevalent, of lawyers producing at the eleventh hour spreadsheet analysis of expenditure during the marriage … If an exercise such as this is to be relied upon, it must be provided well in advance … before the PTR.' *WC v HC (Financial Remedies: Agreements)* [2022] EWFC 22 (Peel J)

(3) Trial templates

The disconnect between advocate and judge is never so obvious as when it comes to drafting trial templates. It is hard to overstate quite how hopeless some of these are. I have dealt with a case where the template allocated longer for examination in chief than cross examination, where (after a 2-day hearing) judgment was meant to be prepared and delivered in an hour.

The main point is to be realistic and, to quote one seasoned district judge who sat at the PRFD, to make the judge your friend, i.e. ensure that the court has sufficient time both to read into the case and prepare a judgment.

The Efficiency Statement, § 19 provides that in every case a template '**must**' be prepared, to: (a) allow a reasonable and realistic time for judicial reading and judgment writing; (b) not normally allow longer than 30 minutes for opening; and (c) not normally allow for any evidence-in-chief. Pursuant to FPR 22.6(2), the parties' section 25 statements will normally stand as their evidence-in-chief.

A template should *not* be agreed on the expectation that a case will either have to go part-heard or a reserve judgment will be required: see *Augousti v Matharu* [2023] EWHC 1900 (Fam) per Mostyn J:

> '[31] Going part-heard is a bane with potentially damaging consequences on a number of fronts. One consequence may well be that another case will be thrown out of the list. Another is that parties, as here, often seem to think that the delay opens the door to the adducing of further evidence. A further downside is that the evidence about facts in issue begins to fade from the judicial memory. And obviously, circumstances can change during the interregnum.
>
> [32] What all this means is that at the pre-trial review there must be the most careful examination of the time estimate, and of the trial template, to ensure that going part-heard at trial is avoided at all costs…'

(4) Section 25 witness statements

Generally, as to the content of a witness statement, see FPR Part 22, *WC v HC (Financial Remedies: Agreements)* [2022] EWFC 22 at [1(ii)], Efficiency Statement, § 11 and President's Memorandum on Witness Statements, in particular:

> '1. Too many witness statements are prepared in breach of proper professional standards …
>
> 7. A witness statement must not: a. quote at any length from any document; b. seek to argue the case; c. take the court through the documents in the case; d. set out a narrative derived from the documents; e. express the opinions of the witness; or f. use rhetoric …
>
> 15. A witness statement must be as concise as possible without omitting anything of significance.
>
> 16. As a general standard, a witness statement should not exceed 15 pages in length (excluding exhibits). This page limit is a statement of best practice and does not derogate from the limit of 25 pages in PD 27A para 5.2A.1, which should be regarded as a maximum.'

- Conduct should not be covered in a s 25 statement (even though it appears as one of the factors), particularly when they are to be exchanged simultaneously. Where it is being pursued, separate directions should be made for evidence on conduct (setting out what is relied upon, the basis, and what effect the alleged conduct should have) with the respondent then having the opportunity to respond. Also, per *Tsvetkov v Khyarova* (see above), permission should be sought.
- It may be helpful to identify in the directions which issues (or sub-sections in s 25) are being relied upon, together with the maximum page count: best practice is 15 pages; the maximum is normally 25 pages (Efficiency Statement, § 22(j)).

(5) Vulnerable parties/ground rules hearing

The court is under a duty to identify any party who is vulnerable and to make, pursuant to FPR 3A and FPR PD 3AA, participation directions, e.g. directing that screens should be in place, that evidence is heard remotely, making provision for regular breaks during the evidence, or in some cases making provision for an intermediary to report on assisting with communication. In the writer's experience, where an issue arises as to whether, for reasons of vulnerability, a hybrid hearing might take place, it is sometimes preferable for the entire hearing to be remote, rather than the complexities that can arise with one party physically in court while the other is remote.

Effective from 21 July 2022, s 65 Domestic Abuse Act 2021 introduced Part 4B (ss 31Q–31Z) into the Matrimonial and Family Proceedings Act 1984, which prohibits cross-examination by perpetrators and alleged perpetrators of domestic abuse ('P'). Consequently, where all other options are exhausted (such as P instructing lawyers, or the court appointing a Qualified Legal Representative: as to which, see *AXA v BYB* [2023] EWFC 251 (B) and the View from the President's Chambers from July 2023 which sets out the problems with the QLR procedure), provision might have to be made for the perpetrator lodging with the court (but **not** the other side) draft cross-examination questions. The problems and potential unfairness of such a direction will be self-evident: cross-examination is generally difficult and involves a number of rules in terms of what can and cannot be asked (e.g. anything relating back to the FDR); many experienced advocates would bridle at having to write out longhand cross-examination questions in advance of a final hearing; it will be all the more difficult for a litigant in person who has limited knowledge of the law, who will likely struggle to understand what issues are going to be relevant, or what normally can or cannot be asked.

Where the court makes provision for such a direction requiring draft questions to be lodged, it may also need to consider what other directions to mitigate the potential difficulties, e.g.:

- providing that the paginated bundle and the parties' open proposals should be filed *before* P lodges his proposed questions;
- requiring that P provides a page reference for every

proposed question, to enable the court to understand what documents are being referred to;
- in an appropriate case, setting out some broad guidance as to which areas P will be expected to deal with in his questions.

(6) Daniels v Walker *applications*

Where a party disagrees with an SJE's report, the first port of call will invariably be raising clarification questions. Thereafter, a dissatisfied party may pursue a second expert's report, although as a general rule of thumb this is an exceptionally difficult application to pursue at the Family Court.

There has, until recently, been a dearth of FR authority on the applicability of *Daniels v Walker* [2000] EWCA Civ 508. In *GA v EL* [2023] EWFC 187 Peel J confirmed that the test would be whether additional expert evidence was necessary, having regard to a number of civil authorities:

> '[28] Whether the further expert evidence is "necessary" will be informed by the approach advanced in *Daniels v Walker* [2000] EWCA Civ 508 and several subsequent cases including *Cosgrove & Anor v Pattison* [2001] CPLR 177, *Peet v Mid-Kent Healthcare NHS Trust* [2001] EWCA Civ 1703 and *Kay v West Midlands Hinson v Hare Realizations Ltd.* From these authorities, I draw the following principles:
>
> (i) The party seeking to adduce expert evidence of their own, notwithstanding the fact that a single joint expert has already reported, must advance reasons which are not fanciful for doing so
>
> (ii) It will then be for the court to decide, in the exercise of its discretion, whether to permit the party to adduce such further evidence.
>
> (iii) When considering whether to permit the application, the following non-exhaustive list of factors adumbrated in *Cosgrove & Anor v Pattison (supra)* may fall for consideration:
>
> "… although it would be wrong to pretend that this is an exhaustive list, the factors to be taken into account when considering an application to permit a further expert to be called are these. First, the nature of the issue or issues; secondly, the number of issues between the parties; thirdly, the reason the new expert is wanted; fourthly, the amount at stake and, if it is not purely money, the nature of the issues at stake and their importance; fifthly, the effect of permitting one party to call further expert evidence on the conduct of the trial; sixthly, the delay, if any, in making the application; seventhly, any delay that the instructing and calling of the new expert will cause; eighthly, any special features of the case; and finally, and in a sense all embracing, the overall justice to the parties in the context of the litigation".
>
> (iv) For my own part, I would draw particular attention to the words "the overall justice to the parties in the context of the litigation" which seems to me to encapsulate neatly the court's task.'

Position statements

Length and content

The point has already been made that, from a judicial point of view, position statements are far too long. Nothing calls into question the judicial will to live quite like the arrival of a 20- or 30-page position statement, densely detailed, reciting a list of complaints without any clear overview of what actually are the issues in a case.

Practitioners often overlook the guidance that they 'should be concise' and as best practice should not exceed 6 pages (First Appointment), 8 pages (interim hearing), 12 pages (FDR), 15 (final hearing): Efficiency Statement, § 24(a). The maximum page limit is as per FPR PD 27A, para 5.2A.1.

This guidance also provides that a position statement should 'define and confine the areas of controversy … not include extensive quotations from documents' and should include a summary of the parties' open negotiations: Efficiency Statement, § 24(b–h).

Citation of legal authority

First, state the proposition of law; then identify the parts of the authority that support the proposition, *without* extensive quotation: Efficiency Statement, § 24. Give the neutral citation where it exits (post-11 January 2001)[14] and where possible give the Official Law Report citation (i.e. [2022] Fam 1[15]). There is no need to cite multiple authorities that all make the same point, a practice recently condemned by the Court of Appeal in *University of Essex v Allianz Insurance Plc* [2023] EWCA Civ 1484 at [1], per Coulson LJ:

> 'leading counsel on both sides referred to the authorities in a measured and controlled way and spared the court *the incontinent citation of numerous vaguely relevant causation authorities*, all too common in appeals of this type. We are very grateful to them'.

What cannot *be cited as an authority?*

It is important to bear in mind the difference between a judgment that has been published on the National Archives/BAILII, and a judgment that can properly be cited as an authority. While all judges in the Family Court have been encouraged to publish 10% of their judgments online (see Confidence and Confidentiality, § 53), judgments at DDJ, DJ, circuit judge or recorder level cannot generally be cited unless they purport to establish a new principle, or extend the present law (or unless there is no available decision at a higher level). Following the Lord Chief Justice's Practice Direction on Citation of Authority (9 April 2001), § 6, the following cannot be cited as authority:

- applications attended by one part only;
- permission to appeal;
- decisions of circuit judge and below unless there is no available decision at a higher level.

Costs

The procedural rules about lodging costs estimates are set out at FPR 9.27. The general rule is that there will be no order as to costs in FR proceedings (FPR 28.3(5)).[16] The points to note are as follows:

- a different order will be made in cases of litigation misconduct, which includes where a party has failed to negotiate openly and reasonably (see above);
- the court may also make orders adjusting for a gross disparity between the parties' costs. In *YC v ZC* [2022]

EWFC 137 W's costs were almost three-times as high as H's (£463k/£159k) and the court added back £200k:

> '[42(viii)] …The court should be slow to allow the grossly disproportionate spender (and the solicitors representing such a person) to feel that there is no check on legal costs spending. A proportionality assessment taking into account the costs being incurred in the context of what is in reality at stake in the dispute is surely an essential requirement at all stages … In obvious cases, and absent any proper explanation for the differential in spending, the court can deal with any unfairness arising from the differential in legal costs spending by making an adjustment in the court's asset schedule before distribution, for example by excluding a portion of the over-spender's unpaid costs and/or adding back a portion of the over-spender's costs already paid, thus appropriately penalising the over-spender without actually making an inter partes order for costs'

- Increasingly, costs arguments may turn on a refusal to engage in NCDR with the coming amendments to the rules and in light of cases such as *Mann v Mann* [2014] EWHC 537 (Fam) and the Court of Appeal's decision not to follow the *Halsey* rule in *Churchill v Merthyr Tydfil* [2023] EWCA Civ 1416 whereby parties can now be ordered to attend NCDR.

Costs and open proposals

FPR 28.3(6) provides that costs orders might be made where appropriate, in case (FPR 28.3(7)) of litigation misconduct, having regard to the terms of ('b') open proposals. FPR PD 28A, para 4.4 provides that:

> '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.'

There are a growing number of cases in which the court can take a party's failure to make a reasonable open proposal into account on costs, e.g. the leading decision of Mostyn J in *OG v AG* [2020] EWFC 52, who commented 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.'

Wasted costs and indemnity costs

> '"When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean"' (Lewis Carroll, *Through the Looking Glass*)

Lastly, as a general observation, practitioners should resist the temptation to habitually threaten 'wasted costs' and 'indemnity costs', without recognising that these terms have specific meanings in law, i.e.:

- a wasted costs order is payable *by a legal representative* as a result of improper, unreasonable or negligent acts or omissions (Senior Courts Act 1981, s 51(6), (7)) – not the same as a costs order following a hearing that turned out to be a waste of time;
- indemnity costs involve any doubt on an assessment of costs being resolved in favour of the receiving party (as opposed to the general basis, where doubts are resolved in favour of the paying party); in other words, the receiving party does not have to and only made where the conduct is – which is rare in practice. The principles were summarised by Coulson J in *Elvanite Full Circle Ltd v AMEC Earth & Environmental* [2013] 4 Costs LR 612 at [16]:
  - (a) 'Indemnity costs are appropriate only where the conduct of a paying party is unreasonable to a high degree. "Unreasonable" in this context does not mean merely wrong or misguided in hindsight': see Simon Brown LJ (as he then was) in *Kiam v MGN Ltd* [2002] 1 WLR 2810.
  - (b) The court must therefore decide whether there is something in the conduct of the action, or the circumstances of the case in general, which takes it out of the norm in a way which justifies an order for indemnity costs: see Waller LJ in *Excelsior Commercial and Industrial Holdings Ltd v Salisbury Hammer Aspden and Johnson* [2002] EWCA Civ 879.
  - (c) The pursuit of a weak claim will not usually, on its own, justify an order for indemnity costs, provided that the claim was at least arguable. But the pursuit of a hopeless claim (or a claim which the party pursuing it should have realised was hopeless) may well lead to such an order: see, for example, *Wates Construction Ltd v HGP Greentree Alchurch Evans Ltd* [2006] BLR 45.
  - (d) If a claimant casts its claim disproportionately wide, and requires the defendant to meet such a claim, there was no injustice in denying the claimant the benefit of an assessment on a proportionate basis given that, in such circumstances, the claimant had forfeited its rights to the benefit of the doubt on reasonableness: see *Digicel (St Lucia) Ltd v Cable and Wireless PLC* [2010] EWHC 888 (Ch).

Notes

1 *O'D v O'D* [1976] Fam 83 per Ormrod LJ.
2 Family Proceedings Rules 1991 (SI 1991/1247), 2.52–2.68, etc.
3 As discussed by Baroness Hale in *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24 at [139].
4 I.e. Standard Procedure (FPR 9.12 onwards) applies, no third-party intervenors, no interim applications.
5 As opposed to the older Efficiency Statement that applies in High Court cases dated 1 February 2016.
6 Available at https://familybrief.org/
7 Efficiency Statement, § 10.
8 There are no references in the FPR 2010 to an 'FDA' or a 'First Directions Appointment' in the context of an FR claim. The term exists in relation to adoption proceedings, e.g. FPR PD 14B. Thanks to Nicholas Allen KC for first correcting me on this point.
9 'What is meant by "necessary." … The short answer is that "necessary" means necessary. It is, after all, an ordinary

English word … If elaboration is required, what precisely does it mean? That was a question considered, albeit in a rather different context, in *Re P (Placement Orders: Parental Consent)* [2008] EWCA Civ 535, paras [120], [125]. This court said it "has a meaning lying somewhere between 'indispensable' on the one hand and 'useful', 'reasonable' or 'desirable' on the other hand", having "the connotation of the imperative, what is demanded rather than what is merely optional or reasonable or desirable."' *Re H-L* [2013] EWCA Civ 655 per Munby P.

10 The expression of Nicholas Mostyn QC in *S v S (Non Matrimonial Property: Conduct)* [2006] EWHC 2793 (Fam), [2007] 1 FLR 1496.

11 See the decision of HHJ Reardon *DP v EP (Conduct; Economic Abuse; Needs)* [2023] EWFC 3.

12 Available at https://familybrief.org/2022/08/24/housing-need-a-plea-for-change/

13 Available at https://financialremediesjournal.com/content/em-myerson-no-1-em-and-fpr-9-17-2-what-em-can-em-the-fdr-judge-actually-do.2cf79a96b51248c89db59f5ca907adf4.htm

14 Practice Direction (Judgments: Form and Citation) [2001] 1 WLR 194, para 2.3.

15 Practice Direction: Citation of Authority [2012] 1 WLR 780.

16 As defined by FPR 28.3(4)(b) excluding interim maintenance/MPS, interim orders and cases where the 'clean sheet' applies, such as intervenor claims.

Demeanour and Denial (or Don't Mention the Data)

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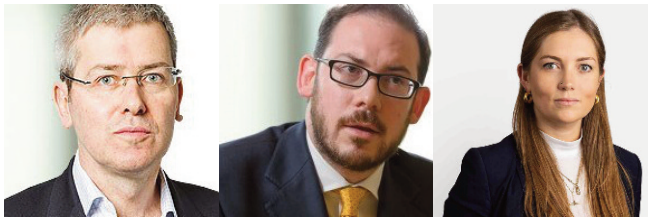

In his groundbreaking 1925 work, *Die Verneinung*, psychoanalyst Sigmund Freud postulated the existence of the psychological defence mechanism 'denial', whereby facts too painful to process or accept are rejected. Examples of its applications abound. It provided the starting point for Ernest Becker's *The Denial of Death* – in which he observes how we manage our fear of mortality by 'tranquilising with the trivial' or pursuing 'an immortality project'. We see it on the stage in Arthur Miller's *All My Sons* in Kate Keller's denial of what she knows to be true about her husband Joe's shipping of defective aircraft parts. And we see it throughout history as explored by Catherine Hall and Daniel Pick in their excellent article 'Denial in History; Thinking about Denial' in *History Workshop Journal*, Volume 84, Autumn 2017, 1–23. But do we find it closer to home?

Our system of fact finding is predicated on the ability of judges to differentiate the truthteller from the liar, not just by reference to analysis of documentation and the corroboration or otherwise which such material provides, but by that special judicial skill of being able to analyse demeanour and identify a liar on the back of it. It embraces Freud's 1905 aphorism, 'No mortal can keep a secret. If his lips are silent, he chatters with his finger-tips; betrayal oozes out of him at every pore'.

But what if that wasn't true?

What if demeanour was no guide to truth telling? What if the odds of telling a dishonest witness from an honest witness on the back of how they present in the witness box was little better than predicting the toss of a coin?

The issue arose for consideration in front of Mostyn J in *Cazalet v Abu-Zalaf* [2022] EWFC 119, *sub nom OC v WAZ* [2023] 1 FLR 1132, in which he made findings of fact about reconciliation (based on his assessment of the oral and written evidence, alongside many hundreds of pages of texts, *WhatsApp* messages and emails, which he had read), and where he observed at [46] and [47]:

> '[46] The wife was by far the better witness. Her evidence was generally clear and given in reasonable tones. She generally answered questions directly. In contrast the quality of the evidence of the husband was poor. He was combative, evasive, rhetorical, strident and in some respects obviously untruthful. For example, he flatly denied that the wife had a key to his home in Belgravia. Yet there is a *WhatsApp* message from him in which he is expressly states that she has the keys to his house.
>
> [47] However, this case is a good example of the perils of placing emphasis on the demeanour of a witness, or placing too great a reliance on a witness's irrelevant lies or other low conduct, when finding facts or exercising a discretion. In my judgment, the demeanour of a witness when giving evidence is unlikely to be a reliable aid either to finding facts, or exercising a discretion on uncontested facts. It is not just that a dishonest witness may have a very persuasive demeanour – that is of course, the first trick in a conman's repertoire. But the opposite side of the coin is equally problematic in that a truthful witness may unfortunately have a classically dishonest demeanour. It is obvious to me that over-reliance on the "quality" of the evidence of a witness, good or bad, can lead to facts being found, or discretion exercised, by reference to influences that are irrelevant.'

It was a topic to which the learned judge retuned in *Baker v Baker* [2023] EWFC 136, [2024] 1 FLR 1081 at [15]–[18] where he cited [46] and [47] of *Cazalet* and said (at [17]):

> 'What I was trying to say was that, in common with Lord Bingham and Lord Leggatt, I consider demeanour to be a highly unreliable method of judging veracity. The court has to decide the case on the evidence, and the evidence comprises the documentary material and the spoken words of the witnesses. I cannot accept that, in any material way, the evidence includes the thespian performance with which witnesses speak the words of their oral testimony. Thus, in *Cazalet v Abu-Zalaf*, although that wife was by far the better witness in terms of demeanour, I found on the evidence of both parties that (a) the court had correctly found that the wife could not reasonably be expected to live with the husband and had therefore rightly pronounced decree nisi on her behaviour petition, and (b) the fact that over a year later they chose to resume their dismal, toxic, cohabitation did not undermine in the slightest the objective judgment enshrined in the decree that they could not reasonably be expected to live together.'

When Cazalet was appealed (*Cazalet v Abu-Zalaf* [2023] EWCA Civ 1065, [2024] 2 WLR 890), King LJ (at [59]–[64]) was critical of Mostyn J for not placing more weight on the demeanour and ostensible credibility of the witnesses, and not following the Court of Appeal in *Kogan v Martin & Ors* [2019] EWCA Civ 1645, [2020] FSR 3 which critiqued the decision of Leggatt J (as he then was) in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) and concluded that:

> 'It is one of a line of distinguished judicial observations

> that emphasise the fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed. Earlier statements of this kind are discussed by Lord Bingham in his well-known essay *The Judge as Juror: The Judicial Determination of Factual Issues* (from *The Business of Judging*, Oxford 2000). But a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all of the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence.'

Mostyn J, the court suggested, had fallen into error by *mirroring* the trial judge in *Kogan*, a case in which,

> 'as a consequence of his understanding of *Gestmin*, the first instance judge had regarded Leggatt J's observations as "an admonition that the best approach for a judge is to place little if any reliance at all on the witnesses' recollections of what was said in meetings and conversations and instead base factual findings on inferences drawn from documentary evidence and known or probable facts".'

But to these authors (admittedly two of whom were on the losing side in *Cazalet* in the Court of Appeal) the criticism of Mostyn J's wise reminder to himself of the warning of *over*-reliance on 'demeanour' (expressed as cautioning himself against 'over-reliance on the "quality" of the evidence of a witness, good or bad, [which] can lead to facts being found, or discretion exercised, by reference to influences that are irrelevant)' seems unfair. The approach of Mostyn J to consider six of the *seven* principal tests or factors applicable in assessing whether a witness is lying (listed in *Phipson on Evidence* (Sweet & Maxwell, 20th edn, 2022), paras 45–18), namely 'The demeanour of the witness', was a model of its kind. Referred to in *Phipson* at paras 45–22 as 'probably having been given too much emphasis in assessing the credibility of a witness', the limitations of fact-finding based too heavily on demeanour are increasingly acknowledged.[1] As Atkin LJ observed in *Société d'Avances Commerciales (SA Egyptienne) v Merchants' Marine Insurance Co (The 'Palitana')* (1924) 20 Ll L Rep 140 at 152, 'I think that an ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of evidence with known facts, is worth pounds of demeanour.' Similar views were expressed by Lord Pearce in *Onassis and Calogeropoulos v Vergottis* [1968] 2 Lloyd's Rep 403:

> '"Credibility" involves wider problems than mere "demeanour" which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person, telling something less than the truth on this issue, or, though an untruthful person, telling the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so, has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by overmuch discussion of it with others? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken? On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part.'

So when King LJ concludes at [62] of *Cazalet*, 'In my judgement, the judge's assessment of the parties' credit was an important feature which should have fed into the judge's determination, alongside objective findings of fact, of whether the parties had reconciled following the making of the decree nisi', ought we not now to ask, why? What empirical basis is there for the received wisdom that 'credit' or 'demeanour' help judges identify truth telling? And is there consistency of approach in this most important of areas?

In *SS (Sri Lanka) v Secretary of State for the Home Department* [2018] EWCA Civ 1391 (a case not relied upon by the respondent before the Court of Appeal in *Cazalet* or referred in argument), a differently constituted Court of Appeal (through the judgment of Leggatt), expressed greater scepticism about the merit of reliance on demeanour alongside consideration of the research that undermines its reliability:

> '[36] Generally speaking, it is no longer considered that inability to assess the demeanour of witnesses puts appellate judges "in a permanent position of disadvantage as against the trial judge". That is because it has increasingly been recognised that it is usually unreliable and often dangerous to draw a conclusion from a witness's demeanour as to the likelihood that the witness is telling the truth. …
>
> [40] This is not to say that judges (or jurors) lack the ability to tell whether witnesses are lying. Still less does it follow that there is no value in oral evidence. But research confirms that people do not in fact generally rely on demeanour to detect deception but on the fact that liars are more likely to tell stories that are illogical, implausible, internally inconsistent and contain fewer details than persons telling the truth: see Minzner, "Detecting Lies Using Demeanor, Bias and Context" (2008) 29 Cardozo LR 2557. One of the main potential benefits of cross-examination is that skilful questioning can expose inconsistencies in false stories.'

Thus the research, and the iteration of the Court of Appeal in *SS (Sri Lanka) v Secretary of State for the Home Department*, caution against over-reliance upon demeanour. And nor is it just the Court of Appeal that expresses different approaches to this issue. At first instance Sir Andrew McFarlane P, in *Re P (A Child: Remote*

Hearing) [2020] EWFC 32, [2020] 2 FLR 726 (concerning fabricated or fictitious illness in a child, and the role of the parents in this) was clear (albeit in a case which he identified as being fact-specific) in his view that the courts should place weight on physical demeanour and the manner in which witnesses gave evidence – at [26] he said:

> 'The more important part, as I have indicated, is for the judge to see all the parties in the case when they are in the courtroom, in particular the mother, and although it is possible over Skype to keep the postage stamp image of any particular attendee at the hearing, up to five in all, live on the judge's screen at any one time, it is a very poor substitute to seeing that person fully present before the court. It also assumes that the person's link with the court hearing is maintained at all times and that they choose to have their video camera on. It seems to me that to contemplate a remote hearing of issues such as this is wholly out-with any process which gives the judge a proper basis upon which to make a full judgment.'

Similarly, in *A Local Authority v AA* [2022] EWHC 2321 (Fam) at [110] demeanour was influential in the trial judge's conclusion that the father in giving evidence was an 'honest' and 'wholly believable' witness.

But other judges differ in approach. In *A Local Authority v A Mother* [2020] EWHC 1086 (Fam) (a case concerning a child in care proceedings who had suffered potential non-accidental injuries) Lieven J heard medical evidence via Zoom about the injuries to the child, and the issue arose of whether the hearing should continue via Zoom for the parents' evidence (who were accused by the local authority of inflicting the injuries). At [23] she observed:

> 'One important factor in a decision whether to proceed, particularly in a fact finding case, is the question of whether the judge will be in a less good position to judge whether or not the witnesses are telling the truth if the case is conducted remotely. This was clearly an issue of particular concern to the President in *Re P* at [26] where he refers to the benefits of seeing the witness in court. The issue of the weight that a judge should give to the demeanour of witnesses is an intensely complex one and has been the subject of considerable judicial debate.'

At [27] she went on to conclude, in reliance on *SS (Sri Lanka) v Secretary of State for the Home Department*:

> 'Having considered the matter closely, my own view is that is not possible to say as a generality whether it is easier to tell whether a witness is telling the truth in court rather than remotely. It is clear from *Re A* that the Court of Appeal is not saying that all fact-finding cases should be adjourned because fact finding is an exercise which it is not appropriate to undertake remotely. I agree with Leggatt LJ that demeanour will often not be a good guide to truthfulness. Some people are much better at lying than others and that will be no different whether they do so remotely or in court. Certainly, in court the demeanour of a witness, or anyone else in court, will often be more obvious to the judge, but that does not mean it will be more illuminating.'

The science would suggest that the approach of Lieven J was correct. In their seminal paper, 'Accuracy of Deception Judgments',[2] Charles F Bond, Jr (Department of Psychology Texas Christian University) and Bella M DePaulo (Department of Psychology University of California at Santa Barbara) observed the ability of 'experts' to differentiate between truth tellers and liars:

> '*Receiver expertise.* In most research, college students function as the judges of deception. Perhaps people who had more experience would be better at judging deceit. To assess this possibility, we identified studies of deception experts. These are individuals whose occupations expose them to lies. They include law enforcement personnel, judges, psychiatrists, job interviewers, and auditors – anyone whom deception researchers regard as experts. In 19 studies, expert and nonexpert receivers judged the veracity of the same set of messages. From these studies, we extracted 20 independent expert-nonexpert comparisons and expressed each as a standardized mean difference. This cumulation yields no evidence that experts are superior to nonexperts in discriminating lies from truths; weighted mean d = -.025, 95% confidence interval = -.105 to.055. Indeed, the direction of the within-study difference favors higher nonexpert accuracy, though this difference is not statistically significant, Z = -.6 1, n.s. Within-study comparisons also reveal no statistically significant difference between experts and nonexperts in the tendency to perceive others as truthful; weighted mean percentage truth judgments = 54.09% and 55.74% for experts and nonexperts, respectively; t'(246) = 1.41. For a broader assessment of experts' deception judgments, see Table 7. From the between-study evidence, it would appear that experts are more skeptical than nonexperts, being less inclined to believe that people are truthful. Having been targets of deceit in their professional roles, experts may have surmounted the usual reluctance to imply that people are liars. If raw between-study comparisons suggest that experts may be better than nonexperts at discriminating lies from truths, it is clear that experts are not good lie detectors. On the average, they achieve less than 55% lie-truth discrimination accuracy. In any case, experts' apparent superiority in lie-truth discrimination disappears when means are statistically adjusted.'

Lord Leggatt's exemplary drawing together of the strands of scientific research in his *At A Glance* keynote address[3] on 12 October 2022,[4] highlights the pitfalls of over-reliance on demeanour:

> 'Let me seek to draw this material together and summarise what seem to me the key conclusions that emerge from the research I have described: (1) On average, accuracy in judging veracity from demeanour is 54%. (2) There is a general "truth" bias, which varies somewhat between individuals, towards believing other people to be honest. (3) Individual variation in ability to judge veracity from demeanour is negligible and "experts" are no more accurate than others. (4) Some individuals are more transparent than others, though most people are pretty good liars. (5) Having an honest demeanour has much more impact on whether a speaker is believed than whether the speaker is in fact telling the truth. If you try to infer veracity from demeanour, you are likely to be fooled by witnesses who have an honest demeanour but are lying and to disbelieve witnesses who have a poor demeanour but are in fact giving honest evidence.'

So what are we to do? Continue, in denial of the facts, to rely on incorrect notions that judges are endowed with abilities to divine truth telling from demeanour, when the research says otherwise? Or embrace an evidence-driven,

Mostynian caution about witness demeanour? It is an issue of real importance; not just (1) because of the uncertainty and different outcomes to which these conflicting approaches (including conflicting approaches in the Court of Appeal) give rise, or (2) because of the real risk of professional judges succumbing to anecdotalism or received wisdom in making findings of fact, but also (3) because of the practical issues that flow from it day in day out across the land. Why should a Muslim woman be obliged to remove her niqab if empirically there is no evidence that sight of her face will assist in gauging whether she is a truth teller – *Re S (Practice: Muslim Women Giving Evidence)* [2006] EWHC 3743 (Fam), [2007] 2 FLR 461? Why should fact finding hearings be held in person, rather than remotely (to gauge *demeanour* or *body language*), if there is no logical, evidenced justification? Why should judges be encouraged to rely on a perceived ability that is no such thing? In early October 2024, recently retired High Court Judge, Sir Nicholas Francis, speaking to *The Times* newspaper, cautioned against reliance on demeanour given the potential impact on witnesses of trauma and domestic abuse. He concluded, 'The more I have learnt about the effects of trauma, the more I realise that judging a witness because of blushing, sweating, hesitancy, forcefulness etc can risk reaching the wrong conclusion'. The simple explanation that this is how we have always done things, is no justification for doing things or emphasising approaches that are wrong. Denial of this reality should not be an option.

Notes

1 See also Law Commission Report No 245 (1997) 'Evidence in Criminal Proceedings', paras 3.9–3.12.

2 (2006) 10 (3) *Personality and Social Psychology Review* 214–234 – the rubric of which reads: 'We analyze the accuracy of deception judgments, synthesizing research results from 206 documents and 24,483 judges. In relevant studies, people attempt to discriminate lies from truths in real time with no special aids or training. In these circumstances, people achieve an average of 54% correct lie-truth judgments, correctly classifying 47% of lies as deceptive and 61% of truths as nondeceptive. Relative to cross-judge differences in accuracy, mean lie-truth discrimination abilities are nontrivial, with a mean accuracy d of roughly .40. This produces an effect that is at roughly the 60th percentile in size, relative to others that have been meta-analyzed by social psychologists. Alternative indexes of lie-truth discrimination accuracy correlate highly with percentage correct, and rates of lie detection vary little from study to study. Our meta-analyses reveal that people are more accurate in judging audible than visible lies, that people appear deceptive when motivated to be believed, and that individuals regard their interaction partners as honest. We propose that people judge others' deceptions more harshly than their own and that this double standard in evaluating deceit can explain much of the accumulated literature.'

3 'Would you believe it? The relevance of demeanour in assessing the truthfulness of witness testimony', available at www.supremecourt.uk/docs/at-a-glance-keynote-address-lord-leggatt.pdf

4 See also page 11: 'To sum up so far, there is extensive scientific research showing that, as a method of distinguishing truth telling from lying, judging on the basis of demeanour is slightly, but only slightly, more reliable than spinning a coin. I could stop there. This finding is, I think, enough by itself to demonstrate that attaching any weight to demeanour in making such assessments is not a rational approach to decision-making. But there are more research findings that I would like to tell you about.'

Is the Current Approach to 'Conduct' in Financial Remedy Proceedings in Need of Reform?

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The significance and role of marital misconduct in proceedings for financial relief on divorce has had a long and varied history in family law. This article explores that history and the evolving significance of conduct within the litigation process and poses the question whether the current approach to conduct under s 25(2)(g) Matrimonial Causes Act 1973 (1973 Act) is in need of reassessment.

Historical context

Pre-1857

From medieval times[1] and up until the late 17th century, the only remedy generally available to married couples wishing to separate was a divorce *a mensa et thoro* from the ecclesiastical court. *A mensa et thoro* divorce was a form of legal separation (or judicial separation). The remedy of a dissolution of a marriage only became available from about the late 17th century to the very select few who could obtain a private Act of Parliament dissolving their marriage.[2]

When determining an application for legal separation, the ecclesiastical court also had jurisdiction to make an order for financial provision for the wife.[3] However, the court's willingness to exercise its discretion to award maintenance depended on its determination of which party was responsible for the breakdown of the marriage. Therefore, if a husband was able to persuade the ecclesiastical court that it was the wife who was responsible for the breakdown of the marriage, he would not be ordered to pay maintenance, despite the marriage continuing. In contrast, if the husband was responsible for the breakdown, he would likely be ordered to pay maintenance.

Consequently, from the earliest times the parties' conduct during the marriage was central to both the grant of divorce and to the financial relief a court would be willing to grant. This, over time, led to the development of the concept of marital offence or fault as the central concept governing the court's approach to the grant of financial relief to a wife[4] lasting up until modern times.

Post-1857

For reasons beyond the scope of this article, the Reformation did not lead to substantive changes to divorce law in England and Wales, as it had done in other European states. It was not until the Matrimonial Causes Act of 1857 (1857 Act) that major reform was introduced. The 1857 Act introduced a designated divorce court with exclusive jurisdiction over matrimonial matters and for the first time enabled both parties to a marriage to present a divorce petition for the dissolution of the marriage (albeit the evidential burden on the parties seeking a divorce was not equal[5]). While the 1857 Act was a major advance in widening the availability of divorce, it did not reform the court's approach to conduct and marital fault in the grant of financial relief. Rather, it codified the existing approach by providing that when the divorce court was exercising its jurisdiction to award financial relief, if the court thought fit, it could order the husband to pay maintenance to the wife 'having regard to her Fortune (if any), to the Ability of the Husband, and to the Conduct of the Parties, it shall deem reasonable'.[6]

Given the parameters set by the governing statute, the case-law that developed following the 1857 Act continued to reflect the central importance of conduct and the importance of marital fault to the grant of financial relief.

The lack of reform, both pre- and post-1857, to the role of conduct in the court's exercise of its discretion to grant financial relief led to the development and entrenchment of the concepts of the 'guilty' wife and the 'innocent' wife.[7] The practical consequence of these concepts was that the court's discretion to grant financial relief would only be exercised in favour of an 'innocent' wife and would not be exercised in favour of a 'guilty' wife, save for in exceptional circumstances. It further meant that there was considerable, if not complete, overlap between the facts needed to prove a divorce and the facts relevant to the court exercising its discretion to grant financial relief.

The Divorce Reform Act 1969

The court's ability to decline to order financial provision for a 'guilty' wife persisted until as recently as 1973 and was only finally brought to an end following the reforms implemented by the Divorce Reform Act 1969 (1969 Act). The 1969 Act transformed divorce law by making the irretrievable breakdown of a marriage the sole ground for divorce and, thereby, removing the need for matrimonial offence to be established. This meant that for the first-time the parties' conduct was not central to the granting of a divorce.

The reform of the law of divorce inevitably meant that some reform was also required to the statute governing financial relief on divorce.[8] Those changes to the statutory provisions were contained in the Matrimonial Proceedings and Property Act 1970 (1970 Act).

However, the 1970 Act left the place of conduct largely unchanged from its previous iterations in the preceding statutes as a matter to which the court was required to have regard to. As such, although the 1969 Act removed matrimonial offence as the basis for divorce, the 1970 Act maintained the court's obligation to consider conduct when exercising its discretion to grant financial relief. While the 1970 Act did not change the statutory language on conduct, it did introduce several significant reforms, including the first iteration of the s 25 factors.

Wachtel v Wachtel

It was against the backdrop of these significant legislative reforms that the role of conduct was considered at first instance by Ormrod J (as he then was) in the case of *Wachtel v Wachtel* [1973] Fam 73. Ormrod J held that the 1970 Act and 1969 Act taken together represented a 'new code of family law' and stated that it was no longer appropriate to talk about an 'innocent' or a 'guilty' wife.[9] He rejected what he described as prevailing view: that conduct under the 1970 Act meant conduct which had contributed to the breakdown of the marriage and, consequently, financial provision for a wife should be discounted in proportion to her share of blame for the breakdown of the marriage.[10] He concluded that the court could only approach the issue of conduct in a broad way and conduct 'usually prove[d] to be a marginal issue which exert[ed] little effect on the ultimate result unless it is both obvious and gross'.[11]

On appeal, Ormrod J's decision, as it related to the role of conduct under the 1970 Act, was approved by the Court of Appeal, with Lord Denning MR stating:

> 'When the judge comes to decide these questions, what place has conduct in it? Parliament still says that the court has to have "regard to their conduct": see section 5(1) of the Act of 1970. Does this mean that the judge in chambers is to hear their mutual recriminations and to go into their petty squabbles for days on end, as he used to do in the old days? Does it mean, after a marriage has been dissolved, there is to be a post mortem to find out what killed it? We do not think so. In most cases both parties are to blame – or, as we would prefer to say – both parties have contributed to the breakdown …
>
> … There will no doubt be a residue of cases where the conduct of one of the parties is in the judge's words ante, p. 80C–D, "both obvious and gross" so much so that to order one party to support another whose conduct falls into this category is repugnant to anyone's sense of justice. In such a case the court remains free to decline to afford financial support or to reduce the support which it would otherwise have ordered. But short of cases falling into this category, the court should not reduce its order for financial provision merely because of what was formerly regarded as guilt or blame. To do so would be to impose a fine for supposed misbehaviour in the course of an unhappy married life'[12]

The reforms implemented by the 1969 Act and the 1970 Act, as interpreted by the court in *Wachtel*, brought about meaningful change to divorce litigation, which up until the early 1970s was manifestly unsatisfactory, discriminatory and long overdue for reform.

The Matrimonial Causes Act 1973

The final step in the statutory evolution of conduct occurred when the 1973 Act, s 25 (which consolidated the 1969 Act and 1970 Act into a single statutory provision) was amended in 1984. As with earlier changes to the law on divorce, the work of the Law Commission underpinned the amendments to the 1973 Act.

The Law Commission report[13] identified 'Two intractable problems' which required legislative reform. One of those intractable problems was the extent to which conduct should be taken into account by the court when exercising it discretion.[14]

The Law Commission recognised the forensic difficulty in a court apportioning blame for the breakdown of a marriage, as identified by Ormrod J in *Wachtel*, stating:

> 'the courts as now constituted cannot reasonably be expected to apportion responsibility for breakdown in any save exceptional cases … It seems to us (and our view was endorsed by the majority of professional and academic commentators on the Discussion Paper) that it would be quite wrong to require the court to hear the parties' mutual recrimination at enormous expense to the individuals involved (or, if they have legal aid, the taxpayer) in those cases where such findings as the court could make would have little effect on the order.'[15]

To bring the governing statutory provision on financial relief in line with the case-law that had been developed by the courts since *Wachtel*, it was recommended that s 25 should be amended to provide that conduct would be a matter which the court *could* have regard to if it was 'inequitable to disregard it', rather than a matter the court was required to have regard to when exercising its discretion. The Law Commission report expressed the need for conduct to have a continuing role in proceedings for financial relief as follows:

> 'The second issue relates to the question of identifying those exceptional cases in which the court can not only identify responsibility for the breakdown of the marriage, but should also allow that assessment to influence the financial orders that are to be made.'[16]

It is evident from the language used in the Law Commission report that the type of conduct being referred to was the conduct that had previously taken centre stage in proceedings for financial relief in the pre-*Wachtel* era, namely

conduct relevant to establishing who was responsible for the breakdown of the marriage. The amendment to the 1973 Act was, therefore, aimed squarely at ensuring that the courts did not go back to a situation in which they would be routinely concerned with hearing the parties 'mutual recriminations', whilst simultaneously ensuring conduct could still have a role in the exercise of the court's discretion in certain circumstances.

This analysis is supported by the then Lord Chancellor (Lord Hailsham) who commented on the proposed amendments to s 25 during the passage of the Bill by saying:[17]

> 'Thirdly, the existing section is right because, although it provides that conduct can have some influence on financial settlement and that it would be repugnant to conscience if it did not do so, the section, as interpreted by case law, makes it quite clear that nothing—I repeat "nothing"—would justify a return by the courts to the degrading and squalid experience which we can all remember as "the defended cruelty case".

The post-*Wachtel* approach to conduct

The case-law since *Wachtel* has emphasised the exceptionality of conduct as a factor capable of affecting a court's award. In *Radmacher v Granatino* [2010] UKSC 42, Baroness Hale described as 'very rare'[18] the cases in which the courts will take conduct into account. In *OG v AG* [2020] EWFC 52, Mostyn J described any personal misconduct as needing to be 'gross and obvious' and which needed to meet 'the high standard of "inequitable to disregard" before it may be reflected in an award.[19] However, neither the passage of time nor the senior courts' emphasis on the exceptionality of conduct has diminished the importance of conduct to the parties themselves, who often struggle to understand why the court will not permit the misconduct of the other to be litigated when the principle of 'fairness' underpins the grant of financial relief.

The inevitable emotional aspect of the divorce process means there continues to be a tension between one or both of the parties wanting to litigate the issue of the other's misconduct and the court's reluctance to adjudicate on the issue. In *Miller v Mille*r [2006] UKHL 24 Lord Nicholls recognised that the relevance of the parties' conduct still remained 'a vexed issue'.[20]

In addition to emphasising the limited circumstances in which conduct will be reflected in an award, the courts have also recently sought to limit the ability of the parties to litigate the issue by imposing certain procedural hurdles. In *Tsvetkov v Khayrova* [2023] EWFC 130 Peel J set out the procedure to be followed where conduct is in issue.[21] The expectation that these procedural hurdles must be overcome before conduct can be litigated as an issue was recently confirmed by Peel J in *N v J* [2024] EWFC 184, as part of his consideration of the issue of domestic abuse in financial remedy proceedings and how it interacts with the concept of conduct.[22]

The procedural hurdles set out by Peel J include the need to 'plead' conduct and the need for conduct to be specifically case-managed, having regard to the overriding objective under the Family Procedure Rules 2010 (SI 2010/2955) (FPR). The active case management suggested by Peel J in *Tsvetkov* includes the court exercising its power to prevent a party from pursuing conduct if the 'exceptionality threshold' is not met. It is noteworthy that these restrictions on a party's ability to rely on one of the s 25 factors do not apply to the other s 25 factors. The s 25 factors are, of course, not listed in any order of importance and the weight to be given to each factor will depend on the facts and circumstances of the case.[23]

The language of s 25(2)(g) itself does not impose any additional hurdles on it being prayed in aid by a party. It simply sets the bar at which conduct may be taken into account by the court as being that conduct which it would be 'inequitable to disregard'. It is the interpretation of this phrase in case-law that suggests that the threshold is a high one. For example, as part of his consideration of domestic abuse and conduct in *N v J*, Peel J reaffirms the need for conduct to be exceptional, relying on the 'both obvious and gross' formulation adopted by Ormrod J (as he then was) in *Wachtel*.

The decision in *Wachtel* therefore continues to have a powerful influence on how the court approaches the issue of conduct today. This is despite the fact that, as set out above, the term 'both obvious and gross' was used in 1973 by Ormrod J as part of an attempt to discourage litigants from arguing about who was to blame for the breakdown of the marriage in circumstances where there had been significant change in the statutory provisions. The mischief *Wachtel* sought to address by restricting the consideration of conduct was the continued reliance on the pre-1969 Act approach to conduct, when the new law meant conduct no longer needed to take centre stage in the litigation. Unsurprisingly, the court at both first instance and on appeal in *Wachtel* held that the old practice of conduct being argued in every case was not compatible with the new code of family law. However, what is arguably surprising is the continued prominence of this approach 50 years later when the conduct issue usually sought to be relied on by litigants is not about who is to blame for the breakdown of the marriage, but rather concerns the effect of one party's behaviour on the other.

Further, it is questionable whether the courts should in any event interpret Ormrod J's words as restrictively as they have done. The speech given by the then Lord Chancellor, Lord Hailsham, during the passage of the Bill gives a useful insight into the intended scope of the new s 25(2)(g) relative to the interpretation of conduct in case-law. Lord Hailsham said:

> 'it is made plain beyond doubt in Section 25(2)(g) of the Act, as it would be inserted by the present Bill, which provides that the court is only to take conduct into account if the conduct is such that the court considers that it would be inequitable to disregard it. This is in effect slightly more restrictive than the wording of the old Act, but *slightly less restrictive* than the judicial rhetoric "gross and obvious" of *Wachtel* might lead one to suppose if taken out of context.' (emphasis added).

It is, therefore, apparent that the intention of the new s 25(2)(g) was to slightly loosen the restrictions imposed by the 'gross and obvious' test and not to maintain the test. However, despite this, the courts have continued to adopt the more restrictive approach that the new s 25(2)(g) was intended to relax.

Domestic abuse and conduct

There can be little doubt that the current landscape of divorce litigation, and family law litigation in general, is materially different to the prevailing landscape of the early 1970s. In particular, there is now a better and more nuanced understanding of the various types of behaviour that affect families emotionally and economically, and the court's general approach to these issues in family proceedings has evolved.

However, it is far from clear that the current approach of the court in financial remedy proceedings has kept pace with the wider contemporary social and legal landscape. In particular, one of the most important legal and social developments since the 1970s is the recognition of the importance and prevalence of domestic abuse, and the economic element of such abuse. As such, arguably a key question for current times is how the Financial Remedies Court approaches and reflects domestic abuse when making its substantive decisions. In private law children proceedings, there is now FPR PD 12J, which sets out a comprehensive approach to be adopted by the courts when domestic abuse is in issue. In addition, the Domestic Abuse Act 2021 (2021 Act) sets out a clear definition and approach towards economic abuse, which is an issue that is particularly relevant in financial remedy proceedings.

The 2021 Act defines 'economic abuse' at s 1(4) as:

> 'any behaviour that has a substantial adverse effect on B's ability to—
>
> (a) acquire, use or maintain money or other property, or
>
> (b) obtain goods or services.'

Examples of economic abuse under the 2021 Act include:[24]

- controlling the family income;
- refusing to contribute to household income or costs;
- refusing to make agreed or required payments, for example mortgage repayments or child maintenance payments;
- deliberately frustrating the sale of shared assets, or the closure of joint accounts or mortgages; and
- deliberately forcing a victim to go to the family courts so they incur additional legal fees.

These examples of economic abuse under the 2021 Act are all examples of misconduct commonly encountered in financial remedy proceedings, although not commonly litigated. The difference in approach between how misconduct is currently approached and interpreted in financial remedy proceedings and under the 2021 Act means a party can be the victim of economic abuse for the purposes of the 2021 Act, and possibly be the victim of an offence under the Serious Crime Act 2015,[25] but based on that behaviour, cannot run conduct in the financial remedy proceedings because they are unable to demonstrate that the behaviour is 'exceptional'.[26] Such a situation is arguably unsatisfactory and inconsistent with the court's overriding duty to achieve fairness between the parties.

The recent comments by Peel J in *N v J* do not suggest, at least for now, that the Financial Remedies Court intends to modify its approach to domestic abuse to reflect the wider changed position or sees there is any need to do so. For example, in *N v J* Peel J held that the high bar in bringing conduct claims established in case-law 'is undisturbed by the recent focus on domestic abuse in society and the family justice system'[27] and further held that the increasing awareness and recognition of domestic abuse and its harmful effects 'does not lower the conduct hurdle to be surmounted in financial remedy proceedings'.[28] While it is positive that Peel J recognised the increased awareness of domestic abuse, such recognition is arguably meaningless if the court is not going to modify its approach to reflect this increasing awareness and recognition in its decision-making process.

Also, as part of his wider consideration of the interplay between domestic abuse and conduct in financial remedy proceedings, Peel J considered the status in financial remedy proceedings of both the 2021 Act and PD 12J. Peel J concluded that 'Neither [provision] amends or supplements the statutory definition of conduct in financial remedy proceedings as interpreted by case law'.[29] But he also said 'Nevertheless, the provisions to which I have referred to are plainly contextually important and relevant to all family proceedings, including financial remedies'.[30]

These comments on the status of PD 12J and the 2021 Act bring into sharp focus the contradiction of the current approach to domestic abuse in financial remedy proceedings. Peel J appears to say that while PD 12J and the 2021 Act are relevant and important in financial remedy proceedings, they do not change the court's approach to conduct. However, the very purpose of PD 12J and the 2021 Act is to change the court's approach to domestic abuse. Therefore, it is not clear how both provisions can be relevant and important in financial remedy proceedings, yet at the same time leave unchanged how the court approaches the issue of domestic abuse when considering conduct.

Further, the difficulty with this approach is that, as part of the family justice system, one would expect the Financial Remedies Court to both fully accept and embrace the wider procedural and substantive changes to the Family Court's approach to the issue of domestic abuse and, further, any substantive changes of approach to how domestic abuse is considered in financial remedy proceedings should be more than 'contextually important and relevant'. It would be surprising if one part of the Family Court (i.e. private law children proceedings) adopted a different substantive approach to the issue of domestic abuse and its ability to affect its decision making from another part of the same court (i.e. financial remedy proceedings).

With regards to Peel J's emphasis that neither the 2021 Act nor PD 12J 'amends or supplements' the statutory definition of conduct, there is, of course, no statutory definition of conduct. There are only examples in case-law of the types of behaviour that may be taken into account for the purposes of s 25(2)(g). As Coleridge J astutely recognised in *H v H* [2005] EWHC 2911 (Fam) all of the cases on conduct going back to 1973 'are so fact-specific that they are very little real guidance in the end'.[31] Therefore, the extent to which *N v J* should in fact be followed in cases where domestic abuse as conduct is in issue is arguable.

Further, the Court of Appeal authority of *Goddard-Watts v Goddard-Watts* [2023] EWCA Civ 115 (which was considered in *N v J* but not followed by Peel J) suggests that a different approach to conduct is permissible. An approach in which there does not need to be a direct financial consequence from the misconduct and conduct can be 'the glass'

through which the effects of the behaviour complained of are addressed. Given the breadth of language of s 25(2)(g), such an approach undoubtedly falls within the statutory language and gives s 25(2)(g) the flexibility it requires to reflect changing societal attitudes to behaviour. Something the approach advocated in *N v J* does not.

Conclusion

It has now been over 50 years since the 1973 Act came into force and over 40 years since s 25 factors were last amended. In a similar way to which the role of conduct in proceedings for divorce and financial relief needed reform by the late 1960s, the time is arguably now ripe for a reassessment of the role of conduct in proceedings for financial relief, with particular consideration of how the issue of domestic abuse is considered as part of conduct. As set out above, the current approach to conduct in financial remedy proceedings is not in keeping with the wider recognition of domestic abuse and the negative economic effects such abuse can have. Further, the current high bar and procedural hurdles an alleged victim of domestic abuse must overcome before they can run a conduct case may be discriminatory, on the basis that domestic abuse is an issue that is more likely to affect women.

Fortunately, there are two important reports on the issue of conduct and the need for reform which, at the time of writing, are due to be published shortly. First, Resolution is due to publish a report prepared by its working party on domestic abuse in financial remedy proceedings. The working party's report will provide an invaluable insight into family lawyers' views about and experience of the current system and will also make recommendations on how the law and/or procedure can be improved.

Secondly, the Law Commission is carrying out a review of the law on finances following divorce and the ending of civil partnerships. One of the areas the Law Commission is considering is 'what consideration the courts should give to the behaviour of separating parties when making financial remedy orders'.[32] The Law Commission aims to publish a scoping paper in November 2024. This paper could form the basis of a full review and future recommendations for reform of this area of law, which hopefully will include a comprehensive reassessment of the current approach to conduct in financial remedy proceedings and recommendation for reform.

We, therefore, have two important reports, which are to be published shortly, which will provide much needed analysis of the current approach and will, hopefully, make recommendations for meaningful change.

Notes

1 The scope of medieval cannon law from the early to late medieval period evolved, with a spouse's ability to obtain a divorce becoming more limited and concluding in the Marriage Act of 1540 confirming the insolubility of marriage.
2 There were approximately 300 Acts of Parliament dissolving marriages between 1700 and 1857 (see Douglas James, 'Parliamentary Divorce, 1700–1857', (2012) 31(2) *Parliamentary History* 169–189.
3 Although the marriage still continued under the legal separation, the ecclesiastical court had the jurisdiction to order a husband to financially support his wife during their separation.
4 Historically it was the wife who always sought financial relief.
5 Husbands were able to petition on the basis of the wife's adultery, whereas wives had to prove both adultery of the husband and, in addition, incestuous adultery or bigamy with adultery, or rape, or sodomy or bestiality or prove adultery coupled with cruelty or adultery coupled with desertion for 2 years or more.
6 1857 Act, s XXXII.
7 'Changes over the centuries in financial consequences on divorce', address by Lord Wilson given on 20 March 2017 to the University of Bristol Law Club.
8 Which at the time was the Matrimonial Causes Act 1965.
9 [1973] Fam 73 at 77G.
10 [1973] Fam 73 at 79E.
11 [1973] Fam 73 at 80C.
12 [1973] Fam 73 at 89 H–90C.
13 Law Commission Report (No 112), *Family Law: The Financial Consequences of Divorce* (Law Commission Report).
14 Law Commission Report at para 36.
15 Law Commission Report at para 37.
16 Law Commission Report at para 38.
17 *Hansard*, HL debate, 21 November 1983, vol 455, cols 28–98.
18 [2010] UKSC 42 at [180].
19 [2020] EWFC 52 at [34] and [35].
20 [2006] UKHL 24 at [59].
21 [2023] EWFC 130 at [46].
22 A thorough and insightful analysis of *N v J* by Samantha Hillas KC, Olivia Piercy and Anita Mehta can be found on the FRJ blog at https://financialremediesjournal.com/content/em-n-v-j-em-the-last-word-on-domestic-abuse-as-conduct.97c663553e724e758657fa38c505e938.htm.
23 *Robinson v Robinson* [2010] EWCA Civ 1171 at [43].
24 *Domestic Abuse Act 2021 Statutory Guidance*, July 2022, at para 65.
25 Economic abuse is capable of amounting to the offence of controlling or coercive behaviour under s 76 Serious Crime Act 2015 provided it is repeated or continuous, the parties are 'personally connected' and it has a serious effect on the victim.
26 *Tsvetkov v Khayrova* [2023] EWFC 130 at [43](ii).
27 *N v J* [2024] EWFC 184 at [39](i).
28 *N v J* [2024] EWFC 184 at [29].
29 *N v J* [2024] EWFC 184 at [21].
30 *N v J* [2024] EWFC 184 at [21].
31 *H v H* [2005] EWHC 2911 (Fam) at [30].
32 Law Commission, Financial remedies on divorce, available at https://lawcom.gov.uk/project/financial-remedies-on-divorce/.

As the English Family Court Grapples with a New Direction of Travel for Non-Court Dispute Resolution, What Are the Likely Impacts of Recent Changes and Are We at Risk of Putting the Cart before the Horse?

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Pre-action reform – the background

Over recent years, there have been an increasing number of public consultations and reports considering how to support the earlier resolution of civil disputes, both within the Family Courts and across other areas of practice.

Whilst there are, of course, many benefits to the early resolution of disputes, a key driver behind the perceived need for additional focus on this area is the overwhelming backlog of cases within the court system, causing significant delays for court users across England and Wales and limiting access to justice.

To give just one example, per the most recent Family Court statistics[1] it currently takes an average of 44 weeks for private law children cases to reach a final order, contrasting with an average of less than 25 weeks as recently as 2016. Although the COVID-19 pandemic is in part to blame, there has been a growing view that too much of the court's time is taken up by cases that should (in theory at least) be capable of being settled without judicial involvement, and where the parties' interests would better be served in a less adversarial environment. As the then Lord Chancellor, the Rt Hon Alex Chalk KC MP, wrote in the foreword to the Government's response to its consultation paper 'Supporting earlier resolution of private family law arrangements' in January 2024:

> 'While most families are able to resolve their issues between themselves without the need to go to court, too many still end up in conflict … Families encounter a justice system that can, at times, reinforce that conflict, pitting parents against each other to "win" an unnecessary and destructive legal battle.'

It has for some time been acknowledged that reforming the pre-action procedure for Family Court cases, to create an environment where parties are – in effect – mandated to meaningfully engage in a form of non-court dispute resolution (NCDR), offers a clear and obvious route to achieving the earlier resolution of disputes whilst at the same time relieving pressure on the court system.

The benefits of meaningful engagement in NCDR are clear. Where successfully adopted, they can offer a cost-effective and speedy resolution to seemingly complex and intractable disputes, and allow for a much more bespoke approach than the court process provides. By providing a platform for parties to re-establish positive communication and reach a settlement by agreement, NCDR also offers the opportunity for families to re-build bridges that might otherwise remain damaged/destroyed, with positive implications for future co-parenting arrangements amongst other things.

However, the opportunity for reform in this area has been limited by the Court of Appeal's judgment in *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, where Dyson LJ found that to compel unwilling parties to engage in mediation would amount to a constraint on their right of access to the court and would therefore breach their right to a fair trial under Art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

This position (whilst undoubtedly not universally popular) remained unchallenged until 9 November 2023, when the Court of Appeal held in *Churchill v Merthyr Tydfil CBC* [2023] EWCA Civ 1416 that Dyson LJ's comments in *Halsey* were *obiter*, and that the court does, in fact, have the power to lawfully stay existing proceedings for the parties to engage in a form of NCDR, or make an order requiring the same.

As a result, the gates have now been opened for much heralded reforms to the pre-action stage in family disputes, designed to encourage a more meaningful engagement in NCDR.

The new financial remedies pre-action protocol

On 29 April 2024, revisions to Parts 3 and 28 of the Family Procedure Rules 2010 (SI 2010/2955) (FPR) allowed the court to stay proceedings on its own initiative, without the parties' agreement, to encourage parties to engage in NCDR including mediation, arbitration, and other methods.

On 29 May 2024, an updated pre-action protocol for financial remedy proceedings was introduced (annexed to FPR PD 9A), prescribing (*inter alia*) full voluntary Form E disclosure, attendance at a Mediation Information and

Assessment Meeting (MIAM), engagement in at least one form of NCDR, and a meaningful attempt at negotiating a settlement before proceedings are issued, with limited exceptions. Failure to comply with key aspects of the new protocol may result in a departure from the general rule of no order as to costs. In particular, under the updated protocol (and FPR 28.3(7)), a failure, without good reason, to attend NCDR is an express reason for the court to consider making a costs award.

The very helpful blog[2] by Michael Allum and Rhys Taylor in the FRJ summarises the pre-action protocol and the key changes we should all be aware of in practice.

It is worth noting that the pre-action protocol in relation to private law children proceedings (annexed to FPR PD 12B) also makes clear that the court has the power to make costs orders as a result of one party's conduct. However, failure to attend NCDR is not referred to as an express reason for such an order to be made.

NA v LA

Reported shortly before the arrival of the new pre-action protocol (on 24 May 2024), the decision of Nicholas Allen KC (sitting as a Deputy High Court Judge) in *NA v LA* [2024] EWFC 113 was made in the context of urgent applications by the wife for a non-molestation order, occupation order and preservation of property order (alongside MPS and LSPO applications). With her Form A, she claimed a MIAM exemption on the basis of urgency and sought directions for the exchange of Form E disclosure and the listing of a First Appointment.

The judge refused this aspect of the wife's applications, and instead made an order to stay proceedings for 3 months so that the parties could engage in NCDR. In response to the wife's position that she could not engage in NCDR without the benefit of court-ordered financial disclosure (given her serious concerns about the husband's lack of transparency), the judge held that this was an unnecessary concern because 'NCDR will almost invariably provide for such disclosure to be given as part of the process' and 'Many forms of NCDR also have "teeth" if there is (say) a reluctant discloser'.

Rebekah Batt's FRJ blog[3] goes into more detail on the judgment.

Impacts of the new protocol, the decision in *NA v LA* and scope for further development in financial remedy cases

Disclosure

Although the judgment was handed down before the amended pre-action protocol was publicly released, *NA v LA* seems to go further than the protocol requires, by stipulating that the absence of court-ordered financial disclosure does not provide justification for failing to engage in NCDR. The pre-action protocol anticipates that the parties will exchange full and honest financial disclosure on a voluntary basis, but what if one party fails to do so? Arguably, the decision in *NA v LA* requires that parties continue with NCDR regardless.

Arbitration, which is cited in the judgment as being an example of NCDR where parties can be legally compelled to exchange financial disclosure, is very much the exception rather than the rule. There is no other form of NCDR where a failure to provide full and honest financial disclosure can be mandated in this way.

Although (per paragraph 25 of the protocol) the court must, when considering whether to make a costs order, take into account 'whether a party has provided appropriate financial disclosure', it is not a certainty, and what of those cases where the non-disclosing party is not concerned by the risk of an adverse costs order and seeks to continue with NCDR regardless? In those circumstances, must the other party incur the wasted time and cost of having to engage in NCDR despite not being provided with full and honest financial disclosure, for fear of a costs order being made against *them*?

It is the submission of these authors that this Sophie's choice cannot have been the intended consequence of the new reforms, and further judicial clarification would be welcome on this issue. It may be that in such cases, the court will allow for proceedings to be issued and a court timetable imposed for the exchange of disclosure (either at that stage, or after the First Appointment and orders having been made for Replies to Questionnaire and the instruction of SJEs, etc) before then considering whether a stay to encourage engagement in NCDR would be appropriate. This would be in-line with paragraph 31 of the updated protocol, which makes clear that pre-action voluntary financial disclosure 'may be particularly suitable where providing or obtaining financial disclosure is not likely to be an issue or has already been adequately dealt with separately'.

Particularly difficult will be those cases where one party is convinced of the other's non-disclosure, but where it cannot readily be demonstrated. As practitioners, we have all had those cases where our client has insisted on pursuing what outwardly appears to be a fishing expedition, only for it to turn out that their concerns were entirely correct. It is right that those parties should be able to pursue their reasonable enquiries with the support of the court's investigative powers (where appropriate) and it is a concern that the new reforms may make this more challenging in practice.

In any case, as the old aphorism goes – you can lead a horse to water, but you cannot make it drink. Some parties (rightly or wrongly) may never accept the other's disclosure until a judge (at First Appointment or perhaps even later) indicates that it is acceptable. The average person is not trained to forensically analyse financial disclosure, and whilst some can afford specialist advisers who can assist them in this endeavour, many cannot. Will it always be right that they be sanctioned by the new regime for refusing to engage in NCDR until they have this comfort?

Delay and abuse

Financial non-disclosure and economic abuse often go hand in hand, and pushing parties to engage in NCDR where one party is determined to frustrate the process risks widening the scope for further abuse.

In the short period since *NA v LA* was reported, the authors of this article have seen a surge in correspondence from parties insisting on pre-action engagement in NCDR whilst at the same time refusing to engage in a meaningful disclosure exercise. It is telling that the method of NCDR most often being suggested in these circumstances is medi-

ation, where there are no teeth to compel full and honest disclosure, and which has historically been considered inappropriate in cases where there are concerns about non-disclosure, abuse or where there is a power imbalance. Although shuttle mediation and lawyer-led mediation are useful options, without proper disclosure from the other party, legal advisers will be limited in their ability to provide meaningful advice. Solicitors cannot be expected to simply fall back on their indemnity policies by advising in these circumstances.

Mediation and other forms of NCDR also lack the rigour of an externally set timetable that must be adhered to. Despite the significant delays that exist within the court system, there is not the same scope for 'drift' that exists pre-action, where promises can easily be reneged on and negotiations can drag for many months, wasting time, money and goodwill. It is easy to see how the new reforms might be weaponised by those whose interests are served by keeping their affairs outside the court system.

What is it to engage in NCDR?

Under the new regime, there is a lack of clarity as to at what point within an NCDR process which is doomed to fail, will parties be deemed to have sufficiently engaged with it before they may issue financial proceedings. Moreover, whilst mediation, arbitration, early neutral evaluation and the collaborative process are referred to specifically within the updated protocol as qualifying forms of NCDR, other mechanisms such as solicitors' round-table meetings '*may* be considered sufficient'. More guidance is needed in these areas for solicitors to be able to advise their clients whether or not they may be at risk on costs by issuing proceedings, despite having had some level of engagement in NCDR. This may be particularly relevant for vulnerable clients including those with disabilities, who have specific requirements that cannot easily be provided for in traditional forms of NCDR.

It is worth noting that in their recent August 2024 FRJ blog 'NCDR Redux: The Impact of October's CPR Amendments',[4] Nicholas Allen KC and Rhys Taylor make the point that the wording at FPR 28.3(7) allowing the court to depart from the general rule of no order as to costs where there is a failure by a party, without good reason, to '*attend*' (emphasis added) NCDR was deliberately chosen by the FPR Committee because of concerns that using the alternative 'engage in' might encourage judges to carry out a subjective assessment of how hard they had tried at it, which should be avoided (not least as it might risk breaching WP privilege). This is helpful comment, however the pre-action protocol nevertheless refers – in several instances – to the expectation that parties will have 'engaged in' NCDR prior to issuing proceedings, and practitioners will therefore continue to feel under pressure to carry out the same subjective assessment when advising their client.

Timing issues

Further guidance is needed in relation to time-sensitive application, for example – applications for spousal maintenance, where payments can only be backdated to the date of the application itself. In those circumstances, are parties nevertheless expected to first engage in NCDR before issuing proceedings?

Conclusion

It is hard to see how the judgment in *NA v LA* could have applied the amended FPR any more strictly, and it is anticipated that judges will feel encouraged to take the same approach in relation to the updated pre-action protocol. However, there will be cases where the new orthodoxy will not be appropriate and it will be interesting to see how the jurisprudence develops to protect those who might otherwise be harmed by a strict application of the new rules.

Notes

1 *Family Court Statistics Quarterly: January to March 2024* (www.gov.uk).
2 https://financialremediesjournal.com/content/revised-finance-pre-action-protocol.56727296240b4652b859dbc9a99f876b.htm
3 https://financialremediesjournal.com/content/na-v-la-2024-ewfc-113.6fd26a8c2a714df6ace32520a7d96975.htm
4 https://financialremediesjournal.com/content/ncdr-redux-the-impact-of-october-rsquo-s-cpr-amendments.67384b8ee9374cbd96c624d9c8abed98.htm

Non-Court Dispute Resolution and the New Protocol – Don't Look a Gift Horse in the Mouth…

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You don't have to travel too far back to a time when separating families had two stark choices – negotiate or litigate. Either you did a deal or you went to court. Those days are now, fortunately, long gone but many couples have still found themselves struggling in the no man's land in between. Whilst there are a multitude of options available to separating families – both in terms of finding outcomes but also support along the way – too often the last resort when the going gets tough has continued to be to default to a court process. Either because couples have struggled to get the help they need to make the alternatives work, or because it has frankly been easier for the parties or their lawyers to fall back into the grooves of a court system which is structured and linear with a judge available at the end of it who can make a final decision. The new protocol is exactly what was needed to force a change of direction. It requires parties not just to consider but, unless there is a good reason not to, to propose and engage in non-court dispute resolution (NCDR). Constructive negotiation in correspondence is not enough, though a Round Table meeting might be. But the overall message is clear – there must be meaningful attempts to seek resolution (and provide disclosure) outside the court process.

What are the alternatives?

Over the course of over two decades doing this job, the number of options open to separating couples who want to try to do things differently has increased enormously, but the fundamental point has remained the same. Where possible, it is better for people to find their own solution. This is the end of a relationship between individuals and if they are able to reach a resolution themselves, they remain in control of what the outcome looks like; and it enables families to work together to find solutions rather than putting people on opposing teams and battling it out – an approach that makes for great small and big screen drama, but no one in their real life wants that.

In terms of options, these vary from mediation, one lawyer one couple models (including Withers' Uncouple and the Resolution Together model), collaborative law, early neutral evaluation, private FDRs, and arbitration. All of which can take place instead of or alongside court proceedings. But the tendency still has been to want to have the court system and timetable available as a fall back. And until the recent rule change, nothing has prevented couples and their lawyers from keeping a foot in both camps.

The threat of court proceedings no longer gives all the advantages it once used to. The law in relation to financial remedies is fairly settled; the shockwaves of *White v White* [2000] UKHL 54 and *Miller v Miller*; *McFarlane v McFarlane* [2006] UKHL 24 and the subsequent cases that dealt with how assets are shared and how maintenance should be calculated have well and truly died down. And so going to court can only in rare cases be said to be *necessary* because there is a point of law that is uncertain. And if instead there is a dispute about how the law should be applied, it will again be a rare case that can *only* be resolved by asking a judge to give a view. And so, for many cases, the main advantage of the court setting is that it offers a structure in which progress can be made. But the NCDR protocol makes it abundantly clear that the court is no longer prepared to offer that service. Couples and lawyers are going to have to find another way.

The rule change that took effect in April 2024 widened the definition of NCDR and also narrowed the Mediation Information and Assessment Meeting (MIAM) exemption. The rule change confirms the court's power to stay proceedings for NCDR, and imposes an obligation on parties to complete the FM5 setting out their view on NCDR. The shift in emphasis and approach is clear.

Carrots and costs

Inevitably change can lead to some level of pushback, not least because the way in which the protocol and the courts have 'encouraged' NCDR can seem to suggest that the judges see lawyers rather than clients as driving the litigation. If your only experience of family lawyers was reading

judgments, you'd be forgiven for thinking that all they wanted was to get their clients to court. Knowles J in *X v Y (Financial Remedy: Non-Court Dispute Resolution)* [2024] EWHC 538 (Fam) said 'family resources should not be expended to the betterment of lawyers, however able they are' and costs in family cases have been described variously as 'outrageously high', 'vast', 'apocalyptic' and 'eye-watering' with judges sometimes calculating not just percentage divisions between the parties but also the percentage that has gone to the lawyers. This sort of coverage not only does the lawyers a huge disservice, but it also overlooks the fact that lawyers take instructions from their clients. And sometimes, however focussed the advice is on settlement, clients can give instructions that disregard that advice.

In fact, most lawyers don't need encouragement to focus on resolving cases – as strategists and tacticians we know we often serve our clients best by helping them to iron out the differences between them. Finding creative solutions or formulating a proposal that incentivises compromise without sacrificing too much is intensely satisfying. Francis J described the wife's offer in *Helliwell v Entwistle* [2024] EWHC 1298 (Fam) as 'spot-on' and made a costs order against the husband because of it.

What is helpful for lawyers in the new protocol is that the repercussions for not following it are clear to the clients as much as the lawyers. The fact that the court is now increasingly likely to make costs orders can be helpful when trying to encourage clients to see a pragmatic way forward and get beyond the mire of emotional fall-out to look forward to a life post-separation. Fundamentally, family law is different to most other fields of litigation as the blocks to settlement are as likely to be emotional as financial, and in the context of a discretionary system with uncertainty as to outcome it can be hard for clients to make that decision to compromise.

Sticks and stays

Failure to consider alternatives could result in a stay or adjournment of the case. In *NA v LA* [2024] EWFC 113 Nicholas Allen KC (sitting as a Deputy High Court Judge) adjourned the case to allow time to explore alternative ways to resolve it. The parties were then to contact him after 6 weeks to confirm: (1) what engagement (if any) there had been with NCDR; (2) whether any of the issues in the proceedings had been resolved; and (3) in light of the foregoing, what were their respective proposals for the way forward; and at that point the judge would decide the appropriate path to take.

It remains to be seen whether this judgment will have had the desired effect for that family, and whether this will be a typical interpretation of the new rules. If the parties had both attended a MIAM and been clear that they chose litigation would the court have taken a different approach? If they tried another approach and didn't reach a resolution, how can the court determine whether they were properly engaged? If they choose not to arbitrate – and other options don't have the necessary 'teeth' to ensure disclosure – will they be criticised?

By removing the ability for this couple to keep a foot in both camps with court proceedings running on in the background, as has been the approach to date, it is in my view far more likely that an NCDR process will work. And if the couple really are eager to have a quasi-court process, then arbitration will provide the perfect solution. Although by closing the court's doors, Nicholas Allen KC has effectively consigned this couple to significant delay if NCDR does not prove fruitful (the court listing is such that it will be many months before they are back in the court's diary), in so doing he has likely ensured that NCDR has the greatest possible chance of success.

In this case, the clock had started ticking on the application for periodical payments, and it seems to me that this is a solution that may prove valuable in other cases where maintenance is relevant – issue the application and then agree a stay to allow time to explore alternatives to court.

NCDR and abuse

One of the most challenging paths to navigate when exploring NCDR is where there are allegations of abuse in a financial remedies case but where those issues are not 'live' in the sense that they do not form part of the court documents or the open narrative. The threshold for findings of conduct impacting financial outcomes remains high. Many clients will choose not to pursue allegations either because they have been advised that they will not have a bearing on the final outcome or because of the cost or emotional implications. For those who have recently found the strength to leave an abusive relationship the idea of embarking on litigation as to whether or not the abuse took place will be overwhelming.

Judges may not be aware of concerns regarding abuse where a decision has been made not to pursue it. MIAMs are confidential and so the fact that a mediator may have heard something in a MIAM that would make them conclude mediation is unsuitable would not be disclosed. Therefore, judges could make decisions regarding what looks like a refusal to engage without all of the necessary knowledge. It is going to be really important that there is proper judicial training in this respect to ensure that these issues are taken into account when mediation is being considered as the NCDR route, particularly if a mediator has indicated that the case is not appropriate to start or continue mediation or any other form of NCDR. However, allegations of abuse need not prevent a case being dealt with in arbitration or via a private FDR. It is more a question of choosing the right approach for the case.

NCDR and disclosure

To the consternation of some, Nicholas Allen KC in *NA v LA* was clear that there need not be full disclosure before a decision is made about NCDR. This seems to me to be an entirely reasonable position to take.

The judgment makes clear that you do not need financial disclosure before exploring NCDR, and that you can use NCDR to obtain that disclosure, but that is not the same as telling parties that they should start to discuss outcomes without that disclosure. When it comes to the financial implications of separation, all forms of dispute resolution begin with the exchange of financial disclosure, whether in the court process or outside it. Given financial disclosure is provided on an open basis, it is relatively straightforward to return to court to explain the information was not forth-

coming. Any facilitator of NCDR will not be willing to support substantive discussions without it. A mediator, for example, would be unlikely to tolerate repeated sessions without the information being forthcoming – that is the 'teeth' in the process: the provision of information is effectively a condition of continuing in the process.

In reality, the request for disclosure is the first test of engagement when it comes to NCDR, those that are unwilling or procrastinate in the provision of information reveal themselves to be unlikely candidates for some forms of NCDR and that lack of engagement may eventually sound in costs.

Risk vs opportunity

Sometimes focussing on risk means losing out on opportunity. There is a real opportunity with the new protocol to do things differently, and for clients and their lawyers to encourage their counterparts to do things differently too.

Where there is concern regarding delay or failure to fully disclose, you can insist on a timetable for the provision of information; set out the stages at which there should be participation in negotiations or mediation; suggest a date for a private FDR; or propose the terms of an ARB1. Open letters can be sent to protect parties' positions in respect of costs. Some of the requirements of the protocol are common sense and good practice – making sure correspondence focusses on relevant issues, avoiding polarising or hostile language, and forcing couples to try more than once and to try different NCDR options.

Where there are concerns regarding abuse, there are ways to mitigate those concerns – for arbitration, the same protective measures that exist within the court process can be imported, e.g. the giving of evidence from behind a screen, separate entrances and exits so that parties do not encounter each other. In mediation, separate space mediation should be explored so that the parties neither see nor hear each other, or solicitor supported mediation to protect parties from intimidation or undue pressure.

The reality is that all of the options will need to be tailored to meet the needs of individual clients and couples. But the benefit of that tailoring highlights even more starkly the inflexibility with applications to court which are sometimes a poor solution to these issues and come at the cost of legal fees, delay, and an even greater polarisation. For those leaving abusive relationships, prioritising autonomy can be key. Supporting survivors of abuse and empowering them will mean that they will have more options open to them and may be better than the only way forward being a court process.

A final note

I have two significant concerns about NCDR.

My practical concern is that this push won't work. Either because judges will find themselves unable to resist the temptation to solve the problem that's in front of them; that is exactly what they have spent their whole careers being trained to do. Or because couples will continue to feel stuck in the middle ground, with no access to a court system, and not sufficiently supported to engage in the alternatives.

Separating families who are fortunate enough to be able to afford support will be able to benefit from the input of lawyers, mediators, financial advisers, accountants, counsellors, divorce coaches, and other professionals. All of these people can offer help so clients can navigate their way through a process without the court as a safety net. Those who are in receipt of Universal Credit should be able to claim legal aid for legal advice in support of mediation. But many families will fall in the gap between these two extremes and, for them, closing the doors to the court without there being properly affordable and accessible advice about the options and the law is dangerous territory. And without that help and support, the court will continue to have to pick up the pieces, however frustrating the judges find that. One can only hope that the space afforded to them as a result of other cases leaving the system helps alleviate the burden.

My philosophical concern is in relation to the importance of access to justice and the indirect privatisation of the family justice system. It has been determined by the Court of Appeal that it is permissible for a court to order parties to attempt NCDR and to stay proceedings to allow for that. However, with arbitration being one of the NCDR options that a court can require, there is an issue not just with the fact that arbitration is binding and this may impinge on a party's Article 6 right to a fair hearing, but also with the fact that in circumstances where a judicial or quasi-judicial approach is appropriate, the court can require parties to self-fund that process. Coupled with which, courts provide much needed jurisprudence so we can better interpret the law and the law continues to develop to better protect the society it serves. If arbitration becomes routinely mandated by the judges who apply this protocol, that will pose a more serious threat to our legal system as a whole.

The vast majority of the clients I work with are already firmly in the NCDR arena. With arbitration on the menu, even those cases that need the structure of a quasi-judicial process with binding decision making powers fit within the new protocol. A surge in private FDRs has taken place, driven by COVID-19 and as a result of the court system becoming increasingly clogged up. The confidentiality that mediation offers to clients who want to have a completely frank discussion to try to head off a fraught legal battle is a unique and valuable option. The time certainly feels right for NCDR to be given another push.

Balancing the Books: Equitable Accounting in Trusts of Land Disputes

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Introduction

This article aims to provide the busy family practitioner with a fairly comprehensive guide to the *what*, *where*, *when*, and *how* of equitable accounting, specifically in the context of trusts of land, to assist you in getting such claims off on the right footing.

In the experience of the authors, accounting issues are often overlooked, particularly at the pre-action stage, and treated as an afterthought. This reflects the fact that accounting issues tend to arise as a subsidiary issue to the main claim, particularly where the underlying beneficial interests are in dispute. However, in the right case, accounting issues can make a substantial difference to net outcome, or to the viability of one party buying out the other. As is also evident from much of the case-law on equitable accounting, claims also frequently arise where one of the co-owners has been made bankrupt and their share has vested in their trustee in bankruptcy.

Equitable accounting is a fact sensitive process. The ultimate outcome will depend on the common intentions of the parties and what they have agreed, either expressly or impliedly, in relation to the sharing of the property and its associated benefits and burdens as well as careful analysis of the nitty-gritty of the figures and supporting disclosure. In many cases, expert evidence will also be required. Such issues therefore need to be foregrounded from the outset and properly evidenced.

We concede that some might take the view that equitable accounting is not the most exciting of subjects. If you are an enthusiast like us, then read on! Otherwise, you may wish to bookmark this article for future reference.

In the hope of breathing a little more life into the topic and assisting you with understanding the practical application of the principles, we have included some worked examples to illustrate the most common issues arising in equitable accounting claims, including:

- Occupation rents.
- Credits for repairs and improvements.
- Mortgage contributions.

Before we look at some of the specific constituent elements of accounting claims, we will cover some considerations of general application, including:

- The ‘what’: understanding the essential aim of equitable accounting.
- The ‘when’: we look at what juncture in a relationship a liability to account will arise. We also consider some other timing related issues such as limitation and claims for interest.
- The ‘how’: we address the basic practical procedural considerations relating to equitable accounting and how equitable accounting sits with the factual enquiry to discern the beneficial interests in the property.

General principles and practicalities

Equitable accounting: What is it?

Equitable accounting is both a process and a remedy via which the court seeks to establish the balance sheet between the parties in so far as they have shared the benefits and the burdens associated with jointly owned land with a view to determining whether or not either of the co-owners has a liability to compensate the other by way of redressing any imbalance between them. Equitable accounting issues typically arise where:

- one or other of the parties has incurred property related expenditure, such as repairs or in meeting mortgage payments, to which the other has not contributed at all or not paid their due share;
- a party has derived a benefit from the property, such as rental income or occupation, that the other has not shared in;
- the court can use the remedy of taking an account coupled with such factual enquiries as are necessary to ascertain what if anything is due from one party to the other to redress the imbalance in the sharing of benefits and burdens.

The principles developed in case-law have been described as ‘(non-binding) guidelines or rules of convenience aimed at achieving justice between the co-owners’: *Murphy v Gooch* [2007] EWCA Civ 603. The rules are now partly codified in ss 12–15 Trusts of Land and Appointment of Trustees Act 1996 (TOLATA) (primarily of relevance to the issue of occupation rent between beneficial co-owners).

Griffiths LJ, in *Bernard v Josephs* [1982] 1 Ch 391, illustrates how this balancing exercise typically works:

> 'When the proceeds of sale are realised there will have to be equitable accounting between the parties before the money is distributed. If the woman has left, she is entitled to receive an occupation rent, but if the man has kept up the mortgage payments, he is entitled to credit for her share of the payments; if he has spent money on recent redecoration which results in a much better sale price, he should have credit for that, not as an altered share, but by repayment of the whole or a part of the money he has spent. These are but examples of the way in which the balance is to be struck.'

The penultimate point that Griffiths LJ makes here, that we are not concerned when taking an account with altering the shares of the parties but rather with the payment of a sum by way of a contribution to the relevant expenditure or by awarding a share in the benefits associated with the property, is particularly important.

Two points flow from this. First, equitable accounting will always be secondary to establishing beneficial interests in the property. This is chiefly for the reason that the shares in which the parties hold the property will usually bear upon the apportionment of the benefits and expenditure between them in taking the account. Additionally, in cases where there is no express declaration of trust and constructive trust principles are in play, departure from an agreement relating to sharing of expenditure, or post-separation conduct including payment of expenditure and use of the property, may be relevant to a finding that the beneficial interests in the property have changed, which will preclude (or at least reduce the scope for) an accounting exercise based on the same conduct.[1]

Secondly, since we are not concerned with adjusting the underlying beneficial shares on taking an account, any sum found to be payable on the account will be fixed by reference to the value of the expenditure or benefits in question and will not rise and fall with the value of the property. In consequence, it is possible to have a situation where the liability to account could result in a negative balance due to the accounting party upon sale of the property, particularly if there has been a fall in property prices, and the accounting party would be required to make up the shortfall.

Equitable accounting: When does it come into play?

A number of helpful points in terms of the juncture at which a liability to account is likely to arise can be distilled from the judgment HHJ Behrens in *Clarke v Harlowe* [2005] EWHC B20 (Ch) at [33]–[39]:[2]

- In commercial scenarios, there may be an express agreement that each will contribute to outgoings, any mortgage instalments, and to the cost of any improvements. Where one party is fails to honour this agreement, the property may still be developed and resold in the course of the relationship between the parties. Equity may take account of the failure by means of equitable accounting, such accounting is not prohibited simply because the relationship is not at an end.
- A breach or failure to comply with an obligation is at the heart of the matter and is necessary before a duty to account arises. This applies just as much in an ordinary cohabitation case as in any other.
- In a cohabitation case, whilst the common purpose of the trust and the ordinary arrangements for the discharge of the outgoings subsist, there will be no breach or failure by one of the parties to honour any obligation and thus no room or reason for equitable accounting.
- Equitable accounting in the cohabitation context usually becomes relevant after the relationship ends and the parties separate, since at that stage there are no longer common arrangements. Each party from this point should ordinarily pay their proportionate share of expenses. However, exceptional cases may warrant equitable accounting before separation if it can be clearly shown that one party is in breach of specific payment arrangements for improvements or expenses.

In a cohabitation scenario, it will therefore ordinarily (but not inevitably) be the case that it will be inferred that any liability to account will run from the date of separation. This reflects the common-sense assumption that cohabiting parties in a continuing relationship do not generally intend some sort of micro-accounting process between them and so it will usually not be possible to say that there has been a breach of an obligation owed to the other if there has not been an exact apportionment of expenditure between them. However, this is just an inference as to the parties' intentions that may be drawn from the fact of cohabitation.[3] Whether or not the court draws on that inference will depend on the particular facts of the case. Such an inference will not be applicable where the court concludes that the parties intended some other arrangement in relation to the sharing of expenditure.

Continuing with the theme of timing, three additional issues warrant consideration: whether the Limitation Act 1980 applies to equitable accounting claims, whether interest can be claimed on amounts due, and the question of timetabling the determination of the accounting claims.

Does the Limitation Act apply?

As we have seen, the root of the liability of co-owners to account to one another lies in a breach of their obligations towards one another in respect of the trust property. Section 21 Limitation Act 1980 prescribes the applicable time limit for actions in respect of trust property. The general time limit for actions for breach of trust is 6 years (s 21(3)). However, no time limit applies to actions in respect of fraud to which the trustee was a party (s 21(1)(a)). Further, and of most relevance to the co-ownership scenario, no time limit applies to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use (s 21(1)(b)).

In our view, the Limitation Act 1980 will not afford a defence to claims for adjustments as between accounting co-owners in most scenarios. This is because, in most cases the parties will be trustees who have either incurred a liability that they are entitled to be indemnified for from the trust property or otherwise who have received a personal benefit. In each of the foregoing scenarios, a limitation defence will not generally be available.

It was held in *Re Howlett* [1949] Ch 767 that where a trustee has had the benefit of rent-free occupation of trust property, he is treated for limitation purposes as if he has

received and retained an occupation rent. Consequently, applying s 21(1)(b) Limitation Act 1980, no time limit applies to a claim to recover an occupation rent. The rationale underlying this principle is explained by Dankwerts J at 778:

> 'a trustee who remains in occupation of trust property for his own purposes … cannot be heard to say that he has not received any rents or profits in respect of the property. Having received, therefore, in theory rents and profits, because he is chargeable with an occupation rent, he cannot discharge himself unless he can show that he has paid moneys away and therefore either discharge himself by proper payments or, indeed, perhaps escape under the Limitation Act having made improper payments. But here the trustee, it seems, did not make any payments out of any kind at all. He merely used the property for his own purposes … having received the occupation rent, for which he is chargeable, he must be considered as still having it in his own pocket at the material date and therefore cannot escape under the provisions of the Limitation Act 1939 …'[4]

However, it is important to note that while limitation may not apply, the equitable doctrines of acquiescence or laches could still be relevant, potentially barring a claim if there has been an unreasonable delay in seeking an account.

In the case of properly incurred expenditure, a trustee will have the right to be reimbursed from the trust property. That right is understood to be a proprietary charge or lien giving rise to an equitable interest in the trust fund with priority over the claims of the beneficiaries. No limitation period will therefore apply where a trustee (which includes parties holding legal title in a conventional co-ownership scenario) has incurred expenditure which the court considers is properly recoverable from the trust property.

Where a credit is sought via equitable accounting against an individual who is merely a beneficiary, and not a trustee, the rule in *Cherry v Boultbee* (1839) 4 My & Cr 442 may also apply. The rule rests on the equitable principle that no one should be entitled to share in the distribution of a fund until he has discharged any obligation to contribute to the fund. This principle has been held in the context of estate administration to permit executors to offset a debt owed by a beneficiary against their share of the estate, notwithstanding that the debt may be statute barred if the executor were to sue for it: *Re Cordwell's Estate* (1875) LR 20 Eq 644. The fact that any liability owed by a beneficiary is yet to be established and quantified does not preclude the application of the rule in *Cherry v Boultbee*: *Re Rhodesia Goldfields* [1910] 1 Ch 239; *Re Jewell's Settlement* [1919] 2 Ch 161. It would appear on this basis arguable that no time limit will apply where a credit is sought under accounting principles against a beneficiary who is seeking to share in the capital value of the property on sale.

Can interest be claimed?

There is authority to the effect that interest is not claimable in respect of credits for expenditure. The case of *Foster v Spencer* [1996] 2 All ER 672, which involved professional trustees, held that a trustee cannot typically claim interest on the reimbursement of ad hoc expenditure. In *Byford v Butler* [2003] EWHC 1267 (Ch), which concerned a conventional equitable accounting scenario, the court did not find it necessary to resolve the issue on the facts, but it was suggested that interest could not be claimed on expenditure on the basis that the time for reimbursement of the expenditure is the date of adjustment of the proceeds of sale, and therefore, there is no basis for interest to accrue beforehand. Nonetheless, there are cases where the courts appear to have taken a contrary view and the issue may be one of discretion.

The position regarding interest on occupation rent is also less than clear. Older case-law suggests that trustees may not be liable for interest on arrears of income: *Macartney v Blackwood* (1795) Ridg L & S 602. This principle might be argued to extend to occupation rent between co-owners, on the basis that occupation rent is effectively income. Further, the reasoning in *Byford v Butler* that the time for reimbursement is the date of adjustment of the sale proceeds might also be thought to apply to retrospective awards of occupation rent. However, there are reported cases in which interest has been awarded on occupation rents: see e.g. *Sinclair v Sinclair* [2009] EWHC 926 (Ch) and *Baynton-Williams v Baynton-Williams* [2020] EWHC 625 (Ch). Again, the issue is likely one of discretion.

Timetabling the account

A claim to an account will usually be raised as a matter of pleading alongside any claim for a declaration as to beneficial ownership or an order for sale. However, it may be appropriate in some cases for the determination of the accounting issues to be postponed until after the beneficial ownership of the property has been resolved, if that is in issue, and potentially until after the property has been sold.

There is no fixed rule as to whether accounting issues should wait until post-sale. Waiting until the property has been sold offers the advantage that the final figures will be available, where otherwise there may be an ongoing liability to pay an occupation rent or mortgage instalments. The account will obviously not be an issue that can wait where one party is seeking permission to buy out the other and wishes to offset any credit owed to them against the purchase price.

Except in instances where there is a disagreement over whether one of the parties has any interest in the property and the accounting claim involves significant complexity – making it logical to delay those costs until the property's ownership is settled – our experience is that it is generally better, to avoid extra cost and delay, to address all issues at once rather than postponing the accounting process.

Equitable accounting: How should it be raised?

Procedural rules: in terms of the governing procedural rules, unless dealing with an intervener claim in the context of existing financial remedy proceedings, it is the Civil Procedure Rules that apply to initiating an equitable accounting claim.

Pre-action considerations: a detailed letter of claim should be sent in compliance with the Practice Direction on Pre-Action Conduct and Protocols. Failure to comply can have costs consequences. The letter of claim and the defendant's response should set out the parties' positions and relevant facts in sufficient detail to enable the recipient to understand the basis of the claim/defence. Pre-action disclosure of the key documents relevant to the issues in dispute is also expected. The parties are also expected to consider whether or not negotiation or ADR might enable

them to settle their dispute without commencing proceedings.

Part 7 vs Part 8: if the matter cannot be resolved pre-issue, the claimant will need to decide whether or not to proceed under CPR Part 7 or Part 8. Part 7 proceedings are initiated by claim form coupled with particulars of claim. Part 8 proceedings are initiated by a Part 8 claim form and a supporting witness statement. The choice of procedure hinges on the question of whether or not there is a substantial dispute of facts between the parties. In cases where there is no dispute concerning the beneficial interests in the property, and the remedies sought encompass a sale and accounting issues, opting for Part 8 is typically appropriate. Where there is a dispute as to the underlying beneficial interests in addition to any accounting issues, proceedings should be issued under Part 7.

Counterclaims: it is very commonly the case that the party out of occupation is seeking an occupation rent and the party remaining in occupation will have claims to contributions for expenditure on repairs or mortgage payments to offset, which will need to be raised by way of counterclaim. It is important to note that you will require permission under Part 8 (CPR 8.7) to raise a counterclaim, if the claimant has issued under Part 8. If the claimant has issued under Part 7, the counterclaim is made at the same time as filing the defence and within the same document.

Part 36: an early and well-pitched Part 36 offer can have considerable tactical benefits, particularly for a claimant who, if they meet or beat their offer, will be entitled to additional interest, costs on the indemnity basis and interest on costs from the date of expiry of the relevant period, as well as an additional amount of 10% on the sum awarded to them (see CPR 36.17). Part 36 is prescriptive and an offer that does not comply with the rules will not attract the enhanced costs provisions it provides for, although it will still be a *Calderbank* offer that may attract cost consequences. There is a form that can be used for making a Part 36 offer (form N242A) to avoid drafting mistakes.

Expert evidence: cases involving claims to an occupation rent or to recover expenditure on works will require valuation evidence from an appropriately qualified expert. In the case of expenditure on unauthorised works to the property by one of the parties, the surveyor will be required to provide an opinion as to the resulting increase in value (if any) to the property. In a case involving multiple properties over a longer time frame and income and expenditure that needs to be accounted for, consider whether it may be more economical to instruct a forensic accountant as a single joint expert to undertake the work instead of the parties' lawyers.

Practical tips: in the authors' experience, it pays to give thought well ahead of the trial as to how the supporting financial information is to be marshalled and presented. In more complex cases, it will usually be sensible to seek a direction for the parties to prepare a Scott schedule with columns for each to set out their respective cases on the various heads of claim and for the judge to include their findings. Depending on the level of complexity, the Scott schedule may need to be supported by more detailed spreadsheets, itemising the underlying financial data and cross-referencing against the hearing bundle. In every case, you should aim to avoid having to argue issues of computation at trial. The judge is not going to appreciate being taken through a line-by-line analysis of bank statements in order to quantify particular heads of receipt or expenditure. Figure work should be undertaken well in advance of trial and the parties' lawyers should aim to agree the figures and narrow points of dispute where possible, ideally leaving matters of principle for determination.

Equitable accounting: Where should such claims be issued?

Unless the claim has is particularly high value, the vast majority of claims should be issued in the county courts rather than the Business and Property Courts. In cases with an element of complexity, you might want to consider issuing in one of the county court centres with specialist business and property judges: Central London, Birmingham, Bristol, Cardiff, Manchester, Newcastle, Leeds, Liverpool and Preston. If there are (or are likely to be) conjoined financial remedy or claims under Schedule 1 Children Act 1989, proceedings should be issued in a court exercising both family and civil jurisdiction.

Constituent elements of the account

Occupation rent

An occupation rent, or statutory compensation under TOLATA, may be sought where one party has remained in occupation to the exclusion of the other. In each case, the overarching consideration in the exercise of the court's discretion is whether or not it is necessary to order an occupation rent, or statutory compensation, in order to do justice between the parties.

An occupation rent will usually be payable where one party has been ousted by the other but will not normally be payable where one beneficiary has left the property voluntarily and would be welcome back at any time (*In re Pavlou (a bankrupt)* [1993] 1 WLR 1046). It is recognised, however, that a party leaving the home on the breakdown of a relationship should usually be regarded as having been constructively excluded from the property, although this is not a rule of law and is merely a *prima facie* conclusion drawn from the facts.

It is not necessary, therefore, to show forceable exclusion from the property on the breakdown of the relationship in order to succeed in claiming an occupation rent. In *Bailey v Dixon* [2021] EWHC 2971 (QB), it was held on appeal that the trial judge had erred in law in requiring the party seeking an occupation rent following her departure from the property upon the breakdown of the relationship to show something akin to forceable eviction by a landlord, such as changing the locks. Further, there is still scope for the court to order an occupation rent if the interests of justice require it, even in the absence of proof of actual or constructive ouster by the occupying party.

In *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432, Baroness Hale at [93]–[94] expressed the view that claims to an occupation rent between beneficiaries with an interest in possession entitling them to occupy the land (and so beneficial co-owners who have acquire a property as their mutual home) will now be governed by ss 12–15 TOLATA, instead of the case-law under the old doctrines of equitable accounting. In most cases, whether resolved

pursuant to statute or the common law, the result will be much the same.

Section 13 TOLATA allows trustees (and thus the court pursuant to s 14(2)) to impose reasonable conditions on any beneficiary in relation to their occupation of the trust property (s 13(3)). This can include (s 13(5)):

- paying any outgoings or expenses in respect of the land – utility bills, mortgage payments, or ground rent charges, for example;
- requiring the beneficiary to assume any other obligation in relation to the land or to any activity which is, or is proposed to be, conducted there – for example assuming responsibility for repairs.

Where one beneficiary is occupying to the exclusion of another beneficiary they can also be required (s 13(6)):

- to make payments by way of compensation to the beneficiary whose entitlement has been excluded or restricted;
- to forgo any payment or other benefit to which they would otherwise be entitled under the trust so as to benefit the excluded beneficiary.

The court has a broad discretion to order an occupation rent, in a case governed by TOLATA, but must consider the following statutory factors (s 13(4) and s 15) as applicable or relevant on the facts:

- the intentions of the person or persons who created the trust;
- the purposes for which the property is held;
- the welfare of any minor who occupies the property or might reasonably be expected to occupy the property as their home;
- the interests of any secured creditor of any beneficiary; and
- the circumstances and wishes of each of the beneficiaries.

The presence of minor children living at the property, for whom both parties have an obligation to provide, will often be a factor weighing against the award of an occupation rent (as it did on the facts of *Stack v Dowden* itself). In other cases, it may be that the parties possessed a common intention that one co-owner would be able to occupy the property rent-free on a continuing basis.[5]

TOLATA does not provide an exhaustive regime governing every case in which payment for occupation is sought by one co-owner against another. In particular, the provisions of TOLATA permitting the award of statutory compensation have no application in claims by trustees in bankruptcy or by other co-owners who have no right to occupy the land, or by persons who may have a right of occupation but where the right of occupation has not been excluded or restricted. In all such cases, the statutory right to compensation under s 13(6) does not arise, since that section is only engaged where the statutory entitlement to occupy the property pursuant to s 12 has been excluded or restricted. There is also a view that s 13(6) operates prospectively only, and that retrospective awards remain governed by the equitable jurisdiction to make such awards, although the statutory principles will be treated as relevant.[6]

Where the right to statutory compensation under TOLATA is inapplicable, traditional equitable accounting rules continue to apply and the court has a broad equitable jurisdiction to do justice between co-owners on the facts of each case. For many years the position was that an occupation rent '… will ordinarily, if not invariably' be ordered against the occupying co-owner in cases involving a trustee in bankruptcy, on the rationale that it is not reasonable to expect a trustee in bankruptcy to exercise the right to occupy the property (*French v Barcham* [2008] EWHC 1505 (Ch)). Doubt was cast on the correctness of that approach by Snowden J in *Davis v Jackson* [2017] EWHC 698 (Ch), who considered that the default position under the equitable jurisdiction is that occupation rent is not payable under the equitable jurisdiction unless there is some conduct by the occupying party, or at least some other feature of the case relating to the occupying party, that justifies a court of equity concluding that it is appropriate or fair to depart from the default position and to order the occupying party to start paying rent.

The Court of Appeal in *Ali v Khatib & Ors* [2022] EWCA Civ 481 has now confirmed the reasoning of Snowden J in *Davis v Jackson*.

Ali v Khatib concerned what had been a multi-generational family home. Mrs Bibi lived in her home with one of her sons and his family (the respondents to the appeal) and in a 2003 will left the home to them. Some years after her death, this will was successfully challenged. Thereafter, the beneficiary of an earlier valid 1997 will (the claimants/appellants) sought occupation rent against the respondents for the period from Mrs Bibi's death to vacant possession.

At first instance, the judge refused to order an occupation rent or statutory compensation. The case was approached on the basis that the other beneficiaries under the 1997 will had a right of occupation under s 12 TOLATA.[7] However, the claimant had not been excluded from or restricted in his use of the house. It was merely that all of Mrs Bibi's children had moved out except for the respondents who had cared for her, and their occupation continued after Mrs Bibi's death under the invalid will that named them as beneficiaries. The judge found that the claimant would not have wanted to occupy the property anyway, as he had his own family home. Consequently, the judge concluded that there was no entitlement to statutory compensation under TOLATA. Applying *Davis v Jackson*, he further concluded that there was no entitlement to an occupation rent under equitable principles. The fact that the property had gone up in value was also taken into account as weighing against awarding an occupation rent. The judge's approach was approved on appeal. The Court of Appeal concluded that that the default position is that an occupation rent is not payable, absent some other feature of the case relating to the occupying party that justifies the conclusion that it is appropriate or fair to order the occupying party to start paying rent.

Following *Ali v Khatib*, the position would appear to be as follows:

- Statutory compensation under TOLATA is not available unless the absent party: (a) has a right of occupation; and (b) that right of occupation has been restricted or excluded – if those pre-conditions are satisfied, the court must then go on to consider whether to exercise its discretion to order an occupation rent having regard

to the relevant statutory considerations as applicable on the facts.
- In all other cases, the court is exercising a broad equitable jurisdiction. The statutory factors are likely nonetheless to be a relevant consideration.
- The default position (and it would appear from the judgment that this is the case as between all co-owners, see Andrews LJ at [72]) is that an occupation rent is not payable, absent some feature of the occupant's conduct that makes it just to order an occupation rent.

Examples of factors justifying an award were suggested in *Khatib* to include exploiting the property for financial gain or precluding the other co-owner from exercising a right of occupation that they otherwise wished to occupy. In many cases involving claims between formerly cohabiting couples, the departing party will often be able to argue that there has been a constructive ouster, justifying the award of an occupation rent or statutory compensation. Prolonged resistance to selling the property might support the decision to order occupation rent. However, an increase in the property's value could weigh against such an order, as highlighted in both *Davis v Jackson* and *Ali v Khatib*.

Quantification and set off

When assessing the quantum of any occupation rent, the court will generally assess the claim by reference to the market rental value. This is usually evidenced by way of evidence from a single joint expert, such as a RICS surveyor. The party ordered to pay an occupation rent, will be liable to account to the other for a share of the rental value attributable to the property, in proportion to the parties' respective beneficial interests (*Akhtar v Hussain* [2012] EWCA Civ 1762).

Alternatively, it has been suggested that occupation rent should be determined by reference to the actual costs of renting alternative accommodation incurred by the cohabitee who is no longer in occupation of the property. In his dissenting judgment in *Stack v Dowden*, Lord Neuberger considered that the court should be able to award compensation based either on the notional rental value of the property or the cost of alternative accommodation. We consider that there are difficulties with the 'alternative accommodation' approach, which raises the need to consider the relative difference between the standard of the co-owned property and the alternative accommodation. The cost of alternative accommodation will not do justice between the parties if the ousted party rents a mansion when a bungalow would do or, conversely, if, due to financial circumstances, the ousted party is forced to rent much more modest accommodation. In our experience, the prevailing approach is to assess occupation rent by reference to the market rental value of the property.

On a pragmatic basis, where the occupying party has discharged the mortgage and the mortgage payments and occupation rent are roughly equivalent, the court may simply offset one against the other if that is likely to do broad justice between the parties and avoid the costs of an accounting exercise.

Repairs and improvements

In the context of co-ownership, equitable accounting principles may come into play if one co-owner undertakes repairs or improvements on the property. As we have seen, unless in the course of the relationship there has been a breach of an agreement to contribute to works, equitable accounting will only come into play post-separation. We have already referred to the case of *Clarke v Harlowe* as authority for that proposition. On the facts, that case concerned an attempt by one cohabitant to claim a credit against the other for half of the sum of £90,000 he claimed to have spent on making improvements to the property. Since that sum had been paid whilst the parties were in a continuing relationship, and in the absence of any evidence that there had been an agreement that the other would contribute to the costs of the work, there was no basis for compelling her to contribute via equitable accounting.

A credit may be obtained where such expenditure has been incurred post-separation. Two key principles established in *Leigh v Dickeson* (1884) 15 QBD 60 provide the foundation for the applicable rules.

- First, a co-owner cannot unilaterally execute improvements or repairs and then charge the other co-owner with a share of the cost. This principle arises because the law posits that a co-owner should not be burdened with expenses without having had the opportunity to either accept or reject them. Pollock CJ's *dictum* in *Taylor v Laird* (1856) 25 LJ Exch 329, 332, though a contractual dispute rather than an equitable accounting case, encapsulates the essence of this principle: 'One man cleans another's shoes, what can the other do but put them on?'
- Despite the seemingly harsh nature of this rule, it is balanced by a second principle that prevents a party from reaping the benefits of an increase in property value without compensating the other for the expenses incurred to achieve it.

Therefore, the overarching rule is as follows.

In the absence of an agreement between the parties regarding sharing the cost of the work, a party can only recover a contribution to expenditure on repairs or improvements if that expenditure has resulted in an increase in the property's value. Additionally, the recovery for such unilaterally incurred expenditure is limited to a proportionate share of whichever is *the lesser* of the actual expenditure or the increase in value brought about by the improvements, as affirmed in *In re Pavlou (a bankrupt)* [1993] 1 WLR 1046 at 1048–1049. In most cases the increase in value will be less than the expenditure, and recovery will usually be capped at a credit for the other party's proportionate share of the increase in value.

Furthermore, it follows from these principles that parties cannot claim for improvements they have carried out without incurring any actual expenditure, whether through their own labour or other means, as per HHJ Matthews in *Solomon v McCarthy (Trust law)* [2020] EW Misc 1 (CC) at [28]. The party seeking credit for the cost of improvements and repairs must provide evidence of both the cost of the work and the corresponding increase in value. Failure to provide such evidence is likely to result in the dismissal of the claim (as happened in *Solomon v McCarthy*).

Case example 1 – repairs and improvements

- Alice and Bill have separated, they hold the property in

the proportions 70% to Alice and 30% to Bill. The exterior of the property needs painting. Alice and Bill agree that this should be done, and Alice takes the lead in making the arrangements. Alice then decides, without consulting Bill, to also ask the builders to retile the roof and to install a new kitchen.

- The repainting cost £1,000 and adds nil to the value of the property.
- The retiling cost £5,000 and adds £10,000 to the value of the property.
- The kitchen cost £5,000 and adds nil to the value of the property.

What adjustment is required to division of the net proceeds of sale of £110,000?

Suggested solution:

Alice	**Bill**	
70% share = £77,000	30% share = £33,000	Proceeds of sale prior to adjustment.
£300	-£300	**Repainting:** we would want to know if there had been any discussion between the parties as to how they would share expenditure. Absent any such discussion, the expenditure falls to be shared in proportion to their interests. B has a 30% share and so should contribute 30% of the cost of repainting.
£1,500	-£1,500	**Tiling:** not agreed in advance, but has resulted in increase in value. Following *Re Pavlou*, Alice can recover whichever is the lesser of the increase in value or the cost of the work. A recovers B's proportionate 30% share of cost of work.
Nil	Nil	**Kitchen:** not agreed, no increase in value.
£78,800	**£31,200**	**Distribution**

Mortgage payments

Mortgage payments: capital

In relation to the period prior to separation, the principles considered in *Clarke v Harlowe* apply to mortgage payments as with other expenditure. Just as with other expenditure, it is open to court to find no intention to account even where substantial repayments have been made by one party during course of relationship. In *Begum v Issa* [2014] WL 5833780, a question arose as to whether under the principles of equitable accounting Ms Begum should give credit in respect of a substantial payment to reduce the mortgage which had been made by her former partner. The answer, applying *Clarke v Harlowe*, was no. The parties had agreed that Ms Begum would not work and would look after the children. All financial matters were dealt with by the man. It had been their common intention that neither should thereafter have to account to the other in respect of expenditure incurred by the other on the property during the period of cohabitation.

After separation, if one party repays more than their share of the mortgage principal, they are typically entitled to a proportionate credit for the resulting increase in the property's equity of redemption. Millet J in *In re Pavlou (a bankrupt)* [1993] 1 WLR 1046 explained this as aligning with how repairs and improvements are treated – capital repayment enlarges the equity of redemption for the benefit of both parties.

Mortgage payments: interest

In *Re Pavlou*, Millet J also allowed the wife's claim to a credit for interest payments, although he did not elaborate on the justification. The analogy with credit for repairs and improvements does not offer a clear basis for awarding credit for the interest component. Mortgage interest payments do not directly enhance the value of the parties' interests and, the context of repairs and improvements at least, expenditure that does not result in an increase in the property's value is generally not allowed.

The better view, perhaps, is that such expenditure is allowable by reference to the general principle at common law and equity that a party who has paid more than their fair share of a common liability can seek a contribution from the other party. There is commentary to this effect in *Byford v Butler* [2003] EWHC 1267 (Ch) and *Davis v Jackson* [2017] EWHC 698 (Ch).

In *Emmanuel v Emmanuel* [2016] SGCA 30 at [103], the Singapore Court of Appeal examined English equitable accounting principles and concluded that there should be no distinction between income and capital. Both payments help preserve or enhance the parties' shares in properties – a failure to pay the interest due under the mortgage will be liable to place the property at risk of repossession by the lender. Moreover, distinguishing between interest and capital can lead to unfairness. It is generally the case that amortisation schedules result in a greater proportion of mortgage repayments made at the beginning of the mortgage being applied towards the payment of interest, whereas more of the payments made later in the lifetime of the mortgage will go towards capital repayment. If a distinction were drawn between payment of capital and of interest, the party who makes repayments at the beginning may end up worse off than a party who pays at a later stage. The court considered this approach to be unjustified, if the aim of equitable accounting is to achieve broad justice between co-owners.

A practical approach can be taken when the monetary amounts involved can be seen to be broadly similar, such that a detailed accounting process would result in unnecessary time and expense. In such cases, the court may direct that the interest component of the mortgage payments be offset against the occupation rent claim without further investigation, as suggested in *Re Gorman* [1990] 1 All ER 717 at 726.

This practice is one of convenience rather than a rule of law. It is more commonly applied between former cohabitants and less likely when the party seeking the account is a stranger or more remotely connected to the occupant (e.g. a trustee in bankruptcy): *Re Gorman; Re Pavlou*. Such an approach will also not be appropriate where it appears likely to lead to an injustice, for example where there is substantial disparity between the mortgage interest and the rental value of the property. In other situations, offsetting will be inapplicable. For instance, when the party entitled to the occupation rent, having vacated the property,

has also been paying the mortgage or where the court decides that the party remaining in occupation should not be liable to pay an occupation rent.

Mortgage payments: proportions

The question of the proportions in which the parties should be expected to contribute to mortgage payments was also considered in *Emmanuel v Emmanuel* [2016] SGCA 30, where the court concluded at [105]:

> 'In our judgment, the extent to which each party is expected to contribute to mortgage repayments will largely depend on the common understanding or agreement between the parties at the time the mortgage is taken out. … If there is a material departure from that common understanding, and one party repays more of the mortgage than was initially envisaged, then equitable accounting may be brought into play, unless it is shown that at the time the mortgage repayments were made, the payor had the intention to benefit the other co-owners.'

We consider the focus on the parties' intentions to be the correct approach, and consistent with the reasoning underpinning equitable accounting as considered in the English case-law.

The mortgage is usually the largest property-related expense that will be incurred by the parties and typically there will have been some sort of discussion or agreement about how the parties intended to contribute to the mortgage from the outset. There are a range of potential conclusions that could be drawn depending on the facts of the case. For example:

- Where the agreed beneficial shares of the parties in the property reflect the fact that there was an understanding between the parties that the mortgage capital would be treated as having been contributed by each of them in particular proportions and that they would service the mortgage in those proportions, it is likely that any liability to account will be assessed by reference to that agreement. For example, an agreement of this description may be struck between the parties where party A has contributed more of the deposit and party B agrees, as a quid pro quo of the property being held as joint tenants or as tenants in common in equal shares, to discharge a greater share of the mortgage repayments. We consider that in such a scenario, the parties will most likely be held to the bargain struck at the outset – it would be unfair to allow party B to retain the benefit of the bargain struck in terms of their beneficial share in the property but allow them to wriggle out of their agreement to shoulder a greater share of the mortgage.
- In the absence of any explicit or implicit agreement to share mortgage liability in specific proportions, or when the court determines that any existing agreement on contribution has ended, the parties are likely to be deemed liable in one of two ways:
  - In accordance with their respective shares in the property. For instance, if party A owns 30% and party B owns 70%, and party A makes excess payments toward the mortgage, party A will be credited for 70% of these payments, reflecting the benefit received by party B (consistent with the rationale in *Re Pavlou* and the result in *Emmanuel v Emmanuel*).
  - Alternatively, it could be argued that both parties should contribute equally to the mortgage, as their liability to the lender is typically joint and several. We favour the proportionate approach, which is consistent with the approach taken to apportioning other expenditure and occupation rent, where that would lead to a different outcome.

Case example 2 – mortgage and occupation rent

- Alice and Bill purchased a property for £200,000. The property is held by them as beneficial joint tenants pursuant to an express declaration of trust.
- Alice contributed the deposit of £50,000 and the remainder was raised by way of mortgage in joint names.
- They agreed from the outset that Bill would pay 60% of the mortgage instalments, as Alice had paid the deposit.
- After the birth of their child, Alice reduces her hours. From this point, Bill pays the whole mortgage making payments (in interest and capital repayment) totalling £10,000 for this period, instead of his originally agreed share of £6,000.
- One year later they separate in acrimonious circumstances. The atmosphere at the house is intolerable and Alice and their child move into a spare room at Alice's mother's house. Bill alone remains in occupation paying the whole mortgage for 2 years paying a further £20,000 (in interest and capital). The property is sold, by which date the property is worth £250,000 and the outstanding mortgage is £120,000.
- The market rental value of the property is £1,200.00 per month.

Suggested solution:

Alice	**Bill**	
£65,000	£65,000	Net proceeds prior to adjustment
Nil	Nil	**B's excess mortgage payments pre-separation:** unlikely to justify adjustment. Whilst it could be said to be a distinguishable feature from *Clarke* and *Begum* that there had been a particular agreement between the parties at the outset to contribute to the mortgage in specified proportions, the birth of their child is a significant change in circumstances. It is likely that a court would consider that there was no expectation that A would be liable to B for failing to pay her share of the mortgage, in circumstances where she has reduced her hours to care for their child. Whether explicitly or implicitly, the change in arrangements is likely to be treated as being by agreement between the parties.

Alice	Bill	
-£8,000	£8,000	**B's mortgage payments post-separation:** we take the view that, post-separation, it is most likely the case that the court would consider that the apportionment of the mortgage should revert to the original 60/40 agreement. This appears the most equitable arrangement where, on our facts, that seems to have been a pre-condition of Bill acquiring a half share in the property. B should be credited, and A debited, with a 40% share of the payments made by B.
£14,400	-£14,400	**Occupation rent:** likely to be ordered where constructive ouster, and parties' child out of occupation. 24 months @ £600 p/m – 50% of the market value, proportionate to A's beneficial interest in the property.
£71,400	**£58,600**	**Distribution**

In the above table, in calculating the net proceeds prior to adjustment, we have treated the mortgage liability on redemption of the mortgage at the point of sale as being apportioned equally between Alice and Bill. Note that the property is held as express joint tenants and, absent fraud or undue influence or some other vitiating factor justifying the recission of the declaration of trust, the declaration of trust is conclusive as to their respective beneficial interests in the property: *Pankhania v Chandegra* [2012] EWCA Civ 1438. There is therefore no scope for Alice to seek to argue on constructive trust principles that she should have a larger share on the basis of her greater contribution to the purchase price.

However, we consider that there is an argument here that the burden of the repayment of the outstanding mortgage should be apportioned as between the parties' gross shares of the proceeds of sale in accordance with the agreement that Bill should be responsible for 60% of the repayment. This approach may be said to be consistent with the intentions of the parties. Why should Bill share in the increase in value in the property on sale, without first deducting the proportionate share of the mortgage that he was expected to ultimately bear over the lifetime of the mortgage and which he had agreed to pay in recognition of Alice's greater contribution to the purchase price?

If this argument was accepted, this would change our starting figures in the above scenario (prior to the other adjustments), as follows:

Alice	Bill
£125,000 (50% of gross proceeds)	£125,000 (50% of gross proceeds)
Less £48,000 (40% of outstanding mortgage)	Less £72,000 (60% of outstanding mortgage)
£77,000	**£53,000**

This is not an argument that the parties' beneficial shares in the property should be varied on constructive trust principles, rather it is about indemnification. The argument on our facts is that Alice has effectively stood surety for the portion of the mortgage that they agreed at the point of purchase was to be Bill's responsibility to discharge and should be entitled to be indemnified and to have her interest in the property relieved from repayment of that portion of the mortgage debt. This approach is consistent with the doctrine of exoneration, whereby co-owner A may be entitled to throw on the share of co-owner B the burden of borrowing taken against jointly owned property for the sole purposes of B, so that A's own share of the property is 'exonerated' from repayment: see the helpful analysis of the law relating to the doctrine in *Armstrong v Onyearu* [2017] EWCA Civ 268, [2017] 3 WLR 1304. Where jointly owned property is charged to secure the indebtedness of one of the joint owners, there is an evidential presumption that the parties intended that, as between themselves, that the liability should fall on the debtor's share of the property. The application of the doctrine of exoneration turns on the presumed or actual intentions of the parties. The underlying rationale of the equity of exoneration is that parties can agree between them the extent to which they will bear responsibility for discharging the secured borrowing. We have found no authority dealing with the question of whether parties can be held to an express informal agreement to apportion a mortgage raised for the purchase of a property. However, in *Cadlock v Dunn* [2015] EWHC 1318 (Ch), it was held that the wife's beneficial interest in a jointly owned property was to be exonerated, based on the presumed intentions of the parties, to the extent that a mortgage had been used to buy back the husband's share in the property from his trustee-in-bankruptcy. Whether or not this argument would succeed on the facts of our scenario would depend on the court's willingness to extend the exoneration line of authority, as well as the court's findings as to the parties' intentions. The same conclusion may arguably also be reached on unjust enrichment principles.

Case example 3 – bringing it all together

- Alice and Bill are separated and living apart. They nonetheless buy a property in joint names pursuant to an express declaration of trust for Alice's sole occupation, and subject to a joint mortgage which they agree will be paid equally. Bill did not pay the mortgage as agreed and is subsequently declared bankrupt.
- Alice of her own accord undertakes repairs to the property in the sum of £10,000, but this has not resulted in any increase in value. The rental value of the property is about equivalent to the sums Alice has paid by way of mortgage.
- The property is worth £450,000 and the outstanding (interest only) mortgage is now £200,000. Alice has paid £120,000 in mortgage instalments since the date of purchase.
- Alice seeks adjustment to her share in respect of the excess mortgage payments she has made and for a contribution to the costs of the repairs. Bill's trustee-in-bankruptcy seeks to offset the mortgage interest against an occupation rent.

Suggested solution:

Alice	Bill's TiB	
£125,000	£125,000	Net proceeds prior to adjustment

Alice	Bill's TiB	
Nil	Nil	**Repairs:** the repairs fall foul of the principles established in *Re Pavlou; Leigh v Dickeson*. Since no increase in value has resulted, no adjustment is due.
£60,000	-£60,000	**Mortgage payment:** A is entitled to a credit for B's unpaid share of mortgage interest from the date of purchase: *Emmanuel*; *Byford*.
Nil	Nil	**Occupation rent:** no ouster or other justification for departing from 'default' position: *Davis v Jackson*; *Ali v Khatib.*
£185,000	**£65,000**	**Distribution**

We can be relatively confident of our answer here, as the factual scenario is drawn from the case of *Davis v Jackson* [2017] EWHC 698 (Ch).

Snowden J could not see how it could be in accordance with equity or justice for his trustee-in-bankruptcy, who has simply stepped into the Mr Jackson's shoes, to become automatically entitled to claim an occupation rent from the wife in circumstances where it had never been intended that Mr Jackson would live at the property.

The court considered it relevant that Mrs Jackson had paid all of the mortgage instalments and other outgoings in respect of the property. Mr Jackson had done nothing other than contributed his willingness to assume liability under the mortgage. If Mrs Jackson were to be charged occupation rent for the period since the vesting in the trustee-in-bankruptcy of the husband's interest in the property, so as to offset the substantial mortgage payments which she had continued to make after that time, the result would represent an unjust windfall for the creditors. The limited involvement of Mr Jackson and the trustee was properly reflected in his share of the equity in the property, which had substantially increased in value over time, after giving credit for the excess mortgage payments Mrs Jackson had made.

The court ordered the proceeds of sale of the property to be split equally between the trustee and Mrs Jackson, with credit to be given to Mrs Jackson for one half of all the payments she has made under the mortgage from the date of purchase until sale. No allowance was made in respect of other payments which she had made. Although she had paid for some repairs and improvements to the property, there was no evidence that these had resulted in an increase in value.

Conclusions

By way of summary, the following points can be made about the court's jurisdiction to adjust the parties' shares in the property to take account of the benefits and burdens or the property, whether under TOLATA or the old equitable accounting principles:

- The golden thread that runs through the body of applicable case-law is whether or not it is necessary to make such credits or debits in order to do justice between the parties.
- In all cases, the court has a discretion whether to order such adjustments.
- The result in every case will turn on the particular facts of the case and the intentions of the parties will usually be of particular importance.
- In most cases, the accounting process is going to be confined to the period post-separation.

We offer a final word of caution: always consider carefully whether the costs of the accounting exercise will be proportionate to the result achieved. Accounting claims in the typical case often involve fairly marginal figures and it is quite often the case that cross-claims between the parties will largely cancel one another out. No one wants to be in the position that the parties found themselves in, in *Murphy v Gooch* [2007] EWCA Civ 603. It took a trip to the Court of Appeal in that case to reach the conclusion that the woman's entitlement to an occupation rent should be set off against the credits due to the man in respect of his payment of interest and rent (the property having been purchased under a shared ownership scheme), with the result that each credit cancelled the other out.

Notes

1 See for example *Gallarotti v Sebastianelli* [2012] EWCA Civ 865.
2 Approved in *Wilcox v Tait* [2006] EWCA Civ 1867.
3 See further *Wilcox v Tait* [2006] EWCA Civ 1867 at [65]–[66] per Parker LJ, citing *Clarke v Harlowe* with approval.
4 Section 19(1)(b) Limitation Act 1939 was drawn in materially the same terms as s 21(1)(b) Limitation Act 1980.
5 See for example *Pickering v Hughes & Ors (Rev1)* [2021] EWHC 1672 (Ch) where a portfolio of properties had been acquired by a husband and wife with the common intention that each of them would be entitled to occupy one of their properties rent free and that this arrangement would continue after the first of their deaths.
6 This is noted to have been agreed by both counsel at first instance in *Ali v Khatib & Ors* [2022] EWCA Civ 481. See further *Amin v Amin* [2009] EWHC 3356 (Ch) at [283]–[304].
7 On appeal, the claimant was refused permission to argue that the respondents were trespassers who had no beneficial interest in the property, as they had not argued this at first instance. The case was therefore approached on the basis that all of the parties had a beneficial interest in the property, conferring on them the right of occupation.

Delaying a Divorce Because of Financial Prejudice: The New No-fault Law and Practice

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Executive summary

There can be real loss and prejudice in some divorce cases if the final divorce order, previously the decree absolute, is granted before the final financial settlement and its implementation in circumstances when the paying party then dies. Automatic entitlement to pensions, the primary circumstance, but also insurance policies, beneficial interest in trusts and similar are then not available as the applicant is now divorced, financial remedy claims are no longer available after death and there might have to be a difficult and separate civil claim. The usual answer from the law, and perhaps just as crucially by the practice of lawyers, is to delay the final divorce order until the financial settlement has been implemented. But the new no-fault divorce has ended some opportunities to defend a divorce pending the financial settlement or to go deliberately slowly. The new provisions in the legislation arguably do not go far enough to give adequate protections, if based on previous case-law. In any event, what is the procedure being adopted at the digital divorce centres? This article looks at the background to the relevant legislation, and how it might be applied and is operating.[1]

Introduction and the risk and prejudice

The starting point is the circumstances in which this sort of case arises. There are automatic entitlements for a spouse during marriage in respect of the other's pensions. This is lost on the final divorce order being made; the marriage coming to an end. A pension sharing order may be made in respect of marital pensions so that the applicant spouse receives her share, or what she needs. Once this pension sharing order is in place,[2] the final divorce order can be safely made and the applicant spouse has her own pension and doesn't have any risk or prejudice by the pension holder dying. But if the pension holder dies between the final divorce order and the final financial settlement including pension sharing order, the applicant spouse will have no further remedy through the family courts. She will lose out significantly on what would otherwise be a pension sharing arrangement.

A similar situation may apply in relation to entitlements under insurance policies. An automatic entitlement as spouse ends on the divorce order and could not be recoverable if the policyholder dies before the Family Court makes an order. Less frequently but certainly relevant may be entitlements as a beneficial owner under trusts and other similar holdings.

So in this context, and over several decades, where there would be this financial prejudice the family law profession has by and large operated a system of putting over the final divorce order until the final financial settlement has been made. Very often once the possibility of any financial prejudice becomes clear, the request would come from the lawyer of one spouse to the lawyer of the other spouse to agree, in terms, that no one would apply for the final divorce order until the financial settlement was completed. Very often that agreement would be forthcoming. Where there is any prospect of a financial prejudice, it's thoroughly reasonable. Advice was given that making this commitment would save the costs of any application and avoid animosity and contentiousness. This agreement was often recorded on the court file either as an agreement or a formal undertaking not to apply. Moreover and as set out below, the profession often didn't trouble itself too much with the technicalities (restrictions) of and in the law, not least because the law didn't help in all circumstances. Lawyers got on with it for the best progress of cases and reasonable outcomes.

But family law also engages in highly adversarial situations and sometimes one party may not play ball, may refuse and insist on going ahead with the final divorce order. In those circumstances, an application had to be made to the court to delay the final divorce. These applications were rare but certainly occurred. And it was at this point that scrutiny of the technical law found the position was sometimes wanting.

The previous fault-based divorce system had ways to

overcome the unreasonable difficulties presented by one party wanting to pursue the granting of the divorce before the financial order where there could be financial prejudice to the other party. If it was the applicant who was at potential risk and if it was known that the other party would not be agreeable to holding off on the final divorce, the simple answer once the acknowledgement of service arrived was not to progress to the conditional order. Either the respondent had to start their own divorce or try to find other ways of encouraging the divorce to go through. They might not have had their own grounds to petition for divorce themselves or it was in any basis a nuisance to have to start a new petition if either the basis of 2 years' or 5 years' separation. These were additional factors encouraging sensible resolution. By and large it often worked.

However once no-fault divorce arrived, the opportunity to prevent the final order being granted was more limited. What opportunity would there be in the new legislation to hold off the final divorce order? Was it fit for the new purpose?

Original position in the 1973 legislation and before no-fault divorce

The provisions are in ss 9 and 10 Matrimonial Causes Act 1973 (MCA). Although fairly cumbersomely worded, for these purposes they are similar in intent and outcome, i.e. a request to delay the divorce. They are however completely different in the party to whom they apply. Section 9 is for the divorce applicant when the respondent to the divorce wants the divorce to be pronounced but the applicant, the financially vulnerable party, seeks to delay it pending the financial settlement. Section 10 is for the respondent where the applicant for the divorce wants the divorce to be pronounced and the respondent is the financially vulnerable party who seeks to delay the final divorce. It is crucial for practitioners to make the distinction.

The original 1973 wording of ss 9 and 10 bears alarming similarity to the present law in circumstances where so much in law and society has changed. Section 9(2)[3] of the pre-no-fault divorce legislation recorded that if there had been no application for the final divorce order, and 3 months had elapsed since the earliest time the applicant could have applied for the divorce order, the respondent could apply for the final divorce order. On that application, the court would make an enquiry and could make the final divorce order, rescind the conditional order[4] or make any other order.[5] The applicant for the divorce would oppose the respondent obtaining the final divorce order by reason of financial prejudice.

Section 10(2)[6] of the pre-no-fault divorce legislation is for the respondent to prevent the divorce being finalised by the applicant pending a financial settlement. However, this statutory protection only applied in circumstances of 2 years or 5 years of separation, and it was only the respondent who could in effect delay the conditional order. In other words, it was not available to the applicant (then known as petitioner), nor available in the other three, fault-based, grounds. Section 10(3) was explicit that in considering whether to make the s 10(2) order in effect delaying the pronouncement of the final divorce order, the court had to take into account all of the circumstances including financial position of the respondent as it was likely to be after the death of the applicant if they should die first. In other words, exactly the circumstances contemplated above. The court *shall* not make the final divorce order unless satisfied the applicant should not require to make any financial provision for the respondent or that the financial provision made[7] by the applicant for the respondent was reasonable and fair or the best that could be made in the circumstances.[8] There were two exceptions in s 10(4) in which the court would make a final divorce order notwithstanding the circumstances in s 10(3) if either there were circumstances which made it desirable the divorce order should be made without delay[9] or the court had obtained a satisfactory undertaking[10] from the applicant that he would make such financial provision[11] for the respondent as the court may approve.[12]

This s 10(2) remedy was only available in circumstances of divorce applications based on 2 or 5 years of separation. Parliament anticipated in the 1973 legislation that most people would use the so-called civilised grounds of a period of separation. That might have been the case in the first couple of decades but certainly wasn't so in the past couple of decades when parties were less willing to wait, hence the greater use of fault-based grounds. Technically, this disallowed any access to s 10(2). In reality applications were entertained. These issues needed to be addressed in the reforms of no-fault divorce which introduced a completely new process of who could apply. It is important to understand this in the context of the position in law now.

Who can now apply at each stage of the divorce?[13]

For a careful understanding of the circumstances of who can now apply to delay the divorce and when, it's important to understand who can and cannot apply at each stage for the divorce, the conditional order and the final divorce order:

(1) A can apply for a divorce.
(2) B can apply for a divorce.
(3) A and B can apply for a divorce jointly.

(4) If A applied for the divorce, A can apply for a CO (conditional order) but B cannot apply if A doesn't and A cannot agree to it being joint, i.e. A and B cannot then apply together.
(5) If B applied for the divorce, then as above for A.
(6) If A and B applied for divorce jointly, they can apply jointly for a CO or, on notice, one of them, e.g. A can apply alone.

(7) If A alone applied for CO, A alone can apply for the final divorce (DA) 6 weeks after a CO. A cannot agree to it being joint so A and B cannot apply together.
(8) In (7) above, if A doesn't apply for the DA, B has to wait 3 months to apply for the DA after the earliest date A could apply.
(9) If A and B applied jointly for the CO, both can apply jointly for the DA or either, e.g. A, on notice, can apply alone 6 weeks after the CO.
(10) In (7) and in (9) above (if it were a sole application for DA and not now joint), B applies under s 10(2) to prevent A applying for the DA after 6 weeks and in effect to delay the DA.

(11) In (8) above, B has to apply for the DA and in doing so A opposes under s 9(2), in effect to delay the DA.

It will be seen that the new divorce law creates a different situation for the respondent to a sole divorce compared to a joint divorce application. Lawyers quickly realised that there remained often a significant advantage in a sole divorce application and consequently a sole application for a conditional order. It is certainly not a process of anyone can apply at any time interchangeably.[14]

As to the extra 3 months before a respondent can apply for the final divorce order, the old law has been retained, perhaps rather cumbersomely. It is difficult to see why. The extra 3 months will rarely mean the difference in finalising a settlement. It might have been far better to have had simultaneous time periods but better protection against financial prejudice.

The position in law now

As the new divorce legislation was going through Parliament, organisations such as the Law Society lobbied for more explicit and clearer protection for the financially vulnerable spouse in the context where the divorce would be concluded within 6 months, perhaps even with one spouse having had much less than 6 months' awareness. It was proposed that it was made far easier to oppose the granting of the final financial order if any or any material financial prejudice or risk was shown. This lobbying was unsuccessful. The position as far as the criteria for delaying the divorce doesn't seem to have changed much.

Section 9(2) has been amended in the new law. Where a conditional order has been made on the application of one party,[15] then any time after 3 months from the earliest time the applicant could have applied for the divorce order, the so-called respondent can apply to the court for the making of the final divorce order. The other party can then oppose, in effect seek to delay, whereupon the court can refuse or allow the granting of the final divorce order or make other orders.[16]

Therefore if a party is anxious that there might be financial prejudice by a divorce order before the financial order is made, ideally they should be the original sole applicant for the divorce. This will give them an additional 3 months to try to finalise the settlement otherwise then applying under s 9(2). These tactics are crucial for lawyers, although perhaps unfortunate in the spirit in which the new legislation was intended.

Section 10(2)[17] of the new law is mostly new as necessary given s 10(2)'s previous reference to separation petitions. Unlike s 9(2) where the application is 3 months after the earliest date the final divorce order could have been sought, an application under s 10(2) must be made quickly after the conditional order and before the 6 weeks have elapsed before the divorce order could be applied for. Section 10(2) applies when a conditional order has been made and is either in favour of one party to the marriage or in favour of both but one party has since withdrawn from the application and then applied to the court under s 10(2) for consideration of their financial circumstances after the divorce, i.e. in effect the prejudice of a final divorce before the financial order. This is in effect the respondent seeking to delay the divorce. If the applicant wants to delay the divorce, they will simply not apply for the final order and let a further 3 months elapse and then apply under s 9(2).

New s 10(3) is a shortened version of s 10(3) of the pre-no-fault divorce legislation and says that the court *must*[18] not make a final divorce order unless satisfied that the applicant should not be required to make any financial provision for the respondent or the financial provision made by the applicant for the respondent is reasonable and fair or the best that can be made in the circumstances.[19] In other words if the court doesn't think there's going to be any more financial provision for the applicant for the delay in the petition, the application won't be successful.

Parts of s 10(3) of the pre-no-fault divorce legislation are now s 10(3A). They reiterate that the court must take into account all the circumstances of the case including what the financial position of the respondent is likely to be after the death of the applicant should that person die first, i.e. the impact of the death of the applicant if they die first. Section 10(4) remains substantially the same.

It will be seen that there has been no change in the criteria to be taken into account by the court. It can certainly be argued that it is pretty clear: the court must not make a final divorce order unless satisfied there shouldn't be, in practice won't be, any other financial provision. This may not necessarily be reflected in case-law.

The rules[20] state that the court will make a conditional order final if satisfied the provisions of s 10(2)–(4) do not apply or have been complied with.

The position in case-law

So what are the case-law principles and guidance on when a court should and should not delay the divorce, whether s 9(2) or s 10(2)? There had been a concern under the pre-no-fault divorce law that it was narrow and geared towards big-money cases. The risk of prejudice applies just as much in modest cases and everything is relative. There should be no dispensations or special allowances in bigger-money cases

The leading case was *Thakkar*,[21] in which the husband wanted, under s 9(2), the final divorce which the wife sought to prevent in circumstances either of non-disclosure or of uncertain risk through trust interest or both or more uncertainty regarding his finances. The court found the existence of offshore structures might cause *very considerable prejudice* to the wife and therefore the divorce was delayed. The husband was quite probably a billionaire, with offshore interests. There were apparent concerns about whether he had given full and frank disclosure. However, the court made it clear that granting this provision to delay the divorce was exceptional, referring to special circumstances. Nevertheless, it declined to explain the special circumstances in which the court would or should (or now must) delay the divorce. This was unfortunate. The High Court could have said for example any case in which there would be any or any material financial prejudice to one party by one party dying after the final divorce order but before the financial settlement. Simple, clear and across the financial spectrum. But specifically it did not.

Years earlier in *Dart*,[22] another big-money case, the Court of Appeal said that there was a presumption in favour of the granting of the final divorce order, weighing heavily against the finding of any special circumstances to delay a divorce.

Hence it was felt at High Court level that such delaying orders would be very much the exception or at least were under the pre-no-fault divorce law. This was very unfortunate. Will this position still be upheld? *Dart* had also held under s 9(2), but presumably also under s 10(2), that the court had an absolute discretion as to whether to grant the application.

Mere outstanding financial provision proceedings are not in themselves a reason to delay the divorce; there might be no financial prejudice. This is another reason for the quick issuing of Form A, i.e. so that at the time of the application to delay the divorce there should at least have been financial disclosure and therefore better knowledge of whether there are any assets which might be lost on a death after divorce and before the financial settlement and what other financial provision can be put in place instead. If for example there are no questions, for example about a pension sharing order and the only asset is the family home where the joint tenancy could be severed, there should be no reason to delay the divorce.

There is limited case-law. In the excellent article referred to in note 1 by David Salter, he refers to the case-law as positively *antique*, citing from past decades. Accordingly, *Thakkar* being the most recent has tended to dominate expectations of when, and specifically when not, a delay order may be made. This may be unfortunate and indeed unintended. Nevertheless, in the pre-no-fault divorce days, the general perception in the profession was that the availability of ss 9(2) and 10(2) had become limited, e.g. non-disclosure of significant assets, risk of losing out of entitlement in substantial trusts or other offshore vehicles. Not the wife of a plumber anxious after a long marriage to make sure she can have a pension sharing order! This was why there had been lobbying at the time of the legislation to extend or at least clarify the protective provision.

The position in the digital divorce centres

It will be seen that an application is needed under s 9(2) or s 10(2) to delay the divorce. But is this happening in practice? It seems that where opposition to the granting of the final divorce by either applicant or respondent is given to the online divorce centre, they will set the matter down for a review in the locality of the parties. Too often, even if the parties are represented in the financial matters, for costs reasons the parties may attend in person, unrepresented, and then have to try to argue the complexities of ss 9 and 10! With the encouragement to people to act in person on the divorce even if represented in financial matters, an opposition to the granting of the final divorce order can be given to the divorce centre without any merits, i.e. without any likelihood of any financial loss or prejudice. It might be that the only asset is the family home which can be protected by severance of the joint tenancy. This does not need a formal s 9 or s 10 process. It might be that they are simply waiting for a final financial order and one of them doesn't want to have the divorce finished until it has come through, but again without any financial prejudice. Moreover, it may well be that the opposition communicated to the divorce centre gives no indication of relevant financial matters or specifically of financial prejudice. Nevertheless, a review hearing locally is likely to be fixed.

It must be remembered that these matters will be referred by the divorce court to a local judge under the divorce portal number alone, so the judge may not even know the number of the financial remedy proceedings to find out what is the financial background and review the merits.

The divorce centre is obviously taking a pragmatic view, particularly with the informality of litigants in person, and an email in clear terms seeking to delay a divorce is sufficient to prompt a court hearing review. Naturally when the court is hearing the review, the judge is likely then to insist on a strict adherence to a formal application and statement, including showing the financial prejudice of the pronouncement of an immediate divorce order. In practice, in many such cases, the issues may be sorted out at the review hearing, and directions sent back to the digital divorce centre to progress the divorce.

Good practice must of course be formally to apply with a statement in support which should set out, strongly particularised, what are the pertinent financial circumstances and what financial prejudice there will be. Only then can the court properly undertake its duties under ss 9(2) and 10(2).

Conclusion

So the important point for lawyers is what criteria are being used in the consideration of delaying a divorce? Does the inclusion of the word *must* in the new s 10(3) legislation strengthen the expectation that there would be a delay in the divorce? Is it the case that around the country, district judges being given these review hearings are turning up *Thakkar* to look at the distinctive circumstances of offshore holdings? Or is it more likely to be the case that if there would be any or especially any material financial prejudice, e.g. in the context of a likely pension sharing order or similar, a delay order is made? If this latter is right, as I suspect, then is there any difference of practice between High Court and District Judge level? District Judges faced with an applicant, quite probably at significant risk of prejudice if the divorce order was made before the financial settlement with the risk of a death, may well adjourn or delay the divorce to make sure that there is no such loss. It is difficult to see why this should not be the normal case where the court is presented with good evidence that such financial prejudice would arise by the immediate granting of the divorce order.

Of course, in big-money cases, insurance can be taken against the death of one party and this does occur. But this is impossible in the wide range of modest asset cases.

The divorce law landscape changed with no-fault divorce. It was well overdue. The entire thinking and psychology, coupled with an encouragement of a collaborative approach, should be informing the new process. Yet it is still fraught with looking back to the pre-no-fault process. The fact a respondent, as equally not at fault as the applicant and often only a matter of timing of who issues first, is at a disadvantage in the timing of the final CO and divorce[23] seems odd and out of kilter.[24] But crucially with a divorce based only on a 6-month notice given to the divorce court office, with no opportunity to defend, with financial claims invariably taking much longer than 6 months, the potential exists for parties to be in a prejudicial position as described in this article. The simple solution should be that if there is any material risk of financial prejudice, there should be a

delay on the divorce.[25] Rarely will there be too much prejudice on a divorce delayed a matter of months or a year or so. The financial prejudice may be colossal. It must be hoped that if and when ss 9(2) and 10(2) go back to the High Court, the opportunity will be taken to make sure that financially vulnerable parties on no-fault divorce are suitably protected. In the meantime, solicitors should not be beguiled by the no-fault divorce concepts and they have positive professional[26] duties to take steps to protect their clients at key stages of the divorce.

Notes

1 The writer acknowledges the really helpful article by David Salter entitled 'MCA 1973, s 10(2)–(4): a New Lease of Life?' where he looks at a number of the relevant cases, describing them as *antique* and going back several decades. Available at https://financialremediesjournal.com/content/mca-1973-s-10-2-ndash-4-a-new-lease-of-life.747b9e83536e40d28539249ded712cd5.htm

2 Here and throughout in the context of pensions it's not just the timing of the making of the final financial order itself which is important but the Transfer Day which is in practice 28 days from the financial order, i.e. time for appealing +7 days or the divorce final order itself, which is a prerequisite for implementation of any financial order.

3 Section 9(1) relates to material facts not being before the court on granting the original decree so irrelevant here although the s 9(1) court powers are referred to in ss 9(2) and 10(2).

4 See the recent case of *Cazalet v Abu-Zalaf* [2023] EWCA Civ 1065 where this featured.

5 As set out in s 9(1).

6 Section 10(1) can be ignored as it is in the context of misleading information leading to the conditional order.

7 Not just proposed: *Wilson v Wilson* [1973] 2 All ER 17.

8 It will be appreciated immediately both require fairly extensive review of the disclosure and possible s 25 outcomes.

9 This might be imminent death.

10 Although held to be inadequate in *Grigson v Grigson* [1974] 1 All ER 478.

11 Not a general undertaking of an offer but specific proposals: *Grigson v Grigson* [1974] 1 All ER 478.

12 This in itself will again require the court to have full disclosure and carry out something akin to a s 25 exercise.

13 The author is grateful to Annie Boxer, solicitor, of iFLG for her help on this section.

14 As the new legislation was entering Parliament and the opportunity of a joint petition was highlighted, it had also been said that even if only one party applied for the divorce initially, both could jointly apply for the subsequent decrees to recognise that there was a collaborative approach and joint recognition of the relationship breaking down. This hasn't come through into the new law itself and the respondent remains in a different situation compared to the applicant if time is important.

15 Note not both parties, another reason to be the sole applicant for the conditional order and not agreeing to a joint request. If it were a joint CO, and one party was at potential financial prejudice, that party would refuse to apply for the DA and use s 10(2).

16 Set out in s 9(1).

17 Section 10(1) is now abolished.

18 Observe the mandatory requirement. No-fault divorce legislation has *must* not *shall* as in the previous legislation. Can anything be read into this? Is there now a stronger obligation under this new legislation? This might be an important point of argument.

19 Each will require disclosure and a quasi-s 25 analysis.

20 See for example FPR 7.19(4)(f) and PD 41G, para 15.3(f).

21 *Thakkar v Thakkar* [2016] EWHC 2488 (Fam).

22 *Dart v Dart* [1996] 2 FLR 286.

23 Indeed, prevented from applying for the conditional order.

24 With the interchangeability of who can apply and when at each stage of the divorce, it's hard now to understand why respondents were put in such a less good position under the legislation.

25 And if disclosure has not yet been satisfactorily provided, with reasonable reason to believe there might be assets which would be lost on death before the final financial order, then surely the benefit of the doubt should be to delay the divorce pending review when disclosure is available.

26 See the risk of negligence in *Griffiths v Dawson and Co* [1993] 2 FLR 315.

Hemain Injunctions: How to Get Them and When not to Resist Them

Lily Mottahedan

1 Hare Court

Part one: the preliminaries

I remember vividly the very first time I made an application for a *Hemain* injunction. The application, made in the Central Family Court, was on behalf of a party seeking an English divorce in circumstances where the other party, who had issued proceedings elsewhere, had applied for a dismissal and stay of the English petition on jurisdiction and forum non-conveniens grounds (whilst simultaneously seeking to progress their petition abroad).

The room was full of experts in international family law. I was instructed by the brilliant Peter Burgess of Burgess Mee. My opponent, the indomitable Professor Rebecca-Bailey Harris, remains one of the leading specialists of cross-border work at the Bar. We appeared in front of DDJ David Hodson OBE whose contribution to and expertise in international family law are well known. The all-star courtroom made the task at hand all the more of a challenge and presented me with a high bar for submissions.

An initial read of *Hemain v Hemain* [1988] 2 FLR 388 suggests a high bar for achieving a *Hemain* injunction. One needs to demonstrate that the respondent has behaved in a manner which is 'vexatious, and oppressive, and an abuse of the proceedings of this court'. This left me with a slightly sinking feeling. However, as I hope to demonstrate, the bar is not *as* high as first meets the eye and the cases where a *Hemain* injunction was not granted had certain unique features.

The context

A *Hemain* injunction application is typically made in the context of jurisdiction and/or forum non-conveniens proceedings. It is designed to restrain the respondent from progressing their rival overseas divorce petition pending the English court's decision whether to dismiss or stay the English petition. This is because when a respondent contests a divorce, the English divorce proceedings are for all intents and purposes temporarily stayed and the petition cannot progress any further until a determination has been made as to the merits of that contest. The basic principle is that it would be unfair for a respondent to then use that temporary stay, usually prompted by their decision to defend the petition, to race ahead in the rival jurisdiction and obtain an overseas divorce order before the English court has even had a chance to hear the substantive application for a stay or dismissal (usually theirs).

In the recent commercial case of *Magomedov v PJSC Transneft* [2024] EWHC 1176 (Comm), Bright J's attention was drawn to the existence of *Hemain* injunctions, which the learned judge described as follows (at [88]):

> '*Hemain* injunctions are interim ASIs [anti-suit injunctions] of limited duration, which are intended not to bring the foreign proceedings to a permanent end, but only to make them pause while the English court deals with a jurisdictional challenge issued by the defendant in this country. Their purpose is to ensure that the parallel proceedings in the foreign jurisdiction, which have been commenced by that party as the claimant, do not steal a march over the English proceedings. The objective is simply to ensure that the challenge to English jurisdiction is not used unconscionably, as a way of delaying matters in England and so obtaining an unfair advantage. The *Hemain* injunction is a temporary device, designed to prevent injustice without a disproportionate effect on comity.'

Similarly, as was said by Munby J (as he then was), in *R v R* [2005] 1 FLR 386 at [49]:

> 'The fundamental if unarticulated premise underlying the decision in *Hemain v Hemain* is that, where there are parallel proceedings in two different courts, fairness requires that neither party should be permitted to litigate the substantive issues in either court until such time as both courts, having disposed of any preliminary issues as to jurisdiction, are ready to embark upon a consideration of the substantive issues.'

Who does it bind?

It binds the respondent only. It is an *in personam* order. It does not bind an overseas court albeit it does constitute an interference in the court process abroad.

Where does the jurisdiction derive from?

The jurisdiction derives from Senior Courts Act 1981, s 37(1), which reads:

> 'The High Court may by order (whether interlocutory or final) grant an injunction … in all cases in which it appears to the court to be just and convenient to do so.'

Section 37(6) reads:

> 'This section applies in relation to the family court as it applies in relation to the High Court.'

In short, one does not need to be before a High Court Judge to achieve a *Hemain* injunction.

What is the core test?

In *Hemain v Hemain* [1988] 2 FLR 388, May LJ confirmed at 392 that the core test is the balance of convenience test enshrined in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 that will be familiar to all from law school days and since.

Part two: the case-law

There are five main reported cases concerning *Hemain* injunctions: in two cases, the order was granted, and in three it was not.

By examining the reasons why, one can decipher the essential ingredients for a successful *Hemain* injunction application.

When you have truly parallel proceedings: the original Mr Hemain

Hemain v Hemain [1988] 2 FLR 388 is an Anglo-French case which remains (as the name suggests) the leading case.

The wife issued first in England and the husband issued a week later in France. The husband filed an answer contesting the English divorce and applied for a stay of the English proceedings.

The wife applied for an injunction requiring the husband to take steps to ensure that the French proceedings did not go any further until such time as the English court had determined his stay application. She succeeded. The husband appealed and failed.

The Court of Appeal found that the balance was wholly in favour of maintaining the status quo. At [392], May LJ commented:

> 'One has to note that in effect what the husband has done is to obtain a temporary injunction in relation to the wife's English proceedings, which is just the relief in respect of the French proceedings which, by resisting the application before the Judge below and prosecuting this appeal, he is seeking to deny her. That, in the present case, I think, is an injustice. It is, without using the epithets in too opprobrious a sense, vexatious, and oppressive, and an abuse of the proceedings of this court.'

From this case, we have the origins of the test I referred to at the outset but as can be seen by the facts of this case, these powerful words are not suggestive of a need for an exceptional set of facts for a *Hemain* injunction to be granted: this was a case with parallel proceedings in two different courts where one party made an application which had the effect of holding up one set of proceedings, whilst seeking to remain free to race ahead in his jurisdiction of choice. This is what we might term classic *Hemain* territory.

Beware of the second in time divorce application made at the 11th hour

By contrast, there is then the case of *Bloch v Bloch* [2002] EWHC 1711 (Fam). This was an Anglo-South African case save that the 'Anglo' component was very weak. The parties lived their married life in South Africa. The wife was from a wealthy family and the financial provider. The husband moved to England very shortly before separation. The wife issued divorce proceedings in South Africa. The husband fully participated in those proceedings and made substantive financial claims which were ongoing. Almost 10 months later, he issued divorce proceedings in England. The wife applied to strike his petition out as an abuse of process or in the alternative sought a stay. The husband responded with an application for a *Hemain* injunction (ex parte) and was successful. The wife appealed the decision and won.

The main reason why the wife succeeded in her appeal was the delay of 10 months between the start of the two sets of proceedings. Munby J (as he then was) distinguished *Bloch* from *Hemain* as follows:

> '[93] In *Hemain v Hemain* both sets of proceedings had been started about the same time, neither had progressed very far, the applicant for the *Hemain* injunction – in that case the wife – had done little in the foreign proceedings and had pursued her application for an injunction with diligence, and the plaintiff in the foreign proceedings – in that case the husband – had in fact commenced the foreign proceedings after the English proceedings had already began. In the present case, in contrast, the foreign proceedings came first and had progressed for many months with the active engagement of the husband before he ever sought to invoke the jurisdiction of the English court. Moreover, in the present case, the application is made at – indeed well beyond – the eleventh hour.'

It is worth noting that the husband's excuse for issuing so late was that the English court did not have jurisdiction yet and he needed to wait for sufficient time to elapse before he could petition. This argument, understandably, did not find favour with the court.

There is no need to show that England is the natural forum (yet)

More akin to *Hemain*, is the case of *R v R (Divorce: Hemain injunction)* [2003] EWHC 2113 (Fam). This concerned a Danish husband and an American life who lived their married life in London. Each issued divorce proceedings without the knowledge of the other. The husband surreptitiously travelled to Denmark to begin legal separation proceedings and about a month later, the wife, also covertly, began divorce proceedings in England.

Upon being served with the Danish divorce proceedings, the wife immediately served her English divorce petition on the husband. The husband disputed the English court's jurisdiction and made an application for a stay of the English petition.

The wife successfully applied for a *Hemain* injunction.

This case is on all fours with the original *Hemain* decision. It concerned truly parallel proceedings where one party was seeking to hold up proceedings in one jurisdiction whilst racing ahead in their jurisdiction of choice.

In the same case, Munby J (as he then was) said, at [54]:

> 'In my judgment, when all that is sought is a *Hemain* injunction, in contrast to a permanent anti-suit injunction, there is no need to show that England is the natural forum. Typically the application for a *Hemain* injunction is made at a time when the court is yet to decide the issue of forum (non) conveniens. A *Hemain* injunction is merely an interim injunction to maintain the status quo, to preserve a level playing field, pending the determination of the application for a stay; in other words, pending the determination of the very question of forum.'

Readers will find that there is a useful sample draft order at [86] of the judgment which can be adapted as appropriate.

No duty the call the race leader back and international comity

S v S (Hemain) [2010] 2 FLR 502 concerned a British couple with a Middle-Eastern background. The husband divorced the wife by *Talaq* in Lebanon following which the wife signed a financial settlement agreement (on the face of it by consent). The husband then issued proceedings in Lebanon to have the *Talaq* registered and instructed English solicitors in England to liaise with the wife to ensure that the marriage is either also dissolved in England or that steps are taken to ensure the recognition of the Lebanese *Talaq* by the English court.

Some 9 months after the husband had pronounced the *Talaq* in Lebanon and many months after he began taking steps in England as set out above, the wife issued fresh English divorce proceedings.

In the Lebanese proceedings, the wife challenged the court's jurisdiction and raised an issue as to undue influence with respect to the agreement. The court there was going to hear her arguments about this in due course.

The husband applied for a stay of the English proceedings in favour of the Lebanese proceedings and the wife countered with an application for a *Hemain* injunction. She was unsuccessful. Why?

First, she suffered from the same problem as Mr Bloch. She was too slow off the mark. Baker J (as he then was) said, at [28]:

> 'I repeat that each case must turn on its own facts, but it will manifestly be much harder for a litigant to demonstrate that the other party is acting unconscionably where one set of proceedings has been started significantly later than the other.'

Secondly, the Lebanese proceedings were very much in progress and the court there was going to determine the wife's application to challenge the Lebanese *Talaq*/settlement agreement. In those circumstances the Judge said, at [31], that:

> 'For this court to make any order obliging the husband to take active steps to stay those proceedings in Lebanon would offend principles of comity and infringe the principles and policy underpinning the *Hemain* injunction.'

In my opinion, whilst this was supplied as a reason for not granting a *Hemain* injunction, given that a *Hemain* injunction is an *in personam* remedy, the point about international comity should not be taken too far and it is submitted that, on its own, the point should not carry significant weight without more (in this case, there was more). Indeed, I suggest that comity is only relevant if the other jurisdiction will in fact hear argument about the points which the opposing party wishes to raise and there is an ongoing process there.

Arbitration and choice of court agreements in prenuptial agreements

Lastly, there is the case of *T v T (Hemain Injunction)* [2012] EWHC 3462 (Fam). This concerned an American couple living in London. They had married in the USA where they had entered into a pre-nuptial agreement stating that the law of a specific state would govern the finances on divorce even if parties live in a different jurisdiction at that time and that any questions regarding validity, enforcement or interpretation of the agreement would be referred to a family lawyer in that state for arbitration.

The husband filed for divorce in that state and triggered the arbitration clause and the wife retaliated by issuing English divorce proceedings, contrary to the terms of the pre-nuptial agreement but on the basis that she intended to challenge that agreement in any event.

The husband applied to stay the English proceedings in reliance on the arbitration clause and on forum non-conveniens grounds. The American divorce proceedings were stayed (by a separate process) but the husband was pressing ahead with the arbitration. The wife applied for a *Hemain* injunction and was unsuccessful.

The Judge (Nicholas Francis QC, as he then was, sitting as a Deputy High Court Judge) at [35] (a) said:

> 'the question is not whether it is unconscionable for the husband to take proceedings in the US but whether it is unconscionable for him to issue an application for a stay of the English proceedings and at the same time press ahead with proceedings in State A.'

This case clearly had unique features. The Judge said as much at [35] (c):

> 'in my judgment, it is this arbitration clause which makes this case different. An American couple took American advice and entered into an American pmA which contained an arbitration clause. That clause also provided a means of resolving any issue as to the validity of the pmA itself. This means that the wife would appear to have a proper forum for airing her case that she was pressurised into signing the pmA. I do not find that the husband is behaving vexatiously or oppressively by invoking the arbitration clause in the pmA.'

It is also important to note that *Dicey* at 16–089 said:

> 'The court also has power to grant an injunction restraining foreign arbitral proceedings, although it is a power that is only exercised in exceptional cases and with caution.'

Moreover, the arbitral proceedings in this case were to deal with preliminary issues such as jurisdiction and the enforceability of the agreement, not the divorce itself.

Readers will recall that in *R v R*, the court highlighted that 'neither party should be permitted to litigate the substan-

tive issues in either court' but this does not stop either court from disposing of 'any preliminary issues as to jurisdiction' (or similar).

Conclusion

Drawing the threads together:

- The timing of the two rival divorce petitions is important – are they truly parallel suits? If not, this could be fatal to a *Hemain* injunction application.
- The extent and nature of the participation and involvement of the two parties in each of the proceedings is relevant (although often subsumed in the above).
- The terms of a pre-nuptial agreement may be relevant.
- There is no need to demonstrate England is the natural forum for the substantive suit but some regard may be had to this (as can be seen from the quote derived from *T v T*).

Companies House: Housing Companies' Information

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Prior to 1844, 'incorporation' was only possible by Royal Charter, or by a private Act of Parliament. However, since neither Queen Victoria nor Robert Peel (the Prime Minister at the time) liked paperwork very much, an 'Act for the Registration, Incorporation, and Regulation of Joint Stock Companies' was drafted and duly received royal assent, becoming the Joint Stock Companies Act of 1844.

And thus, the United Kingdom of Great Britain and Ireland (as it then was) established its first registrar of companies, known as Companies House.

Today, Companies House is an executive agency of the UK government's Department for Business and Trade. It holds the UK's register of companies, as well as the Register of Overseas Entities.

It is maintained by three registrars, one each for England & Wales, Scotland, and Northern Ireland. Their objectives are to ensure proper delivery and accuracy of documents, to maintain a truthful register, and to prevent unlawful activities by companies and individuals.

It is responsible for incorporating, maintaining and dissolving limited companies, examining and publishing company information, and promoting transparency and growth in the UK economy. The recent Economic Crime and Corporate Transparency Act 2023 has boosted the powers of Companies House to meet its responsibilities.

Nearly all commercial companies in the UK nowadays are incorporated under the Companies Act 2006, although incorporation by Royal Charter, which dates back to the medieval period, does still exist. For example, the BBC, the Royal Opera House and the British Red Cross were incorporated by Royal Charter. And indeed, Acts of Parliament can still incorporate a company, as they did with the Port of London Authority in 1909, and the Post Office in 1987.

It is the published company information that we are interested in when it comes to financial remedies. First though, about what type of entity can one find information at Companies House?

What exactly can be incorporated?

More than 5 million companies are on the UK companies register. Over 900,000 new companies were incorporated in 2023.

We have all heard of a limited company (specifically, a company limited by 'shares' in which each member's liability is, in effect, limited to the amount paid for the shares). These types of companies were introduced by the Limited Liability Act 1855. A limited company can be a 'private company' (i.e. not a public company) and given the suffix 'Ltd' for 'limited', or a 'public company' (i.e. has at least £50,000 in share capital, which can be issued to the public), and given the suffix 'Plc' for 'public limited company'.

'Limited liability partnerships' or 'LLPs' were introduced in 2001. They are similar to limited companies except they are taxed like an unincorporated partnership. LLPs are incorporated by the Companies Act and they need to be registered at Companies House.

However, they can elect whether to maintain and hold their registers of members, members' residential addresses and people with significant control at their registered offices, or to keep the information in the public register at Companies House instead.

There are, also, some other rather esoteric types of incorporated companies. These include:

- '**Companies limited by guarantee**' have members who undertake to contribute a specified amount to the company's assets upon its winding-up. Network Rail is one such example.
- '**Quoted companies**' are public companies that have been formally accepted by the London Stock Exchange for trading on the open market.
- '**Unlimited companies**' are rare as each member is jointly and severally liable for the debts of the company in the event of its winding-up.
- '**Community Interest Companies**' are limited by shares

or by guarantee that exist to provide benefits to a community or a specific section of a community. They are an alternative to a charity and are subject to less regulation.

Unincorporated businesses or entities such as sole traders, partnerships and co-operatives do not need to register or file any documents with Companies House. So, if one is looking for information on one of those types of entities, a search on the Companies House register will be fruitless.

What can one find on the public register at Companies House?

The initial information one can find about a company are the nature of its business, its registered office address, whether the company is active or dissolved and previous company names. The nature of a company's business is classified by its 'SIC' code which stands for 'standard industrial classification of economic activities'. A company's SIC code covers a vast range of activities from the depths of mining of uranium and thorium ores (code 07210) to the heights of space transport (code 51220) and companies can have more than one (if they mined uranium ore on the moon, for example).

The list of types of documents that a company can file with Companies House is long. Really long. Types of documents include incorporation documents, changes of constitution, mortgage charges, opening of an overseas branch, and even certifying a voluntary translation of an original document (it is Form VT01 you want for that, should you ever need it).

Companies must tell Companies House about new appointments, resignations and changes in personal details of its directors and secretaries as well as 'people with significant control'. These are people who hold 25% of the shares or voting rights of the company. Companies must also tell Companies House about changes to its company name, registered office address, share structure and any mortgages.

Confirmation and accounts

The two main types of documents are the accounts, and the confirmation statement. All companies must file annual accounts with Companies House, and all companies must file an annual confirmation statement.

A confirmation statement is, as you might expect, a statement that confirms to Companies House that the information it holds about a company is correct. It replaced the old 'annual return' in 2016. The information Companies House holds includes the details of a company's registered office, directors, secretaries, the address where its records are held, its statement of capital and shareholder information, its SIC code and register of people with significant control. Unhelpfully, the confirmation statement itself does not necessarily list much information, which can only be found by looking at other documents that the company will have been required to file.

Directors and secretaries must file a service address for the public register, to be used for correspondence, but it does not have to be their home address. It can be the same as the registered office address of the company, or it can be somewhere different.

When it comes to shareholder information, although companies must maintain a shareholder register as per the Companies Act 2006, filing this register with Companies House is not mandatory. Companies can choose to keep information from its register of members on the public register or to keep it privately. If it is held publicly, the company has to update Companies House of any changes to shareholders in real-time, rather than annually through the confirmation statement process.

So, finding information about shareholders (other than those with significant control) at Companies House is possible, but rare. However, under the Companies Act 2006, anyone can ask to inspect a shareholder register and request copies of it at any time, even if not provided to the public register. This is a viable alternative if one has identified a company of interest.

Therefore, a browser of the public record at Companies House is likely to find that the richest source of information about a company will be its annual accounts.

Every company must keep accounting records whether it is trading or not. Accounting records must detail all money received and expended by the company and record its assets and liabilities. If a company deals in goods, the records must also include details regarding levels and movements of its stock.

This means generally accounts must include a profit and loss account, a balance sheet, and notes to the accounts that provide context and clarification for the numbers. Notes to the accounts are not to be overlooked as they often contain information that is essential to understanding the financial statements.

Eating soup with a fork

It might be thought that the requirement to file accounts and the provision about the detailed information that accounts must include would mean that, once one had identified a company of interest, it would be possible for a researcher to gorge on succulent publicly available financial information about it. Sadly, that is not the case because it is only 'large' companies that must file full accounts.

There are three classifications of company size that determine what level of detail will be included it its publicly filed accounts: small, medium and large. And for small companies, there is also a sub-classification called a micro-entity. (I make that four classifications, but who am I to question Companies House?)

A company is classified as a micro-entity, small or medium-sized based on thresholds for turnover, total assets and the average number of employees. Any companies that breach the thresholds are classified as 'large' companies.

A micro-entity must meet at least two out of the three following conditions:

- turnover of less than £632,000;
- total assets of £316,000; and/or
- no more than 10 employees on average throughout the year.

Now, if you thought that that covered most companies, you would be right. In the UK, around 96% of companies are micro-entities.

So, what morsels of information do micro-entities have to file? Well, although a micro-entity must prepare a balance sheet and profit and loss account, with notes, it does not have to provide the profit and loss account to Companies House, and the balance sheet may be an abridged version, omitting full details of assets and liabilities.

One is left to nibble on limited information regarding the amount of unpaid called-up share capital, fixed and current assets, prepayments, and accrued income, creditors, provisions and capital and reserves. The notes must contain additional information regarding guarantees and contingencies, securities given and commitments concerning pensions, but these are seldom provided in any great detail.

What is more, most micro-entities do not have to be audited, so there is no assurance that the accounts are true and fair. In total, micro-entity accounts give very little information about a company's finances so that even a forensic accountant will struggle to divine much from them.

Similarly bleak fare is to be found in dormant company accounts. A company is dormant if it had no 'significant accounting transactions' during the accounting period. Dormant companies do not have to provide a profit and loss account to Companies House, nor a directors' report.

By comparing balance sheets from two points in time, one can infer the company's net profit or loss over that period, but only if one knows what dividends have been paid out. This means that without knowing what dividends have been paid, it is impossible to ascertain the extent of a company's profitability without its profit and loss account. Even access to the tax returns of a shareholder may be of only limited assistance because of timing differences that arise between the company's financial year end to which the accounts are prepared and the tax return year end of 5 April.

One will be only slightly more satiated with the information available from 'small company' accounts. The thresholds are increased to £10.2 million turnover, £5.1 million assets and 50 employees, but again, small companies do not have to deliver a copy of the profit and loss account (nor the directors' report).

It is only when a company reaches the lofty height of being 'medium-sized' (turnover up to £36 million, balance sheet total £18 million and up to 250 employees) that one can finally find a publicly available profit and loss account, and none of the accounts can be abridged versions. However, less than 0.1% of UK companies are medium-sized or large.

Crime and punishment

Of course, this information can only be gleaned if the company has actually filed its accounts with Companies House.

The time normally allowed for delivering accounts to Companies House is 9 months (or 6 months if it is a public company) from the end of the accounting period. If a company fails to file its annual documents, the Registrar may assume that the company is no longer carrying on business or in operation and take steps to strike it from the register. If the Registrar strikes a company off the register, it ceases to exist, and its assets become bona vacantia and pass to the Crown.

However, by changing a company's accounting reference date, a company can legitimately delay the delivery deadline for its annual accounts. A company can extend its accounting reference period once every 5 years, but it can shorten its accounting reference period, by as little as 1 day at a time, as often as it likes. It is very easy to change the accounting reference period. It can be done by using the appropriate online form (it is Form AA01 one wants this time). If a company changes its accounting reference period, then the deadline for delivery of its annual accounts becomes at least 3 months from the date of receipt by Companies House of the change of accounting reference date form. And, subject to the approval of Companies House, if a company is approaching that new deadline, it can simply reduce its accounting reference period by a further 1 day and receive another 3-month deadline extension.

Under the Companies Act 2006, it is a criminal offence for directors or LLP designated members to file their accounts late. And it is a strict liability offence. As soon as a company is late with its accounts, the offence is committed, and its directors are at risk of a criminal prosecution and subject to a potentially unlimited fine for each offence. In addition, there is an automatic civil penalty for submitting accounts late.

Filing penalties for 2022–23 in England & Wales were said to have been around £150 million. However, Companies House is increasingly of the view that the relevant filing penalties are evidently not a sufficient deterrent to drive compliance with the filing obligations in the Companies Act. For example, 1,938 charges were made against company directors or LLP designated members in 2022–23, and 856 were convicted.

Conclusion

In conclusion, Companies House plays a crucial role in the UK's corporate landscape by promoting transparency and ensuring the proper regulation of incorporated entities.

While it provides a wealth of information to the public, especially through annual filings and confirmation statements, the depth of that information can vary significantly depending on the size and type of the company. Micro-entities and small companies, which make up the majority of UK businesses, often offer limited financial insights, making it challenging to get a full picture of their operations.

For those seeking deeper financial clarity, especially in legal or financial contexts, forensic accounting analysis or direct requests for shareholder registers will likely be necessary.

A Practical Guide on How to Select your Expert, Reviewing the Expert's Report and When to Consider Engaging a Shadow Expert

Fiona Hotston Moore

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Introduction

I am an accredited expert witness and am instructed on 40 to 50 matrimonial cases each year. A significant number of these instructions are as single joint expert (SJE) or party expert providing an opinion on the valuation of a business or shareholding. I also act in cases requiring an expert determination on valuation. In addition to instructions as expert, I am regularly instructed as shadow adviser to assist lawyers and clients in assessing the financial disclosure by the other party or to review the SJE's report.

This article shares my practical guidance as a valuation expert for family lawyers and barristers in three areas:

(1) Selecting an appropriate SJE.
(2) Top considerations when reviewing the SJE's report.
(3) Engaging a shadow adviser.

Selecting a single joint expert

The SJE is typically selected either from a shortlist of three quotes obtained by the lawyers acting for one party or by the parties agreeing whom to appoint. Although understandably the quoted SJE fee for the report is likely to be a significant factor in selecting the expert, here are my tips for selecting your expert. Typically, SJEs are appointed in family law cases to provide:

(1) A view on a business valuation or a company shareholding including the tax consequences of a disposal or transfer of the interest.
(2) Liquidity, i.e. how capital can be extracted and the associated tax consequences.
(3) The likely future maintainable earnings of the party who retains the business or interest in it.
(4) The tax consequences of the sale and/or transfer of other property and/or assets between parties.

Expertise and experience

In cases other than simple tax calculations, I recommend instructing an accredited expert witness rather than simply a qualified accountant. The role of an expert witness is very different from the advisory role of an accountant in practice; in my view it is not sufficient to read the Part 25 Directions. It is advisable to select experts who are accredited by the Academy of Experts or Expert Witness Institute as they will have undertaken formal training.

The pool of experts undertaking business valuations in family cases is relatively small. They may be in larger accountancy firms, in large consultancy businesses and in small niche forensic accounting practices. The role is a personal appointment and so it is the individual who is key as opposed to the corporate entity.

For larger cases it is important to check that the expert has experience of giving evidence in the witness box.

When valuing private companies, an experienced business valuer should be competent to value businesses across a broad range of sectors; few sectors need specialist knowledge or input. However, it is key that the individual is experienced in business valuation and understands both the International Valuation Standards and the fundamentals of valuing businesses in matrimonial cases.

Valuation is subjective and there can be a range of opinions depending on the assumptions made by the expert. I occasionally see valuations prepared by accountants which have fundamental flaws in the methodology such as valuations based on capitalising future maintainable earnings that are based on operating profit, rather than Earnings Before Interest, Tax, Depreciation and Amortisation (EBITDA). The valuer then applies an EBITDA multiple to the operating profit. The resultant valuation may be significantly

understated due to this methodological flaw. There are other errors that I regularly see as shadow adviser and I explain some of these below.

Not all business valuers are experienced in tax and occasionally I am asked to assist in cases where the SJE has given a view on business valuation but has not given a view on the tax implications of the valuation, capital extraction and future earnings. This can result in delays and increased costs and can be avoided by checking the expert's credentials at the outset.

Cost-proportionate

Clients and courts are keen to ensure costs are proportionate. Inevitably, the cost of using experts from large consultancies and Big Four firms reflects their overheads. Independent firms may be more cost-effective and more of the work will be performed by the expert directly. For larger cases, regardless of whether the expert is working in a large practice or independently, check that they have access to support to deal with holidays and the inevitable peaks of work.

Getting fee quotes

To avoid nasty surprises later and to ensure your client can make an informed choice of expert, it is critical to provide the expert with sufficient information when getting a fee quote. To provide a reliable quote I need to know the scope of the anticipated instructions. For business valuations it is helpful to know the sector in which the business trades and an indication of its size such as turnover, number of employees and net assets. Typically, on family matters, I expect to give an opinion on valuation, liquidity and future maintainable earnings. If there are further points on which the parties require an opinion such as diversion of profits or trade, the additional work will increase costs and it is helpful to outline the likely instructions at the outset.

Instructing the selected expert

Provide the experts with sufficient notice regarding when they are likely to receive the instructions and ensure enough time is allowed for sending information and the completion of the report, as well as time for the parties to raise questions ahead of any FDR hearing or meeting.

It is important that the instructions clearly identify the issues on which the expert will be giving an opinion. Do not assume that the expert will include commentary on tax issues, liquidity or maintainable earnings if this is not specified.

It is helpful if the instructions on a business valuation include copies of the full financial accounts including detailed profit and loss accounts for the previous 3 years. Providing these with the instructions will help expedite the work and will allow the expert to affirm or revise their fee quotations before work commences.

If additional instructions such as those covering diversion of trade or other financial investigations are to be included, it will be helpful to liaise with the expert as to what can realistically be achieved and the likely cost.

Paying the expert

If the law firm is not going to be responsible for the expert's fees and the parties will be settling the invoices, it is important that this is clear in the letter of instructions. In such cases it is likely that the expert will raise fees upfront and be paid at the outset to mitigate the risk of having to spend time chasing unpaid invoices many months after the work is completed.

Top considerations when reviewing the single joint expert's report

Here are my tips on how to review the SJE's report. These are what I consider when instructed as a shadow adviser to give my opinion on another expert's report.

Has the expert given an opinion on all matters in the original instruction?

Typically, I review the introduction to see if the instructions are accurately extracted from the letter of instruction. I then look at the summary/conclusions section to see if each instruction has been addressed adequately. For example, I occasionally come across SJE reports on family cases where the tax implications are omitted.

At what date is the valuation given?

I would expect the report to state the effective date of the valuation (this is typically the balance sheet date) at which reliable accounts were provided. This can be several months or even years in the past and, if so, it is possible the current valuation is significantly different. I will review the expert's report to ascertain if he has obtained any information to give confidence that the valuation is still relevant and any limitations are explained.

What valuation methodology has the expert adopted?

Below are the typical valuation methodologies and where they are used.

Future maintainable earnings

In family law cases we are typically valuing trading private companies and the valuation will be based on capitalisation of future maintainable earnings. In this context we are assessing the market value as the future return the business is expected to return to the owners. The valuers assess what they feel is a reasonable estimate of future EBITDA and apply a multiple to this figure to give the business' enterprise value. The multiple is broadly the number of years that an investor might expect to wait to get a return on their investment; a risky investment will attract a lower multiple. The enterprise value is then adjusted for long-term debt and non-trading assets (including surplus cash) to give the equity value attributable to the shareholders. An example is shown below.

A	Maintainable earnings (usually EBITDA)	= £3 million
B	Earnings multiple	7x
A x B = C	Enterprise value	= £21 million
D	Net cash/debt/working capital/ surplus assets	= (£5 million)
C +/- D = E	Equity value	= £16 million

The key assumptions that the expert is making are A, B and D:

- the assessment of the future earnings, the EBITDA figure;
- the selection of the multiple applied to the EBITDA;

- the assessment of the adjustment for debt and surplus assets.

Valuation is inherently subjective and it is important to determine if the expert's judgment is within a reasonable range or whether it can be challenged.

Common issues I come across when reviewing SJE reports on valuations using future maintainable earnings are:

- An estimate of EBITDA that does not adequately adjust for exceptional trading years or changes to the business.
- A failure to adjust for a commercial salary for the business owners. Typically, family shareholders draw most of their earnings as dividends rather than salary. To calculate the adjusted EBITDA a commercial salary must be deducted.
- A failure to add back discretionary or other non-commercial expenses in the profit and loss account. Family businesses can have significant costs that an acquirer of the business would not continue, including family wages, non-essential travel and hotel costs and refurbishment of the family home. I have sometimes identified non-business expenditure in the accounts that amounts to tens of thousands each year. An adjustment of, say, £20,000 with a multiple of 5X impacts the valuation by £100,000.
- An inappropriate multiple. It should be clear which sources the expert has considered when choosing a multiple. For example, have the experts relied on generic data such as UK200 data or BDO PCP reports, have they used sector analysis or have they identified appropriate transactions in sufficiently comparable companies. The selection of the multiple is subjective but I am looking for the reasoning and whether, in my view, the multiple is within a reasonable range. For example, if the multiple selected is 7X but in fact 4X is more appropriate then with an EBITDA of £500,000 the impact on the business' valuation is £1,500,000.
- Applying an EBITDA multiple to operating profits or to profits after tax rather than EBITDA. Operating profits are stated after deducting depreciation and can be significantly lower. It is important that the source of multiple is consistent with the earnings to which it is applied.
- Adjusting the enterprise value by adding the business' net assets rather than deducting debt and adding surplus assets. The enterprise value already includes the value of the assets used in the trade so this is double counting.
- The impact of an overdrawn director's loan account. Normally, the equity value assumes the overdrawn loan is repaid and so this should be considered when assessing the parties' overall assets and liabilities.
- Failing to check the equity value against the net assets valuation. The net assets valuation is effectively the baseline value that implies that it has no goodwill. It is not the value that could be obtained if the business ceased trading and value was returned to shareholders by selling the assets and winding up the business, because this would require many assets such as stock to fall in value when trade ceases and similarly there are often liabilities such as redundancy costs and lease early termination penalties that arise on a cessation of trade. If the valuation based on maintainable earnings is lower than that based on net assets, the latter should be adopted.

Net assets valuation

This is described as a *cost approach* where the business is valued on the value of its net assets without reference to future profits. There are typically fewer areas where the expert must use judgement. An example is shown below:

	Net assets in the latest balance sheet	= £7 million
+	Revaluation of property/investments to market value	= £6 million
-	Latent tax on gains in investment value	= (£2 million)
-	Obsolete stock	= (£1 million)
=	Adjusted net asset value	= £10 million

A review should consider the following points:

- Has the valuer assessed the latent corporate tax (deferred tax) relating to the property values? Typically, the properties are shown in the accounts at the historical cost and in calculating the net asset value the adjustments include the uplift to current market value. Also worthy of consideration is how to deal with the inherent tax were the business to dispose of those properties and whether an adjustment should be made for this and, if so, by how much. Ultimately this is a matter for the court but typically I would expect to see the calculations presented and normally 50% of the latent tax is deducted in the valuation.
- If the valuation is based on the balance sheet in the last accounts, has the expert assessed the likely retained profits after that date in the current valuation? If so, is that calculation reasonable and has it considered the impact of dividends and tax?
- Are there other historic assets or liabilities which are not in the balance sheet at realistic values? For example, I have seen significant discrepancies on stock figures and wildly exaggerated provisions for future liabilities.

Discounted cashflow

This is the ultimate *income approach* where future projected cashflows are converted to a current value using a risk adjusted discount rate.

Entry cost method

This is another *cost approach* and looks at the estimated cost to set up a similar business from scratch.

Dividend yield

This method is an *income approach* adopted to value minority shareholdings.

Industry precedent

In certain industries there are guidelines used such as a multiple of income or numbers of customers.

Minority discounts

When valuing a minority shareholding experts should have considered the applicability of a minority discount or control premium. The subject of minority discounts is

complex and beyond the scope of this article but, briefly, a shareholding of less than 100% may be a simple pro-rata of the value of the whole business or may be discounted to reflect the rights and risks associated with the minority holding. I would expect the expert to have considered:

- the impact of the Articles of Association and any shareholders' agreement. These may spell out in general terms whether a discount should be applied;
- the size of the shareholding relative to other shareholdings;
- the relationships between the shareholders;
- the relevance of the concept of a quasi-partnership;
- the published guidance on the size of minority discount. Currently I am only aware of the ACCA Technical Guidance 167 giving a guide to typical discounts. Whilst not prescriptive I would expect it to be discussed;
- the application of discounts in any previous transactions;
- the normal approach by the Family Court in this area.

The impact of the minority discount can be significant. For example, if a pro-rata valuation of a 25% shareholding is £500,000 and an appropriate discount is 50% this gives a discounted value of £250,000 if a discount is applicable.

Future maintainable earnings

If the experts have given a view on the future maintainable earnings of the party retaining the interest then they should have considered not just what the party previously received as dividends and salary but also what is available. In other words what is being drawn may be far lower than what is available or, conversely, might not be sustainable.

Extraction of capital

Where the instructions cover the extraction of capital the expert should have considered any available cash reserves in the business and any funds that could be raised by borrowing. When assessing surplus cash, namely cash more than that required as working capital, the expert will normally have considered any available cashflow projections and the normal trend of cash in the business such as the month-end balances over an extended period. The tax implications of withdrawing a lump sum should be estimated.

Limitations arising from information disclosed

In addition to reviewing the contents of the report, the reviewer should consider the potential impact of any limitations that the experts have encountered in their work. The expert should have explained the potential impact of any discrepancies in the information provided. For example, there may be concerns about whether there is undisclosed discretionary/non-business expenditure in the accounts. In this case, the potential impact on the valuation and future maintainable earnings should be outlined. If further information and analysis might resolve an issue this should be explained.

Engaging a shadow adviser

A shadow adviser can assist clients and their legal advisers in reviewing the report of the SJE and suggest questions to be raised. Typically, a shadow adviser's involvement is confidential and not disclosed to the other parties' advisers. For larger or more complex cases, I would recommend choosing a shadow adviser who is themselves an experienced SJE.

Normally the timetable to raise questions on an SJE report is 10 days. I recommend considering an approach to your shadow adviser before the SJE report is received to ensure they are available to assist.

Whilst shadow advisers are usually engaged for higher value cases, they can also be cost-effective on smaller cases.

When instructed as shadow adviser on a business valuation we will consider the following points:

(1) Has the SJE answered the instructions?
(2) Did the SJE request and receive sufficient information to reach a view on the valuation and other instructions?
(3) Was the appropriate valuation methodology chosen?
(4) What key assumptions did the SJE make and what was the impact of these on the valuation?
(5) If the party has a hunch that the valuation may not be fair or material information has not been provided or considered by the SJE, these concerns can be considered by the shadow adviser.
(6) Is the valuation opinion fair bearing in mind that valuation is inherently subjective?

I have already explained the key points I would consider when reviewing the report of an SJE and these are the areas a shadow adviser will consider.

In our experience, the modest cost of a shadow adviser can be a worthwhile investment to ensure the client understands the SJE report, can raise appropriate questions and has peace of mind knowing they have a second opinion.

Valuation and Treatment of Business Interests on Divorce in England and Australia

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'The valuation of private companies is a matter of no little difficulty.'[1]

The definition of 'value' is the present value of expected future net economic benefits to be generated by an asset. This definition alone gives an indication as to the complexities in arriving at a reasonable value of an asset. The complexities when seeking to determine the value of an asset where there is no sale/purchase negotiation underway increase exponentially.

The process of valuing a business on divorce can, therefore, be very difficult. The data on which business valuations are based is often volatile, there is typically no open market on which to test the valuation, and there is regularly competing evidence from two (or more) expert witnesses as to the value of the business interest.

Deciding how to treat business interests on divorce, even once the value has been ascertained, is often no easier. There are regularly arguments about categorisation (i.e. to what extent was the value of the business generated during the relationship), disputes can arise as to the appropriateness of discounts, and lack of liquidity can cause difficulties funding a settlement.

This article attempts to compare the approach taken by the family courts in England and Australia to some of these issues. The authors are a specialist financial remedies solicitor practising in England and a forensic accountant practising in Australia.

For a comprehensive overview of the treatment of business interests on divorce in England, see the excellent article by Duncan Brooks KC in the Spring 2024 edition of the *Financial Remedies Journal*.[2] The Australian Family Law Act 1975 and Australian cases cited in this article can be accessed on www.austlii.edu.au.

Methods of valuing a business

There are a range of valuation methods depending on the nature of the business interest being valued. The most common methods (which are used in both England and Australia) are:[3]

(1) net asset valuations, which are often used, for example, when valuing a property investment business (cost approach); and
(2) earnings-based valuations:
  (a) earnings before interest, tax, depreciation and amortisation (EBITDA) x multiplier +/- surplus/deficient assets – debt (market approach); and
  (b) discounted cash flow (DCF) valuations (income approach).

In England it is for the court, not the expert, to value a business interest on divorce. Although the English court will usually direct the parties to instruct a single joint expert, it is common in 'bigger money' cases for one or both parties to subsequently instruct their own expert to put forward competing evidence. It is not therefore uncommon in England to have two (or more) expert reports before the court at final hearing.

In Australia, a single expert regime is generally adopted by the court where the parties cannot agree on the value of a business interest. The court will generally accept a single expert's findings as to the value of the asset to include in the property pool. However, a single expert may be asked to give evidence at final hearing and be cross-examined. The judge may also ask questions and ultimately decide on a value that is different to that measured by the single expert. The expert, unless instructed otherwise, will generally adopt a 'market value' basis of value, known as the 'hypothetical willing but not anxious purchaser and vendor' principle.[4]

Hindsight

As Mostyn J said in *E v L* [2021] EWFC 60, it is an iron principle of valuation theory that when advancing a historic valuation of an item the valuer should be transported back in time to the date of that valuation and must formulate their opinion using only the data available at that time. However, when seeking to place a value on a business interest on divorce, the English Family Court can (and very

often does) use knowledge of subsequent events to fix a fair value on the business interest.

This occurred in *SK v WL* [2010] EWHC 3768 (Fam) when the court was seeking to determine the value of a business at the date the parties separated (which was 6 years before the date of the trial). In that case Moylan J (as he then was) said as follows:

> '[30] Valuations, when required, should be based on real and known events. This approach ensures that valuations are more likely to be closer to the reality of any given situation than the result achieved by ignoring known history. It is difficult also to see how the latter approach, of ignoring known facts, could be consistent with the court's obligation to achieve a fair outcome.'

This approach has been followed by the English Family Court in a number of cases including *Jones v Jones* [2011] EWCA Civ 41, *Robertson v Robertson* [2016] EWHC 613 (Fam) and *WM v HM* [2017] EWFC 25 (which was upheld by the Court of Appeal in *Martin v Martin* [2018] EWCA Civ 2866). The rationale for taking hindsight into account was explained by Mostyn J in *E v L* as follows:

> '[63] Blinding oneself to the knowledge of subsequent events, whilst conforming to the purity of valuation theory, obviously risks serious injustice. It must never be forgotten that the exercise has as its endgame a calculation which results in an award of hard cash to the claimant. …
>
> [66] I regard it as unreal, and a likely source of real injustice, for calculations to be undertaken to work out the scale of acquest (and thence the wife's award), on historic figures which with hindsight are shown to be completely wrong. It is not consistent with "a broad analysis of fairness".'

In Australia, the use of hindsight is considered on the basis of two categories of subsequent events:

(1) events that affect value. These should *not* be considered in the valuation *unless* the facts of those events were known or knowable at the valuation date; and
(2) events that do not affect value but provide evidence of the value that existed at the valuation date. These may be considered in the valuation.

In *Pope & Pope* (2012) FAMCA 204 a single expert valued the husband's interest in a group of companies at the time of co-habitation of the parties (April 1995) in the amount of AU$1.8m (utilising a capitalisation of earnings approach), her valuation explaining that the valuation must reflect the information and circumstances 'known or knowable' at the valuation date. This was important as the subject business' growth in the later 1990s was 'inarguably described as spectacular'.

In evidence, the single expert explained that had she been able to utilise full hindsight she would have undertaken a DCF approach utilising 5-year future cash flows from April 1995, which, in 'very rough' terms, would have resulted in a value in the high teens of millions of dollars. The judge commented on this evidence by saying:

> '[138] While this evidence does not affect the value as at the date of cohabitation, it provide [sic] support for the husband's claim that he introduced not only an asset of significant value but one which was fundamental to the acquisition of future income and wealth.'

On that basis the judge decided the husband's contribution to the value of the parties' assets at the date of the hearing significantly outweighed the wife's contributions.

Discounts

When valuing a business on divorce the English Family Court will often apply a series of discounts. Again, it is for the English court (not the expert) to determine whether, and if so to what extent, a discount should be applied. In (the brilliantly named) case of *HO v TL* [2023] EWFC 215 regarding the valuation of a chain of hotels, Peel J categorised these discounts as either:

(1) accountancy discounts; or
(2) court-based discounts.

An accountancy discount means a minority discount and has two elements: (1) a discount for lack of control; and (2) a discount for lack of marketability. A discount for lack of control may be applied where one party owns some, but not all, of a business. In practice these discounts are rare. As Mostyn J said in *Clarke v Clarke* [2022] EWHC 2698 (Fam), the English Family Court will look to the future and ask itself whether, on a balance of probabilities, the business interest will be sold independent of, or in conjunction with, the rest of the business. In many cases the court will conclude that it is more likely than not that the business will be sold as a whole. If, however, the court finds that the interest will be sold separate from the rest of the business, the English court may apply a discount. An accountancy discount may also be applied where there is a lack of marketability for the business.

A court-based discount may be applied by the English court to reflect that a business interest may be illiquid and/or laden with risk. The English court has explained in numerous cases that there may be a difference in quality between, for example, cash (which is liquid and free of risk) and an interest in a business (which may be illiquid and laden with risk). As an example, in *Chai v Peng* [2017] EWHC 792 (Fam) the court discounted the valuation of the business by 30% (10% to reflect the fragility of the valuation and 20% to reflect illiquidity).

As Peel J said in *HO v TL*, in the right case it is permissible for the English court – having already applied an accountancy and/or court-based discount – to decide when determining how to allocate the resources on divorce that the person who is retaining the business asset should receive more than half the assets to reflect that their share of the settlement is less liquid/safe than the settlement being received by the other party to the divorce.

In Australia, it is up to the expert to apply any discounts considered relevant, whether to a minority interest and/or lack of marketability.

Typically, in a 'market value' basis of valuation the expert will consider the appropriateness of:

(1) a minority interest discount – a discount to the pro-rata value of shares to reflect a minority share parcel; and
(2) a lack of marketability (illiquidity) discount – a discount to the pro-rata value of shares to reflect the fact there may not be a ready market for unquoted shares.

A minority interest discount will come into play where the

share parcel holder has little or no *control* over the management decisions of the particular entity.

A lack of marketability (illiquidity) discount will come into play where there is uncertainty and likely delay in converting the shareholding to cash.

Often the two types of discount are dealt with together and typically range from between 20% to 50% of the pro-rata value of the shares.[5] The more technically correct approach in generally accepted valuation theory[6] is first to apply a discount for lack of control (DLOC), followed by the application of a discount for lack of marketability (DLOM). The arithmetical effect of this is that the application of a DLOC of 25% and DLOM of 15% results in an overall discount of 36.3%. Many valuers would (incorrectly) deduct 40% (25% plus 15%) from the pro-rata value.

Another common mistake made by valuers is that liquidity and marketability, although closely related, are not the same. Technically, these are two distinct factors which should be applied separately.[7]

In the late 1980s and early 1990s the Family Court in Australia started to question the traditional premise of 'market value'. A number of cases dealing with shareholdings in closely controlled family entities saw no or low discounts. This gave rise to a legal concept of the basis of value in a family law context – 'value to owner'.

In *Sapir v Sapir (No 2)* (1989) FLC 92-047 the judge concluded that the value of the wife's shareholding in a family company was the value of the shares to the wife, not their commercial value or their value to a hypothetical purchaser (and thus the departure from 'market value'). In this case, each party had their own valuation expert and the judge accepted the position of the husband's expert, opining that:

> 'Essentially the accountants valued two different things. The husband's accountant has valued what is the value of the shares to the wife. His basic philosophy was that the only foreseeable purchaser of the wife's shares would be her parents and they would not be worried about the fact that they were buying a minority holding. Accordingly, a reasonable person in the position of the wife would accept a small discount on the asset value of the shares so as to have cash now, but there would be a figure below which she would not go but she would rather wait for her parents to pass on rather than part with the shares now. The wife's accountant valued the shares on what they would be worth to an independent third party. Such a person would discount the asset backing value heavily because of the difficulty in either realising his investment by winding up the company or alternatively, on selling the shares to some other third party who would have similar problems.'

Although no hard and fast case-law exists, in *Scott & Scot*t (2006) FamCA 1379 the judge noted her own responsibility to determine the value of the husband's interest on the whole of the material before the court, including the divergent expert opinion. The judge considered the valuation methodology adopted by each of the parties' experts and observed that the concept of 'value to owner' considers and takes into account the benefits to a particular owner even though this may not be based on a hypothetical third party purchaser.

It is worth noting that, in valuations for the Australian Family Court, if the expert is instructed to value the entity of the basis of 'value to owner' (as opposed to market value), it is unlikely any of the discounts mentioned above will be applied.

The 'value to owner' concept is similar to what the International Valuation Standards Council refers to as 'equitable value' which it defines as 'the estimated price for the transfer of an asset or liability between identified and knowledgeable and willing parties that reflects the respective interests of those parties'. Mostyn J took a similar approach in *Clarke v Clarke* (referred to in more detail above) when he spoke about ensuring valuations are not 'unreal' by recognising that in practice the minority shareholding was unlikely to be sold to an unconnected third party and that the court should not therefore apply a discount for a minority interest.

Pre-marital endeavour

When deciding how to treat a business asset on divorce the court will often have to determine to what extent the value of the business was generated during the marital period. The three main approaches adopted by the English Family Court when seeking to determine what portion of the business is matrimonial are:

(1) the accountancy method;
(2) the linear method; and
(3) the intuitive method.

The accountancy method usually requires an expert to be instructed to opine as to the value of the business when the marital period commenced. In *Jones v Jones* an expert had valued the business at £2m at the date of the marriage and £25m at the date of the trial. However, the Court of Appeal increased the historic valuation by £2m to reflect the latent potential in the business at the time and by a further £5m to reflect passive growth.

In *GA v EL* [2023] EWFC 206 Peel J discouraged the accountancy method when he said as follows:

> '[32] In my judgment, although there may be cases where the historical valuation exercise can be carried out relatively simply, and will clearly assist the parties and the court, I consider that there must be clear justification for this approach to be adopted before the court gives permission for expert evidence as to past values to be undertaken. It should very much be the exception, rather than the norm.'

The linear method was adopted by Mostyn J in *WM v HM* and upheld by the Court of Appeal in *Martin v Martin*. It involves taking the date the business commenced, the date the marital period started and (subject to post-separation accrual – dealt with in more detail below) the date of the trial, and apportioning accordingly. This method has the benefit of being simple, quick and cost-efficient, but it risks giving insufficient attention to when the value in the business was generated.

The intuitive approach has been adopted in a number of cases including *Robertson v Robertson*. In this case the husband had created the business (ASOS) 6 years prior to the 10-year marriage. Holman J took the view that the expert's assessment of the value of the business at the time of the marriage (£4m) was too low and held that the present value (£141m) should be treated as to 50% matri-

monial and 50% non-matrimonial. This approach has the disadvantage of being very subjective and uncertain, but has probably become the most common.

In Australia, there is no consistent approach by the court to the issue of 'pre-marital endeavour'. Instead, the Family Law Act 1975, at section 79 1C4(a), requires that the court consider the financial contribution *made* directly or indirectly by or on behalf of a *party* to the *marriage* to the acquisition, conservation or improvement of any of the *property* of the parties. The effect of this is that the court will consider the value of each parties' assets brought into the marriage and the value of the pool at the end of the marriage, and determine the percentage financial contribution by each party.

In the Australian case previously mentioned in relation to the use of hindsight (*Pope & Pope* (2012) FAMCA 204), rather than disagreeing with, and adjusting, the expert's valuation at co-habitation, the judge concluded that the husband's AU$1.8m corporate interest at co-habitation was 'fundamental to the acquisition of future income and wealth' and determined that the husband's financial contribution during the course of the marriage was 74%.

Any property acquired prior to the commencement of a marriage or a de facto relationship becomes that party's direct financial contribution towards the relationship and is called an 'initial contribution'. It must be remembered, however, that the court has discretion in assessing the parties' contributions and there is no set formula to assess initial contributions.

Post-separation accrual

It is harder to persuade the English Family Court to exclude the value of a business that may be attributable to work undertaken post-separation. As Mostyn J said in *E v L*:

> '[73] In my view there are already in this field too many uncertainties and subjective variables. The law needs to be transparent, accessible, readily comprehensible and should propound simple and straightforward principles. In my experience convention and tradition dictate that save in cases where there has been undue delay between the separation and the placing of the matter for trial before the court, the end date for the purposes of calculation of the acquest should be the date of trial. This rule of thumb should apply forcefully to assets in place at the point of separation which have shifted in value between then and trial.'

Moor J also said as follows in (another excellently named case of) *DR v UG* [2023] EWFC 68 regarding the valuation of a pharmaceutical business:

> 'In general, post-separation endeavour is relied on to argue for a greater share of an increased value of the assets. I have always had real reservations as to the concept for the reason that, if the assets have fallen in value, it is difficult to see why the other party should not then argue that he or she should not have to share in that fall in value. Such difficulties are avoided if the concept is severely restricted in its operation. It is, of course, a very different matter if there has been a significant delay in bringing the application, such as in *Wyatt v Vince*, but that is not the case here. Just as the Husband has continued to run his businesses, so the Wife has continued her contribution in caring for the four children. Moreover, she can say with some force that he has been trading her undivided share. In this particular case, I will also have to consider the very significant losses that the Husband has incurred in other business ventures since separation that the Wife had no involvement in, or even, initially, knew about.'

Although Moor J declined in *DR v UG* to rule out the possibility of any further categories, at present the only circumstances in which post-separation accrual has been taken into account are where:

(1) the business was established post-separation;
(2) there has been a significant delay between separation and the resolution of the proceedings;
(3) work is required after separation, for example in private equity cases involving carried interest, to harvest the asset; and
(4) the paying party is required to carry on working in the business after sale.

As a general rule, in Australia property will be valued at the time of the final property settlement/hearing. Thus, a business interest having perhaps been valued for the purpose of mediation where no settlement is reached, will require an updated valuation as close as possible to the hearing date. If one party can argue deliberate diminishment in the value of the asset since separation, the court may turn to an earlier valuation and/or award the disadvantaged party a higher proportion of the pool than would otherwise have been the case.

Methods of distribution

When deciding how to divide the assets on divorce in a case where there is an interest in a business the English court will generally:

(1) fix a value at the date of the trial;
(2) order a deferred lump sum to be calculated at a future date;
(3) order a sale of the business; or
(4) transfer some shares in the business between the parties.

In most cases the English court will seek to fix a value at the date of the trial if possible. This often involves offsetting so that the other party receives more of the other assets and/or ordering a fixed lump sum which may be payable over a period of time.

The English court can also order a deferred lump sum to be calculated contingent on the performance of the business in the future, although this requires very complex drafting, risks sharing post separation income, and is contrary to the clean break principle.

Although the English court has the power to order the sale of a business interest on divorce, in practice this is very uncommon. Similarly, the English Family Court is very unlikely to order that an interest in the business should be transferred unless the other party already has an interest.

In Australia, the Family Law Act 1975, section 81, requires that the court shall, as far as practicable, make such orders as will give a clean break to the financial relationships between the parties (excluding any orders made as to maintenance).

Thus, the value of a business interest will be fixed at trial and included in the marital asset pool available for distribu-

tion. This may also involve offsetting so that the other party receives more of the other assets.

The Australian court will largely leave it up to the parties to determine how the percentage split ruled by the court will be effected. It may, however, rule that assets are to be sold so as to implement the order. However, similar to the approach in England, the Australian Family Court is very unlikely to order that an interest in the business should be transferred unless the other party already has an interest.

Conclusion

The underlying valuation methodology is, as would be expected, similar in England and Australia as both countries adopt International Valuation Standards and similar professional standards. It is the different approaches taken by the courts in both countries which highlight the differences in valuing business interests on divorce. Whereas Australia adopts the traditional accountancy approach to hindsight, the English court will consider events which affect the value of the business interest even if they were not known at the valuation date. Although the definitions vary, the approach to discounts is similar in both jurisdictions save (as below) in relation to risk. The courts in both countries have discretionary approaches when assessing pre-marital wealth and post-separation accrual.

Arguably the most significant difference between England and Australia relates to the weight given to the risk that will be shouldered by the party retaining a business interest post-divorce. In England the court may, when determining the value of an asset and/or when deciding how to allocate the resources between the parties, take into account the inherent risk associated with a business interest. It has long been established in the English court that there is a difference in quality between a copper-bottomed asset and a risk-laden asset. This exercise is not as common when dealing with business assets on divorce in Australia, albeit such risk may be reflected in the ultimate percentage split of assets.

It is beyond the scope of this article to explore the (numerous) other differences between England and Australia on relationship breakdown. Specialist advice should always be taken in both countries where there is a choice as to the jurisdiction in which to bring proceedings. But for cases involving business interests, careful and early consideration should be given as to factors such as approach to hindsight, pre-marital/post-separation endeavour and allocation of risk when dealing deciding in which jurisdiction to commence proceedings.

This article is not intended to be a comprehensive statement of law or practice and must not be relied on as such. The authors have given due care and diligence in the preparation of this article, however no warranty is given as to its accuracy and completeness.

Notes

1 *Versteegh v Versteegh* [2018] EWCA Civ 1050, Lewison LJ at [185].
2 'Businesses in Financial Remedy Claims', available at https://financialremediesjournal.com/content/businesses-in-financial-remedy-claims.e128c4cf8fcc4552830b10c8489a4752.htm
3 The three alternative methods defined by the International Valuation Standards Council are the market approach, the income approach and the cost approach.
4 A principle established in *Spencer v The Commonwealth of Australia* (1907) 5 CLR 418.
5 Ranges of discounts applied are underpinned by various empirical studies of publicly traded companies. However, the actual % applied by the valuer is subjective.
6 Shannon Pratt, *Valuing a Business* (McGraw-Hill Co, 6th edn, 2022), p 401.
7 Shannon Pratt, *Valuing a Business* (McGraw-Hill Co, 6th edn, 2022), p 421.

Dame Jennifer Roberts

An Appreciation

On 13 June 2024 a packed Lady Chief Justice's Court was the scene of affectionate tributes to Mrs Justice Roberts, known to all as Jenny, who died on 10 June 2024. The sadness evident on that occasion and in writing an obituary for Jenny is mingled with the pleasure of recalling such a fine and lovely person.

Jennifer Mary Halden was born on 3 March 1953 in Southampton. She spent her early years in Sudan. After leaving school she did not follow the conventional route to the Bar: instead she did some work as a model and for Island Records. Jenny married Richard Roberts when she was only 18, and brought up her two daughters in the family home in the Hampshire countryside. She then obtained a first-class degree in Law at Southampton University, and was called to the Bar.

In 1988 Jenny became a pupil in what were then the Chambers of Roger Gray QC in Queen Elizabeth Building. Starting at the age of 35, she might have expected to be the oldest pupil, but she was younger than two of her fellow pupils. Lavender Patten practised at One Garden Court and later went to Hong Kong with her husband Chris, the last Governor. Caroline Beasley-Murray, already a JP, recently retired after 20 years as HM Coroner for Essex.

Not long after starting her pupillage Jenny was on one of the trains involved in the Clapham Junction crash, in which 35 people were killed. Fortunately, Jenny was not on the part of the train on which she usually travelled, and so she survived, unhurt.

Jenny was the overwhelming candidate for a tenancy in QEB, and was duly taken on as a tenant at the end of her pupillage. It did not take her long to build up a most impressive practice at QEB in both financial and children work. Later she concentrated on big-money cases. It was either Thomas Brudenell or Roger Gray who first called her 'Duchess'; an affectionate nickname, reflecting her grace, elegance, good looks and perfect manners. Anyone taking over one of her cases would find completely helpful and legible notes, handwritten with a fountain pen; and the case in apple-pie order, provided Jenny's advice had been followed. Jenny had, like most very successful barristers, an appetite for hard work, excellent judgment and complete command of the facts of her cases. What stood out from other high-flyers were her invariably unflappable manner and evident care for the client, which inspired total confidence from people often battered by their experiences of divorce. Solicitors, senior and junior, warmed to her and had complete confidence in her.

Jenny became a Recorder on the Western Circuit in 2000, after only 12 years at the Bar. Though very much a family specialist at the Bar, she was well able to tackle criminal work and she produced some impressive written judgments in a range of civil cases.

Jenny took silk in 2009. Fifteen years later the glorious white trouser suit Jenny wore to her silks' party is still remembered. She was appointed a Deputy High Court Judge in 2011. After a long, difficult and fiercely contested financial hearing before Jenny, who was sitting as a Deputy High Court Judge, both counsel told me (in separate conversations) that Jenny had heard the case superbly. A QC in whose divorce she acted confided in me: 'I have such a high opinion of Jenny: to me she has practically god-like status.'

Somehow Jenny always had plenty of time for the many fellow members of chambers who went to her immaculate room, seeking her help with their professional difficulty. Often there would be two people in her room at the same time, queueing up for her advice. And whenever a child of a member of chambers came to QEB, the most visited person in chambers would be Jenny, who gave the warmest welcome.

'Is she really a granny?' said my then 12-year-old daughter to me in 2012, just after we had left Jenny, who had mentioned her grand-children in the conversation. 'She seems too young.'

On 3 June 2014 Jenny became a High Court Judge assigned to the Family Division, replacing her former Head of Chambers, Sir Paul Coleridge. Four weeks later she was hearing the case which led to the biggest reported lump sum award to that date (US$530m, about £330m): *Cooper-Hohn v Hohn* [2014] EWHC 4122 (Fam). The interlocutory judgment in respect of a reporting restriction order on the husband's fallback submission was 177 paragraphs. Just as she had begun the *Cooper-Hohn* case, Jenny was diagnosed with breast cancer. The doctors recommended immediate chemotherapy. Jenny's first thoughts were for the parties. So she heard the case, and only then began the chemotherapy and started to write her judgment. The judgment is reported at [2015] 1 FLR 745–837. It ran to 310 paragraphs.

Because of the seriousness of her condition and its implications for her ability to sit as a judge, Jenny offered her resignation to the then President of the Family Division, Sir James Munby, who refused it, enabling Jenny to have a 10-year judicial career, for the great majority of which she was able to work full-time.

Sir Nicholas Mostyn's entertaining and affectionate tribute to Jenny in his online *Daily Telegraph* obituary asserted, specifically in relation to despatching an inflated needs claim in *Juffali v Juffali* [2017] 1 FLR 729, that Jenny employed a 'literary style reminiscent of Cicero's'. He commented on her following a Family Division predecessor

with 'Proustian-length judgments'. To which one might respond 'Quae ista impudentia?' (Cicero: *Ad Verrem* II.4.) Jenny's judgments were comprehensive, clear and unpretentious. Certainly, they could have been cut without risking criticism from the Court of Appeal; but at the cost of the side losing the point feeling that their evidence or argument had not been fully considered. She preferred to deal carefully and fully with the case in front of her and to leave historical excursus and guidance to the profession to others.

Along with her financial remedy work, as Family Division Liaison judge on the Western Circuit, Jenny heard difficult public law cases, and she ran the Deprivation of Liberty Safeguarding list. Does anyone who knew her doubt that Jenny could deliver a succinct and full judgment in a difficult case? If so, they should look at the 14 paragraphs setting out her ex tempore judgment, quoted almost in full, when the Court of Appeal upheld Jenny's order in parallel proceedings in the Court of Protection and Family Division, declaring that a young man with severe learning difficulties should not be permitted to travel with his family to Afghanistan last summer (*J v Luton BC* [2024] EWCA Civ 3).

When seeking to justify the effect on the children of publicly permitting the reporting of the family's travails, as opposed to the previous longstanding practice of anonymising first instance decisions, a senior family judge relied on the multiple Old Testament references to the effect that the sins of the fathers are to be visited on the sons. One could never imagine Jenny thinking along such lines.

After receiving a diagnosis of terminal cancer in September 2023, Jenny made the same resignation offer as she had made to his predecessor to the current President, Sir Andrew McFarlane. He too refused it. She continued to work as much as she could. She was still attending judges' meetings and supporting her mentees as and when her cancer treatment and condition permitted.

Jenny's husband Richard died in 2004. One of her two brothers, Ian, an RAF Officer, was killed in a flying accident in 1991. To the end of her life she had a close and loving relationship with her daughters and six grand-children, and with her brother Simon.

After Jenny's death, many solicitors have contacted QEB to pay tribute. There have been many references to her kindness, good example, elegance, eloquence, sense of fun, compassion, courtesy, and her exceptional qualities as a barrister and judge.

A solicitor wrote:

> 'She always knew just what to say in an FDR to get the parties to be sensible – the wonderful phrase "time for that elegant gesture". I also loved that she brought a bit of Chanel to the Western Circuit!'

A silk from a rival set commented that even a notoriously irascible silk from his set could be calmed down by her.

A Lord Justice of Appeal described Jenny as a:

> 'wonderful colleague in QEB and in the Family Division. A wise, careful and considerate judge. A great loss.'

Three days after Jenny's death in the Lady Chief Justice's Court, the Lady Chief, who had known Jenny since they were Bar Finals contemporaries 37 years earlier, summed up Jenny:

> 'Beautiful on the outside; beautiful on the inside.'

Oliver Wise
QEB

From HHJ Edward Hess, Chair of the FRJ Editorial Board

'Everybody whose path crossed Jenny's will share the same positive thoughts about her. We are very pleased to publish the affectionate piece above from Oliver Wise, who shared chambers with Jenny for many years at QEB, which sincerely captures just how well she was regarded by those close to her professionally. Having got to know her a little when I worked with Jenny for several years on the Western Circuit (when she was FDLJ and I was DFJ for Wiltshire) I would like to add my own brief words. Jenny somehow managed to combine writing substantial judgments in difficult money cases in London with tireless leadership work in the South West. With half a dozen or more DFJs (and no doubt many others) seeking her guidance on an almost daily basis on numerous issues, she always responded to an email with an amazing promptness and often called on the phone to discuss the issue with a personal touch. Not only was the response prompt, but it was given with full and proper consideration and sensible reflection. Perhaps even more important than that, I never saw her respond to anything without the utmost calm, patience, friendliness and charm, which always inspired loyalty, affection and warmth. I very much share the view that she was a remarkable human being and it was the good fortune of all of us that she chose to devote her professional life to the cause of family law.'

DR Corner: Early Reflections on Pre-Application Protocol – Seismic Shift or Damp Squib?

Harry Gates
4PB, co-founder of The Divorce Surgery

Samantha Woodham
4PB, co-founder of The Divorce Surgery

Family judges don't have it easy. When the combined wisdom of a thousand cases leads to the identification of a particular problem, what are they to do about it? Publishing a judgment provides the most obvious and immediate answer. But often such pleas resemble the proverbial pebble dropped into the bottomless well, a hopeful judiciary cupping an ear downwards in the hope of detecting a reassuring splash but there comes back only the sound of silence.

In an earlier article in these pages published 2 years ago,[1] we returned to Mostyn J's exhortations about excessive costs in *J v J* [2014] EWHC 3654 (Fam) at [11], that although 'the mantra "something must be done" is repeated time and again, nothing ever is'. And later at [13]: 'the time has come when the law-makers in this country, whether they are legislators or judges, must stop saying something must be done and actually do something'.

Much the same could have been said about efforts to embed non-court dispute resolution (NCDR) since the advent of the Family Procedure Rules (FPR) in 2010. By Part 3, the court has been enjoined to 'consider' NCDR, as well as to adjourn proceedings for the parties to obtain 'information and advice about NCDR' if thought appropriate and/or in favour of substantive NCDR 'where the parties agree'.

Plenty was written and said about the efficacy of these provisions in the ensuing years, not much of it positive and with an enduring sense that this was a missed opportunity. Part 3 just wasn't really a consideration when it came to case management. As the report of the Family Solutions Group *What about me?* put it in November 2020 'Concern has been expressed within our discussions and the wider [working group] that the courts are not actively case managing in accordance with Part 3 of the FPR, and opportunities to resolve cases out of court are thus lost'.[2] The court's general case management power in FPR 4.1(3)(c) to adjourn a hearing was also rarely (if ever) used to encourage parties to attend NCDR.

Emphatically though, something has now been done. Practitioners could hardly fail to have noticed the blizzard of commentary that started in December 2023 with *Churchill v Merthyr Tydfil CBC* [2023] EWCA Civ 1416, introduced to a family law audience shortly afterwards via Knowles J's decision in *X v Y (Financial Remedy: Non-Court Dispute Resolution)* [2024] EWHC 538 (Fam).

Further developments

Those cases having established the proposition that, in the right case, the civil courts can: (1) order the parties to engage in NCDR; and/or (2) stay the proceedings to allow for NCDR to take place, we had only to wait a few weeks more for the entry into force of the Family Procedure (Amendments No 2) Rules 2023 (SI 2023/1324) by which the court gained new powers to:

(1) 'encourage' NCDR within natural gaps in the court timetable, whether the parties agree or not;[3]
(2) require parties to set out their views on using NCDR in Form FM5;[4] and
(3) in financial remedy cases, consider whether a failure, without good reason, to engage in NCDR should impact on who pays the costs of the litigation.[5]

A more muscular approach to implementing Part 3 was immediately evident in *NA v LA* [2024] EWFC 113, where Nicholas Allen KC (sitting as a Deputy High Court Judge) stayed the financial remedy application and refused to list a First Appointment, further directing a joint letter in 6 weeks' time setting out what engagement there had been with NCDR and proposals for the way ahead. The case is also notable for Peel J's exchange with the wife's leading counsel at an earlier hearing, in which he said 'I know it is a culture shift, but all lawyers and judges must get into our heads that it is not simply a case of disclosure before we contemplate anything. Non court dispute resolution must be considered which can embrace disclosure ...'.

And then, only a week later at the end of May 2024, came the comprehensive code set out at FPR PD 9A, in the shape of the Pre-application Protocol. There is no substitute for reading the whole thing (and it is not long) but here are some highlights from the Summary:

- 'Before coming to court, unless there are safety concerns or other good reasons not to do so, the court will expect parties to have attended at least one form of NCDR' (para 2);

- 'If the parties have not attended a form of NCDR, the court may decline to commence the court timetable or suspend the court timetable so that the parties may attend a form of NCDR. The court will also take into account any failure by a party to attend a MIAM or form of NCDR when considering the question of costs […]' (para 5);
- 'Before starting court proceedings, the parties should attempt, where possible, voluntary financial disclosure and negotiation. Any disclosure must be full, honest and open' (para 7). Form E should be used (para 8).

Subsequently, in *HJB v WJB (financial remedies) (separation agreement – application to show cause)* [2024] EWFC 187, HHJ Vincent (sitting as a Deputy High Court Judge), having determined as a preliminary issue that a separation agreement reached between the parties would be 'presumptively dispositive' when the court came to consider the s 25 factors, said:

> '[125] The parties will need some time to reflect on the decision and consider directions. In accordance with the changes to the Family Procedure Rules Part 3, Practice Direction 3A and Part 28 of the Family Procedure Rules, the Court will be seeking to focus the parties' minds on the potential for non-court dispute resolution of remaining issues between them as a next step and before further costs are expended in this litigation.'

In terms of the court's expectations, so far so clear. But where are we in terms of the cultural shift referenced by Peel J? How far have we come and how worried should we be about the propensity to slip back into old habits as the lustre wears off the amended rules and the Pre-application Protocol? Will this iteration of Part 3 succeed where the old one failed? And what is the future direction of travel?

What has been the response from practitioners?

Somewhat in the manner of *Family Fortunes*, we've asked colleagues how the new rules are bedding down. Obviously this is anecdotal rather than scientific, and we accept without hesitation that the sample size is tiny. Moreover, we don't have any data to shed light on how many cases are avoiding litigation *altogether* thanks to NCDR, which remains its central ambition. But the responses we've received from family lawyers as to how the rules are affecting existing cases are varied and interesting nonetheless and include:

- an example of a case where a party had not filed an FM5 before the First Appointment and was unable to inform the court of any prior attempts to engage in NCDR. The judge adjourned the case, with liberty to restore after the parties had engaged either in a private FDR or another form of NCDR;
- a sense that clients are not rushing to mediate but are happier to do so where also supported by their solicitors or counsel;
- an increased number of proposals to adjourn court hearings to try mediation on terms they arbitrate afterwards if need be;
- greater uptake of arbitration generally with judges pressing this in particular;
- a noticeable shift in advice from counsel to clients in favour of making proposals for NCDR, in order to avoid criticism from judges and/or costs orders;
- 'A real sense of wanting to make sure that we're not on the wrong side of a reported decision where a judge is looking to make an example … I think it's more than just paying lip service to NCDR (in the way that often MIAMs are), and it is having a meaningful impact on strategy and how cases are being run.';
- disheartenningly, several barrister respondents considered that the new rules were being 'completely ignored and the District Judges I've been before have not been remotely interested in taking it as a point when raised.';
- successful use of the rules to pressure the other side to agree an earlier private FDR when delay suited the other side. Similarly, one respondent had 'Not had a single judge raise it or be bothered about it but useful to put pressure on opponents.';
- 'I had a case where the judge adjourned as per the new rules even though one party opposed. Other judges have said "we will list and if you agree in parallel you can apply to vacate".'

Cases in which domestic abuse plays a part raise their own particular issues. This article comes too soon to take into account a report from Resolution due on 8 October 2024 looking into all aspects of domestic abuse within financial proceedings, including NCDR. Particular concerns have been raised about the extent to which perpetrators might potentially be handed an advantage if parties are compelled into NCDR. Striking the right balance between mitigating such difficulties but without undermining the core features of the new rules is plainly delicate.

Meanwhile, our civil colleagues have also been busy. Following *Churchill*, the Civil Procedure Rule Committee launched its own consultation in April 2024 on possible changes to the Civil Procedure Rules 1998 (SI 1998/3132) (CPR) as a result, the fruits of which are to be found in the Civil Procedure (Amendment No 3) Rules 2024 (SI 2024/839) and come into force on 1 October 2024. These go further than the recent revisions to the FPR in providing for:

- amendment to CPR 1.1 (the overriding objective) to make specific reference to the court and the parties using and promoting alternative dispute resolution (ADR) when dealing with a case justly and at a proportionate cost;
- amendment to CPR 1.4 (court's duty to manage cases) to clarify that the court can order and not merely just encourage parties to use an ADR procedure as part of its active case management duties;
- amendment to CPR 3.1 (the court's general powers of management) to confirm that the court has the power to order parties to participate in ADR.

It remains to be seen whether any of this makes its way across into the FPR in time, but it has often been the case that where civil procedure leads family procedure follows and the direction of travel across jurisdictions seems clear. NCDR is likely to become ever more woven into the procedural fabric.

1 October 2024 will also see an amendment to CPR 44.2 (court's discretion as to costs) at sub-rule (5)(e) so the

conduct of the parties to which the court will have regard in deciding what order (if any) to make about costs will include 'whether a party failed to comply with an order for alternative dispute resolution, or unreasonably failed to engage in alternative dispute resolution'.

This amendment – which echoes the similar amendment to FPR 28.3(7) referred to above but which only applies to financial remedy proceedings – has the effect of bringing other family proceedings (Children Act 1989, Schedule 1 applications, interim applications and appeals) and applications under the Trusts of Land and Appointment of Trustees Act 1996 and the Inheritance (Provision for Families and Dependants) Act 1975 into line.

And that is without taking into account the future impact of the Online Procedure Rule Committee (OPRC). The stated intention of the (then) Government in its OPRC policy statement was 'that people will be able to easily use our online services to resolve their disputes which would, in some cases, alleviate the need to go to court.' One of the key barriers to NCDR is public awareness. The more options for families, the better, but that mantra only works if they know what options are out there.

What more can be done?

But back to the here and now. The last year has seen changes which are intended to be transformative but of a scope and breadth which will inevitably take time to bed down: cultural shifts do not happen overnight and the anecdotal responses set out above suggest there is no room for complacency.

If the recent reforms are to reach their full potential, there will inevitably have to be robust top-down implementation *pour encourager les autres*. Courts will have to develop the reflex, rather than simply being attuned to the possibility, of enquiring into what steps have been taken to avoid a particular hearing and stand ready to adjourn and/or make adverse costs orders where appropriate. Readers will have their own experiences, but the responses we have collated to date suggest that this remains a rarity.

We would respectfully suggest there needs to be sufficient carrot to go with the stick. Making the argument that 'you should do NCDR now because otherwise you might be on the hook for costs' seems likely to be effective in driving basic take up but less so in promoting wholehearted participation. For that to happen, the incentives need to be better. We would make two pragmatic suggestions, within the scope of the existing rules:

(1) *Financial disclosure*: where the parties have exchanged Forms E (or E1s or E2s) pre-application, as should invariably now be the case following introduction of the Protocol (at para 35) should there be a stronger working assumption that there will be no requirement to file further Forms E in the event of later court proceedings unless either party can point to a material change in a party's financial position that requires documentation and/or an early explanation? Exchanging multiple Forms E is unnecessary, burdensome, confusing and expensive and should be avoided where possible (particularly in light of the emphasis on the quality of pre-application disclosure at paras 32–34 of the Protocol). Financial disclosure is almost invariably updated during the course of proceedings in any event.

(2) *FDRs*: in the right cases, might courts be prepared to reconsider the necessity for an FDR? The current position as set out by FPR 9.15(4) is that, for all standard procedure cases, 'the court must direct that the case be referred for an FDR appointment unless … there are exceptional reasons which make a referral to an FDR appointment inappropriate'. No one seriously doubts the basic utility of the FDR or its historic contribution to settlement rates, but a criterion of exceptionality seems to us to put the bar too high, these days. Doubtless such a test was fair enough at a time when NCDR was less effectively prioritised. But if separating families, doggedly adhering to the Protocol (dutifully supplied them by their advisers pursuant to para 4) have done their best in an NCDR process, and can demonstrate that fact to the court's satisfaction, then it is difficult to see how obliging an FDR will help either them or the court lists. Put another way, the court already dispenses with a court-based FDR where the parties have elected for that form of NCDR known as a private FDR. Why should it not also do so where other forms of NCDR are preferred?

The fundamental changes to the NCDR landscape can only be the end of the beginning. Grander references to tectonic plates realigning and seismic shifts may have to wait a little longer…

Notes

1 'Someone! Do Something About Costs! The Single Lawyer Solution', available at https://financialremediesjournal.com/content/someone-do-something-about-costs-the-single-lawyer-solution.73d4996586674193b043a0582a43ce86.htm
2 Annex 10, §16.
3 FPR 3.4(1A).
4 FPR 3.3(1A).
5 FPR 28.3(7)(ii).

Tech Corner: Access to Justice, Technology and AI in Family Law: A New Frontier for Lawyers

Amanda Bell
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Victoria Nottage
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The fusion of family law and cutting-edge technology is no longer a distant prospect – it's a reality that will reshape the way legal services are delivered.

In this article, Victoria Nottage and Amanda Bell argue that not only will technology bring positive changes to the ways that lawyers provide services to their clients, it also presents exciting opportunities to bridge the long-standing gap in access to justice.

Technology's role in family law

Technology is already playing a crucial role in the delivery of services within family law.

The court's introduction of the online portal has been transformational. The gateway to divorce proceedings is no longer the preserve of the legal professional. Litigants are guided through the administrative process of obtaining a sole or joint divorce and in the latter case, what to do if consensus falls away in the meantime.

Virtual court hearings and remote access capabilities have become a standard feature of proceedings in the wake of the COVID-19 pandemic and have now practically replaced telephone hearings at financial remedy first appointments. These technologies allow proceedings to continue even when physical attendance is impossible or impractical, ensuring that justice is not delayed.

Digital case management systems are streamlining administrative processes, reducing paperwork, and improving the efficiency of case handling and the draft FPR PD 27A released on 12 September 2024 reflects the fact that electronic bundles are commonly now used in most family proceedings.

Whilst these examples of innovation emanating from HM Courts & Tribunals Service (HMCTS) are already transforming the experience of divorce and separation for thousands of people (litigants and lawyers alike), technology is also being applied within law firms and legal service providers, to help lawyers be more productive, manage more cases and achieve better outcomes for clients.

Machine learning and artificial intelligence (AI) applications for family lawyers

Given that clients use technology in their day-to-day personal and business lives (from online banking to AI assistants), it's not surprising that they are increasingly expecting the lawyers involved in their personal lives to be employing available technology.

Within law firms tasks traditionally performed by hand are increasingly yielding to automation. This is nothing new. Years ago, trainee solicitors would search through bank statements manually looking for specific transactions. A simple 'Ctrl + F' now does the trick in a fraction of the time and that's not controversial. However, the scope of automation is expanding. Open banking now allows third-party financial service providers to secure access to consumer banking and transaction data from banks and financial institutions using application programming interfaces (APIs). This technology is available now (some family lawyers will have seen it in action thanks to ClearCourt, a web-based digital platform designed to assist in the disclosure process on divorce and separation).

Not only can open banking technology perform a task more efficiently, it protects against the manipulation of bank statements in financial remedy cases: a practice seen in the case of *X v Y* [2022] EWFC 95. The tool BDGT goes further, using open banking technology and AI to scan through bank statements to create evidence-based budgets for clients.

Machine learning tools that can automate mundane process-driven tasks are now starting to be offered in the family law context (as an add-on to increasingly sophisticated case management solutions or standalone, like Thomson Reuters' CoCounsel or Lexis+AI) with the potential to sift through volumes of paperwork to find missing information on demand, produce chronologies and summaries, and highlight inaccuracies or inconsistencies within a case presentation.

This technology can help lawyers in many ways – not just in the ways the vendor suggests. If lawyers understand how the technology works, they'll be able to identify other ways that it could be applied within their business. An understanding of the technology will also mean that lawyers are better placed to carry out effective risk assessments (more on this below). We believe that we are nearing the tipping point where it is no longer acceptable for some mundane tasks which could be automated to be carried out by humans. As the Master of the Rolls Sir Geoffrey Vos suggested in his speech to the Professional Negligence Bar Association in May 2024, not only are we fast approaching the point at which clients will expect their lawyers to automate processes where it's safe to do so, but there will soon be a professional responsibility to leverage available technology for the benefit of our clients.[1]

What about large language models (LLMs)?

When people from non-technical backgrounds talk about AI, they are often referring to LLMs. LLMs are advanced AI systems trained on vast amounts of text data to understand, generate and manipulate human-like text. They use deep learning techniques, typically based on transformer architectures, to process and produce natural language. Examples include ChatGPT and Claude AI.

Both Thomson Reuters and LexisNexis have launched their own LLM tools in England & Wales within the last few months, demonstrating the power and potential of free text searching pulling results from their own authorised, maintained and curated resources and are producing impressive responses to questions such as 'What are the key legal principles and considerations relevant to varying spousal periodical payments orders in E&W'.

Some law firms have sought to develop their own LLM function which then requires in-depth consideration of the architectural structure of the data set and how best results can be pulled through.

It is important to remember that LLMs are not truth-telling machines. They are word prediction machines – they simply predict the order of words together. When trained on high quality data it is much more likely that the material will be right – however, this leaves two glaring problems: one issue with ChatGPT is that it's had a lot of training on forums such as Reddit and those biases embedded from scrapping the internet cannot be erased. Secondly, when it doesn't know the answer, the LLM produces an excellent lie (as has been seen in litigation in the US and more recently in England & Wales[2]).

For consumers, the use of LLMs as a Google search therefore introduces something of the Wild West. Already, answers to basic questions are tantalisingly close to the right answer but could be based on the law in Canada for example and not England & Wales or cite the pre-Brexit answer to jurisdiction. A layperson would not know. After all, these tools provide their answers with extreme confidence.

However, that is not to write them off. If done well, there is a powerful use case for LLMs to help bridge the access to justice gap for those who cannot afford lawyers. In Singapore, for example, an LLM tool was employed to help litigants in person to draft pleadings in the small claims court. The LLM has been trained on high quality pleadings that have been specifically selected and used within the closed server to produce pleadings that are better than an individual could produce on their own. When it goes before the judge it is generated with a header to tell the judge that it's an AI-enabled draft.

In other domains, AI-powered chatbots are being deployed for initial legal advice and triage, providing 24/7 access to basic legal information and guidance. These tools can help individuals understand their situations better and determine whether they need to consult a lawyer, potentially saving time and resources for both clients and legal professionals. At SeparateSpace we have been awarded Innovate UK funding to develop our own AI tool to help our users navigate our digital platform.

The impact for access to justice

We believe that the technological advances described, combined with our society's increasing willingness to embrace them, will vastly improve access to justice within our society.

Any professional working in the family law field will be familiar with the significant challenges facing the court system and all those attempting to navigate it. Overloaded courts result in lengthy delays, often exacerbating the emotional and financial stress on families seeking resolution.

Access to legal advice is key to unlocking better outcomes, including improved future financial outcomes (for example, ensuring pensions are considered within financial settlements) and protecting children from the impact of separation.[3] Yet, legal advice as it is traditionally delivered is expensive and, since legal aid funding was restricted in 2013, is inaccessible for many. This issue has been exacerbated in recent years by the cost of living crisis.

Without professional support, and despite the policies promoting non-court dispute resolution (something that is not new – after all, MIAMs have been compulsory for the vast majority of cases since 2014), judicial intervention becomes the recourse for a considerable number of families desperate to get some sort of input into their situation. Others walk away from their opportunity to make financial claims.[4]

This is an access to justice crisis that costs the economy an estimated £51 billion[5] as the financial burden spreads across various government departments, including the NHS, HMCTS and education.

There is an urgent need for more flexible, accessible support. The good news is that not only are technology-driven solutions starting to deliver just that but also the Ministry of Justice has embarked on the task of creating a framework for technological solutions to operate and thrive in this space, with the creation of the Online Procedure Rule Committee and its remit to support digital justice.

Our hope is that through the use of this technology, family lawyers will be able to support more people with their legal issues. There are thousands of people in our jurisdiction alone who are under-served by the way legal services are delivered at present. More of the mundane, routine tasks (like analysis of bank statements) can be done by technology, freeing up the time of the lawyers to take on more cases, focusing on more strategic activities like giving advice.

In the consumer-facing sphere, legal information websites and self-help tools are empowering individuals with knowledge and resources to better understand their rights and options: our own SeparateSpace being an example, alongside NeedsMet and Courtney Legal, which are other recent entrants to the market. Law firms have also created excellent free resources and tools: Family Law in Partnership's Maintenance Indexation Calculator[6] being an example. These digital tools are not a silver bullet; they cannot replace the expertise of a qualified human lawyer. However, they shouldn't be underestimated because they are already helping to bridge the information gap for those who might otherwise be completely unguided.

We see a legal landscape where those people who currently end up in court desperate for some legal input, or walk away altogether from their financial claims, are instead supported through a combination of self-serve tools, and one-to-one legal advice at key moments through the process. The early legal advice pilot, which was given funding of £12m in the Spring 2024 Budget, is an example of an important development in this area.

Another critical consideration is ensuring equal access to technology-based solutions. As the legal system becomes increasingly digitised, there's a risk of creating a 'digital divide' that could further disadvantage those without access to technology or the skills to use it effectively.

The upshot of technology in the practice of family law

Change in any context is challenging. For law firms, technology will impact the way we train junior lawyers and their role within the team. Indeed, we believe we are on the frontier of a shift in the way legal teams are structured. The junior roles will still be critical, but their nature will change.

Human oversight remains crucial in all technology-aided legal processes. While AI can provide valuable assistance, it is simply a tool and the nuanced judgment of experienced legal professionals is irreplaceable, especially in the emotionally-charged arena of family law. Careful implementation will be vital so juniors with access to AI research tools understand the nature of an LLM and why the results generated are what they are. We will be training people differently – juniors will need to master tasks manually so they have the skills and knowledge to effectively supervise the output from technology.

AI therefore presents a challenge for lawyers and raises thorny questions about how we evolve as a profession. However, it's worth remembering that family law is distinct from other legal sectors because emotional intelligence and connection is at the heart of the client relationship.

Ethical considerations and potential risks

As with any innovation, there are ethical considerations and potential risks for us all to consider.

We have already seen the potential pitfalls of a computerised process that doesn't allow for error where the mistaken selection of the wrong case name resulted in a final divorce order that could be not reversed.[7]

If lawyers can make mistakes then what about the risks for litigants in person, who are ignorant of the legal consequences of the final divorce order? The *Fair Shares Report*[8] highlighted the enormous gap in knowledge about the financial consequences of divorce and whilst litigants in person are empowered to obtain a divorce order fairly easily thanks to the court's online portal, the story is not the same for a financial remedy final order. Many litigants in person are not even aware of the need to obtain a final order in respect of finances.

Turning to technology designed for professionals to use, the ethics and risks have to be considered extremely carefully – and that in itself is a challenge because of the pace of innovation. Indeed, on 5 September 2024 the UK joined the EU and the US in signing the first international AI Treaty, drawn up by the Council of Europe to 'fill any legal gaps that may result from rapid technological advances'.

So what should family law firms, especially those firms that don't have multi-disciplinary teams around them, consider when presented with AI opportunities?

First, remember that AI is a tool to enhance your client service. When you are presented with any opportunity to consider new tech, you need to adopt the same risk approach as with any other opportunity and that will depend on a number of factors, crucially including the risk profile of your firm.

Secondly, think about training and the structure of the firm. We have already mentioned clients will be using AI products but juniors will also be using them, and it's unrealistic to expect that their reliance on them outside work won't transfer into the workplace. Think about adopting a culture of openness so that all juniors are encouraged to highlight where they have used AI to help with drafting a phrase or a term and to highlight that to their supervisor.

Thirdly, seek to get a good understanding of how the technology works and how to mitigate risk. Consider training in terms of understanding the opportunities and risks of the models that you are going to use. For example, with LLMs, output will be different each time. The prompt (meaning what the user puts into the LLM – the question they ask and the way they ask it) will impact the result. Providing context should improve the output but the same question posed 2 hours later will not produce the same answer. Training on prompt engineering is therefore critical. Just as important is understanding the content (referred to as the data set) on which the model has been trained. If you are thinking that you may like to explore the potential of having an LLM function across your internal resources, then you will need to think about the quality of your data set. This may also bring up GDPR issues relating for example to retention of client information.

Fourthly, take a multi-disciplinary approach to the extent you can – so use the interests and specialisms within a small team. Marketing, risk and compliance, knowledge and financial management are all relevant and it will be important to consider technological solutions from all these perspectives.

This is not an exhaustive list of issues to consider but perhaps gives an indication of the complexities involved in working with these new tools.

The future of family law practice

So far the groundbreaking potential of technological advances in the legal sphere has mainly sought to be

exploited by commercial practices, many of which have entire teams leading the way (Allen & Overy (now A&O Shearman), for example). Alongside this we have seen an increase in the profile of Knowledge and Innovation specialists with many commercial firms creating positions on the board for people with this expertise.

As for family law, such a focus on technology isn't a distant development that will affect only future generations of family lawyers. It is a transformation that has already begun.

That prospect shouldn't alarm lawyers. Looking ahead, the future of family law practice in England & Wales is likely to be characterised by hybrid models of legal service delivery. These models will combine the efficiency and accessibility of technology with the empathy and nuanced judgment of human lawyers.

Continuing legal education will need to evolve to include training in legal technology and AI, ensuring that lawyers are equipped to leverage these tools effectively. Indeed, we believe that those legal teams that adapt and leverage new tools will be better equipped to serve their clients effectively in an increasingly digital world. That will involve interdisciplinary teams that bring together legal expertise and technological innovation. However, it must not be forgotten that the ultimate goal of technological advancement in this field should be to enhance, not replace, the legal reasoning skills, human expertise and emotional intelligence that so many family lawyers have in spades.

Notes

1 www.judiciary.uk/speech-by-the-master-of-the-rolls-to-the-professional-negligence-bar-association/

2 https://financialremediesjournal.com/content/fabricated judicial-decisions-and-lsquo-hallucinations-rsquo-ndasha-salutary-tale-on-the-use-of-ai.1265d5deeb39450bbdc059ad5ae69818.htm – *Harber v HMRC* [2023] UKFTT 1007 (TC) and *Mata v Avianca* 22-cv-1461 (PKC).

3 J Symonds et al, *Separating families: Experiences of separation and support* (Nuffield Family Justice Observatory, 2022). E Hitchings, C Bryson, S Purdon and G Douglas, *Fair Shares Report* (University of Bristol Law School, 2023; funded by the Nuffield Foundation).

4 E Hitchings et al, *Fair Shares Report*.

5 Family Solutions Group, *What About Me? Reframing Support for Families following Parental Separation* (Family Solutions Group, 2020).

6 www.flip.co.uk/calculator-page/

7 *Williams v Williams* [2024] EWHC 733 (Fam); https://financialremediesjournal.com/content/williams-v-williams-2024-ewhc-733-fam.7764778e0e9a420f9f967ac1df1c8ba7.htm

8 E Hitchings et al, *Fair Shares Report*.

Money Corner: EBITDA – The Valuer's Measure of Profit

Jessie King

Director, Quantuma

It is often said that 'valuation is an art, not a science'. Whilst it is undoubtedly true that value is in the eye of the beholder the reference to art rather than science should not be taken as meaning there are not right and wrong ways to approach the valuation of a business. There should be consistency between the approaches adopted by different valuers.

There are many different 'right' ways of valuing a business. The extent to which a particular method is the 'right' right way will depend on factors specific to the business, its future prospects and the sector in which it operates. When looking at the value of most trading businesses (as with most things, there can be exceptions to the rule), the 'right' way will include a multiple of profit (being the net income of a business over, usually, a year).

A valuation using a multiple of profit (or earnings) is commonly referred to as a 'market approach'[1] or 'capitalised [insert profit measure here] approach'.

This article takes a look at the starting point in any valuation of a profitable trading business: profit/earnings.

The starting point

The starting point for understanding the profitability of any business is its 'Statement of Profit and Loss' (also referred to as the 'P&L', the 'Statement of Comprehensive Income', or the 'Income Statement').

COMPANY LIMITED
STATEMENT OF COMPREHENSIVE INCOME
FOR THE YEAR ENDED 31 DECEMBER 2023

	Notes	2023 £'000	2022 £'000
Revenue	X	2,500	2,200
Cost of sales		(1,000)	(880)
Gross profit/(loss)		**1,500**	**1,320**
Administrative expenses		(950)	(900)
Other operating income		-	10
Operating profit	X	**550**	**430**
Interest income	X	20	25
Finance costs	X	(30)	(50)
Profit before tax		**540**	**405**
Tax on profit	X	(135)	(101)
Profit for the financial year		**955**	**734**

The P&L is a high-level breakdown of the income generated and the costs incurred in the period. It is fairly standard in its structure and will usually set out the following measures of profit:

- Turnover (sales or revenue) – being the income generated directly from the business' trade (net of VAT)
- Gross profit – being the turnover less costs directly attributable to its generation
- Operating profit – being gross profit less administrative costs (the overheads of the business such as staff costs, rent and rates) plus other operating income (e.g. if the business also owned property which it was renting out and receiving rental income)
- Profit before tax (PBT) – being operating profit less financing costs plus interest receivable
- Profit after tax (PAT) – being PBT less tax

Each of the above measures of profit can, in theory, be used in valuing a business. However, there is a more common measure, particularly in real world transactions involving owner-managed businesses. This measure is EBITDA.

What is EBITDA?

EBITDA is another measure of (annual) profitability although it is not reported in the P&L. It stands for:

- Earnings = profits (income less costs) before …
- Interest = costs of financing the company (through bank lending, hire purchase, invoice discounting, etc) and interest receivable (e.g. on cash deposits)
- Tax = corporation tax
- Amortisation = the cost of intangible assets such as software, spread over the period over which they will be used by the business. When fixed assets (either intangible or tangible) are acquired, their cost is initially recognised on the balance sheet of a company and the cost is spread through the profit and loss

account as either an amortisation or depreciation charge over the useful life of the asset
- Depreciation = the cost of tangible assets, spread over the period of their life/expected use by the business as with intangible assets (above)

EBITDA ignores the impact of the financing structure and financing decisions of the directors to give an understanding of the underlying profitability of a trade on a basis which can be compared between entities. Two entities may have equal EBITDA but very different net profits because one may be financed by debt (thus incurring interest costs) whereas the other is financed by equity (with no interest costs). A valuation using EBITDA means the trade of these businesses will have the same value (the value of the shares will not be the same, however – more on that later).

It is important to understand that EBITDA reflects the profitability of the trade as it is currently being managed and does not seek to determine the optimum level of profitability.

How is EBITDA determined?

While not stated in the P&L, EBITDA can be fairly easily calculated from one of the profit measures of the P&L. Depreciation and amortisation are usually included within administrative expenses. EBITDA therefore most closely resembles operating profit and can, on a rudimentary basis, be calculated by adding back depreciation and amortisation to operating profit (the amount of depreciation and amortisation can usually be found in either the operating profit note or fixed asset note to the financial statements).

But it isn't really that simple.

For the purpose of valuation, a valuer needs to determine a 'maintainable' EBITDA, namely that level of EBITDA that the business might reasonably be expected to generate in the immediately foreseeable future and from which a hypothetical purchaser would expect to benefit.

This is achieved through a review of recent historical (and sometimes forecast) EBITDA, which is adjusted for income and costs which are not expected to be received or incurred in future years (i.e. exceptional or one-off costs) and non-market rate costs.

Exceptional costs may relate to, for example, bad debts, profits or losses on the disposal of fixed asset, or litigation surrounding an employment dispute.

The most common adjustments for market rate costs are:

- Directors' costs – directors (or other staff) who also own shares are often not remunerated at a market rate. They commonly either receive: a nominal salary, with the scope for a top-up via dividends or an increase in the value of their shares through reinvestment of income; or a higher than market rate salary at their own discretion. For valuation purposes, EBITDA needs to be adjusted to reflect a market cost, being the cost that a purchaser of the company would have to incur if they employed a suitably qualified third party (or parties) to manage it.
- Rent – where a company operates from property that it owns, or that is owned by its shareholders, it may be paying no or discounted rent. While there are certain exceptions, companies rarely need to own the property from which they operate. Consistent with the reasoning for directors' costs, adjustment for a market rate of rent is therefore necessary.

In assessing the level of EBITDA that is 'maintainable', consideration of historical trends and future expectations is required.

There is no 'common' approach to the calculation of maintainable EBITDA – such as an average of the previous 3 years, or a 3:2:1 weighting of such. The approach should be specific to facts at hand, i.e. if the company has consistently grown year on year (with no expectation of a change in this trend) it is reasonable to assume that EBITDA will be at least that of the most recent year. If EBITDA has been stable year on year, it may be reasonable to assume that it will continue to be so.

Alternative measures of profit

A valuation does not exclusively require EBITDA as its measure of profit. Other profit measures may be equally (or more) appropriate (and a valuer may consider several approaches using different types of profits).

With each approach, an assessment is still required as to the level which is 'maintainable'.

Turnover

As already mentioned, turnover (revenues or sales) represents the income (net of VAT) generated by a business from its trade (e.g. for a retailer, the income from the sale of goods; or for a law firm, the income from providing legal services).

A multiple of turnover is commonly used where the 'selling point' of a business is its revenue stream/customer base which can be serviced with minimal additional cost to the buyer (such as software as a service companies, where its income is derived from the leasing of software).

Common adjustments to ascertain a maintainable level include adjustments for one off or new contracts or recent changes to contracts which are not reflected in historical revenues.

EBIT

EBIT stands for Earnings Before Interest and Tax and is usually equal to operating profit.

A multiple of EBIT may be appropriate where the business being valued is required to incur significant capital expenditure on a regular basis (such as a freight or haulage business owning a fleet of vehicles).

An EBIT approach recognises the regular cost associated with the acquisition and maintenance of the equipment required for the generation of its income, through the depreciation charge put through the P&L, assuming this is a suitable proxy for the ongoing amount of capital expenditure required by the business.

Similar normalising adjustments as are required for an approach using EBITDA would also, likely, be required.

Valuations using a capitalised EBIT approach are not common due to the fact that they are only suitable for relatively few companies and information on EBIT deal multiples is limited (valuers may have to calculate implied multiples themselves).

Profit before tax (PBT)

A review of PBT year on year can enable the valuer to assess

the profitability of a business without the impact of changes in tax policy or reliefs available. It is seldom used as a profit measure for valuation purposes.

Profit after tax (PAT)

PAT represents the ultimate profit of a business after taking into account all income and all costs (including tax). It is the PAT that is the profit available for distribution to shareholders, assuming that there are no accumulated losses from previous years.

A multiple of PAT is more commonly referred to as a Price/Earnings (P/E) approach.

A P/E approach does not seek to neutralise the financing decisions of the directors (reflected through depreciation, amortisation and interest charges, which are included within PAT) and therefore inherently assumes that the company is financed in the same way as comparable businesses. For this reason, and due to the fact that deals are no longer transacted based on P/E multiples, valuations using a P/E approach are less common.

Free cash flows

Free cash flows (FCFs) are the measure of profitability in a valuation using a discounted cash flow (DCF) approach (referred to by the IVS[2] as an 'income approach'), a valuation method whereby the valuation is determined as the current value of future cash flows.

Profit ≠ cash

Future FCFs are the inflows (and outflows) of cash to/from a business. As a starting point, a valuer will consider forecast EBIT and will adjust for expected net cash inflows (such as the recovery of debtors) and cash outflows (such as the payment of creditors, capital expenditure and tax) to determine the net cash movements of the business.

Future cash flows are discounted to reflect the risks and uncertainties associated with them on the basis that £1 in the hand now is worth more than £1 to be received (maybe) in one (or more) years. This is achieved through the application of a discount rate.

A DCF is most appropriate when a business is not in a steady state, often because it is young and/or growing or has a finite lifespan. However, a DCF approach requires robust, reliable forecasts (for a period of say 3–5 years). Many businesses (even of a 'decent' size) do not prepare detailed forecasts beyond the current or next financial year (if they prepare forecasts at all), making a DCF approach unviable in many valuations. Even where forecasts are prepared, they may be incidentally or deliberately under or overstated depending on the intended use of the forecast. Forecasts should therefore always be approached with caution.

There is a theoretical relationship between the discount rate and an EBITDA multiple (discussed below), so inability to adopt an income approach is rarely catastrophic.

The others

The above is not an exclusive list of the profit measures which may be considered in a business valuation. For example, hotels and care homes can be valued based on a rate per room.

The next steps

Whilst not the focus of this article, greater understanding of the differences between the different profit measures may be obtained from a basic understanding of their ultimate use in a valuation.

Once a reliable measure of maintainable profit has been concluded upon, a suitable multiple should be applied and adjustment made for assets and liabilities not associated with the direct operation of the trade to determine the overall value of the business:

- Maintainable EBITDA x multiple = Enterprise value (the value of the trade)
- Enterprise value + (cash + surplus assets – debt) = Equity value

Where:

- Enterprise value equals the value of the trade; and
- Equity value equals the value that is available to the shareholders of the company

The multiple, in brief

In calculating the value of the trade (the equity value) a multiple is applied to the concluded maintainable profits (being that EBITDA, revenues, etc).

The process of concluding on a suitable multiple is, arguably, the most subjective element of the valuation, and influencing factors will include the industry in which the company operates, its size, geography, trading performance, and factors specific to the company (such as a reliance on key individuals, a concentrated customer base or the development of a new product). Conclusions are therefore usually based on a combination of partially relevant data, namely: deal multiples for recent M&A transactions; trading multiples of public companies; and published non-industry-specific indices.

As already alluded to, multiple information is more readily available for some measures of profit, being EBITDA and turnover than for others such an EBIT or a PBT.

Generally speaking, the smaller the metric of profits, the higher the multiple. Thus, revenue multiples (applied to the highest profit figure of a company) will be comparatively small, while P/E multiples (applied to PAT, the smallest profit figure of a company) will be comparatively high.

Enterprise to equity adjustments

In corporate transactions, companies are commonly valued on a cash-free debt-free basis, assuming a normal level of working capital and adjusting for surplus assets (if any). This approach is based on the assumption that, immediately prior to a sale of the company, any surplus cash would be available to shareholders by way of a dividend and any long-term structural debt would be repaid.

For most valuation approaches (including capitalised revenues, EBITDA, EBIT and DCF approaches) adjustment is made for any assets and liabilities not directly associated with the trade, such as property and debt, based on the latest balance sheet position of the company.

A valuation using a P/E approach does not require this adjustment. As PAT is calculated after charges for interest, tax, amortisation and depreciation (the cost of financing the business and costs relating to the directors' decisions to purchase rather than hire assets), no adjustments for net

debt are required. However, surplus assets should still be addressed, for example if the company owns assets that are wholly unconnected with its trade. Examples include investment properties or the indulgences of the directors such as luxury yachts, collectable artwork and private jets.

Summary and conclusion

There are many different measures of profit that may be considered when valuing a business, with some more suitable than others (depending on the activity of the business and the availability of robust information). This article has run through the most commonly considered profit measure (EBITDA) and the usual alternatives (revenues, EBIT, PAT and FCFs). This should assist the reader to understand how the different profit measures compare and the rationale behind the adoption of different profit measures in a valuation.

Notes

1 Being the terminology referenced by the International Valuation Standards Council (IVSC) within its International Valuation Standards (IVS). Note that in the UK, accountants are not required to follow the IVS but they do form a useful reference point for valuation approaches. Deviating from the IVS could be seen as adopting the wrong approach to valuation.

2 See previous note.

Book Review: *Research Handbook on Family Property and the Law*

Professor Margaret Briggs and Dr Andy Hayward (Edward Elgar, 2024)

Dr Charlotte L Bendall

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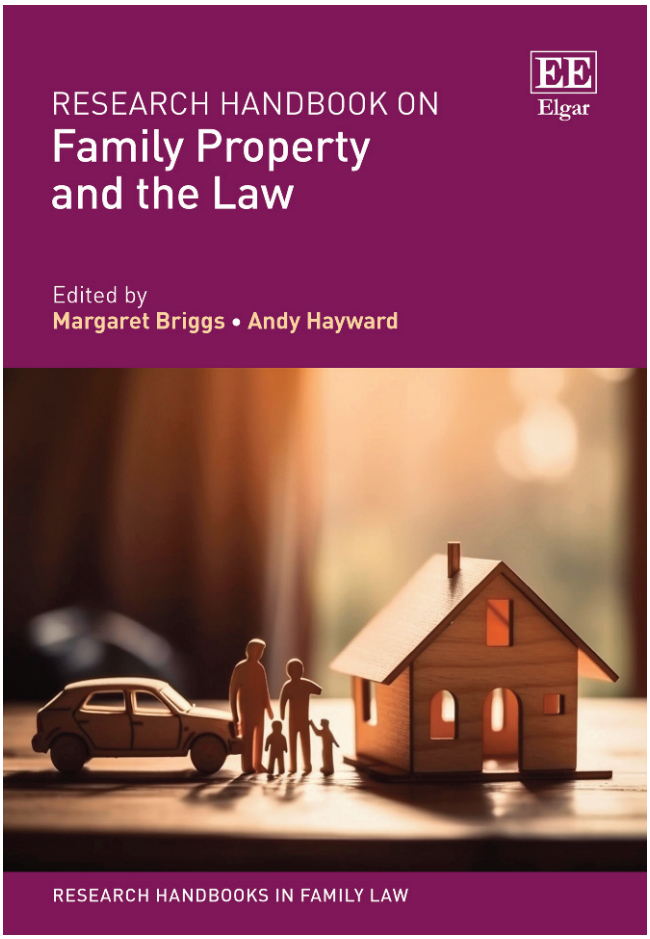
Property plays a key role within our family lives. Moreover, we may tend to perceive that there is something inherently 'special' about the family, which means that it – and the property associated with it – should be set apart, and treated differently, to the various forms of partnership located within other areas of the law. Yet, significant questions remain around the concept of 'family property', with understandings and perspectives varying across both jurisdictions and time. For instance, what does this term mean and encompass? Who does/should benefit from 'family property'? How is it/should it be distributed? To what extent should the state even be regulating family property affairs? Briggs and Hayward's new edited collection aims to speak to such questions, drawing on expert legal insights from 33 contributors around the world.



The book is separated into six parts, with the first considering 'the origins of family property'. The authors, within Part I, conduct historical analyses as part of which they commonly identify the ways in which notions of property have helped to maintain patriarchal structures of power. Du Plessis, for instance, addresses Roman law and particularly the authority of the pater familias, whilst Ireland concentrates on coverture within England and Wales, under which, upon marriage, the wife's property would pass over to her husband. Other chapters within this part – consistently with the book's wider aim of including a range of 'voices' – think about how 'family property' systems are able to accommodate religious concerns (and, indeed, how they can struggle to do so). Ruru, for example, identifies difficulties experienced in New Zealand in its attempt, via national law, to make provision for Indigenous laws and customs, specifically in relation to the family home. Akhtar and Manjoo further consider the modernisation of family laws across Muslim states in recent decades, and how that sits against more 'classical' Islamic jurisprudence.

Part II proceeds to think about who is impacted by 'family property', which relationships are included within the relevant legal frameworks, and what the implications of that might be. Chapters within this part focus on the issues raised by an assortment of relationship types – including those that are non-conjugal and queer – in addition to entitlements upon death and succession. Aloni's chapter, for instance, acknowledges that same-sex relationship recognition has offered gay and lesbian couples property rights

which they previously were unable to access, but highlights that the property rules that accompany such recognition are rooted in traditional, heteronormative models. He emphasises how the assumptions associated with these models may not be a good 'fit' for same-sex partners, who will commonly adopt more 'diverse, equal and flexible approaches to household finances' than their different-sex counterparts.[1] Briggs, in her chapter, sets out the position in New Zealand in terms of recognising cohabiting relationships, who have been treated in much the same way as married couples there since 2001. Adopting a 'functionalist' (rather than 'formalistic') approach, the rationale is applied that the issues faced by couples are much the same regardless of relationship form, and that failure to formalise a relationship is often not simply a matter of active choice. The view is taken, Briggs explains, that it is crucial, in any event, to ensure that those who are financially vulnerable are protected when their relationships end. Briggs's chapter offers insight and inspiration at a point where, in England and Wales, we eagerly anticipate law reform within this area as a result of the Labour Government's manifesto commitment to 'strengthen the rights and protections available to women in co-habiting couples'.[2]

Part III moves on to look at how 'family property' is conceptualised, and what kind of property is covered by 'family property' rules. Contributions within this part reflect on the positions adopted within the United States, Germany and Australia. Both of the latter two chapters particularly engage with the highly topical debate as to whether to favour a rule- or discretion-based approach to the distribution of property; notably, this is again of interest to an English and Welsh audience, as we await the Law Commission's scoping paper on financial remedies (which, at the time of writing, is due for completion in November 2024).[3] Kha, for example, whilst being mindful of the challenges surrounding judicial discretion, argues that the adoption of a wide definition of 'family property' in Australia has helped to generate 'fairer' outcomes by enabling 'a comprehensive assessment of financial assets that is based on substance rather than form'.[4] Part IV proceeds to revisit the 'rules versus discretion' debate in addressing in detail how 'family property' is distributed in the event of relationship breakdown or death. Scherpe initially offers comparative observations relating to various approaches towards 'marital'/'matrimonial' property, before other chapters place the spotlight on the approaches adopted in Belgium, Chile, Switzerland and Ireland.

Part V raises some of the central difficulties faced when attempting to form policy within this area. It considers factors such as class, wealth and gender, which can impact how property is allocated. Thompson's chapter, for example, flags up the 'gold digger' as a cross-cultural, international phenomenon, and points out how it can inflict a 'triple blow of discrimination' (with the stereotype generally being applied to women seeking relationships with wealthier men, who may be in a different social class to them).[5] She draws on a fascinating story from China to demonstrate how this stereotype has influenced 'family property' law and policy in a way that extends significantly beyond the West. Women, Thompson argues, can be labelled as 'gold diggers' irrespective of their own intentions. However, this stereotype is laden with gendered power; as Thompson explains:

> 'If a man has property to protect, then claiming his female partner might be more interested in his money than his love […] gives him leverage in divorce settlements. It gives him the upper hand in prenuptial agreements. And, in some cases, it can excuse him from financial liabilities he would otherwise incur.'[6]

It is important to be cognisant of this power when assessing whether, and how, the law should be reformed, and indeed when exploring constructions of entitlement that may feed into any such reform decisions. Hitchings subsequently highlights the underexamined experiences of those divorcing couples who settle their financial matters outside the formal legal system, without obtaining a financial order. She emphasises that there is still not enough known about what this 'outsider' population are doing, and how they are reaching decisions in terms of their finances and property. It is essential, she argues, that the law develops in more of a data-led, 'bottom-up' way, reflecting the 'lived reality' of 'everyday' couples.[7]

Lastly, the authors in Part VI are thinking about 'family property's' outer boundaries, or 'frontiers'. Whilst Robinson analyses how Anglo Caribbean states remade their law of 'family property' following their independence, Yip draws attention to how judges in Singapore have questioned the suitability of applying English trust principles within their jurisdiction (especially given the significance attributed there to intergenerational connection). Hayward's chapter additionally focuses on the widely known case of *Burns v Burns* [1984] Ch 317, under which Valerie Burns was unable to establish a proprietary interest in the family home after a 19-year cohabiting relationship with Patrick Burns, and having cared for their two children. The chapter addresses important questions around the ways in which *Burns* is being utilised today, contemplating the extent to which 'strategic litigation' can prove helpful. Hayward himself identifies the 'timeliness' of such an investigation, given that practitioners have sought a more recent 'test case' on cohabitation to create pressure to change the law (in much the same way as occurred with *Owens v Owens* [2018] UKSC 41 in relation to the laws of divorce).[8] On the one hand, he suggests that *Burns* has been perceived to exemplify 'all that is wrong with the law', demonstrating how 'unsympathetic' it is to the 'messiness of home sharing'; in that sense, the case has amounted to a 'focal point for activism'.[9] On the other hand, some have viewed the case as an 'atrocity tale', warning women of the risks of cohabiting without getting married. Interestingly, Hayward explains how Mrs Burns was unable to see herself in the ways in which her matter has been academically 'retold'. Consequently, whilst he stresses that it may well be the case that *Burns* would be decided in much the same way were it to reach the courts today (given that 'non-financial contributions remain undervalued and ignored by the law'), Hayward also calls for greater 'caution' and 'precision' in how we deploy this landmark case.[10]

Overall, this book is a must-read for those with interests ranging from human rights law to property, the family and social policy, and for practitioners, academics and policy-makers alike. Pushing to ensure the best outcomes for individuals is a duty that is incumbent on practitioners, and the

book encourages reflection not only on how we have reached our current legal position, but also on how the law might go about keeping pace with the ways in which people live their family lives. Particularly, as we come to think about how we might wish this area of the law to develop in the future, it reminds us of the value of shifting away from an exclusive focus on the property law of the Western world. If we are receptive towards listening to a wider range of viewpoints – not simply geographical, but also cultural and religious – we will have much to learn.

Notes

1 At p 135.
2 'Change: Labour Party manifesto 2024', available at https://labour.org.uk/wp-content/uploads/2024/06/Labour-Party-manifesto-2024.pdf, p 68.
3 'Financial remedies on divorce', available at https://lawcom.gov.uk/project/financial-remedies-on-divorce
4 At p 277.
5 At p 374.
6 At p 387.
7 At p 405.
8 At p 443.
9 At p 441.
10 At p 460.

Financial Remedies Case Round-Up

End April 2024 to start October 2024

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 April 2024.

Importance of the FDR

In the last issue, we discussed the new FPR 3.4(1A) and FPR PD 3A, which contains powers to encourage parties to pursue non-court dispute resolution (NCDR) and adjourn for that purpose. An example of this came only a couple of weeks later, in *NA v LA* [2024] EWFC 113, when Nicholas Allen KC (sitting as a Deputy High Court Judge) stayed the proceedings to allow for NCDR and directed the parties to advise the court of their progress.

In a similar vein, in a very short judgment in *GH v GH* [2024] EWHC 2547 (Fam), Peel J overturned a decision by the first instance judge that an FDR would not be effective in circumstances in which the wife's position had not crystallised, and there was an issue over her earning capacity.

FPR 9.15(4)(b) allows a judge to dispense with an FDR in exceptional circumstances, but said Peel, 'It is very hard to envisage a situation where the FDR should be dispensed with. Perhaps if one party has not engaged at all, including not attending court hearings, and has stated that they will not attend the FDR.' Here, the court had the facts and resources, the parties were able to make offers but had not done so, and no NCDR had been attempted, and it was thus 'all the more pressing' that an FDR should proceed. 'The FDR (which for these purposes includes the increasingly popular Private FDR) is an integral part of the court process. Its value has been proved time and again', said Peel J.

Constructive trusts and changed intention

Nilsson & Anor v Cynberg [2024] EWHC 2164 (Ch) concerned a couple whose TR1 expressly declared that they held the property as joint tenants. When they separated, the husband said he did not wish to retain his interest in the property, and thereafter the wife paid all the expenses and the mortgage that had previously been paid equally between them. Unfortunately, some years later, the husband became bankrupt. The wife claimed that she was the sole beneficial owner of the property. James Pickering KC (sitting as a Deputy High Court Judge) agreed.

An express declaration is conclusive of the parties' intentions as at the time that they enter into the declaration. It cannot be overridden by any constructive trust arising prior to or at the same time as the express declaration. However, in *Stack v Dowden* [2007] UKHL 17, Baroness Hale had said, at [49], that an express declaration of trust is conclusive unless varied by subsequent agreement or affected by proprietary estoppel. The issue in *Nilsson & Anor v Cynberg* was whether the parties' verbal agreement was sufficient to displace their express written declaration with a constructive trust on different terms, or whether they had to have complied with the requirements of the Law of Property (Miscellaneous Provisions) Act 1989 that disposition of an interest in land be in writing and signed. Baroness Hale had not addressed this, and there was a conflict between *Clarke v Meadus* [2010] EWHC 3117 (Ch) and *Bahia v Sidhu* [2022] EWHC 875 (Ch) on the one hand, and *Re Iqbal* [2024] EWHC 49 (Ch) on the other.

Nilsson comes down on the side of *Clarke* and *Bahai*: no formalities were required, and if they had been it would draw an artificial distinction between constructive trusts and the requirements of estoppel.

This is our Mostyn Award winner for this issue, being the judgment that we recommend as a 'must read'.

Matrimonialisation

The issue of when assets become matrimonialised and whether 'un-matrimonialisation' exists as a concept occupied the Court of Appeal and HHJ Hess respectively.

In *Standish v Standish* [2024] EWCA Civ 567, the appeal from Moor J's decision in *ARQ v YAQ* [2022] EWFC 128, the Court of Appeal thought that the concept of matrimonialisation should be applied narrowly with a focus on the source of the asset and not title to it. Moreover, any suggestion that 'once an asset is matrimonialised and treated as matrimonial property, it *must* be shared equally is unsupported by any authority and would be contrary to the objective of a fair outcome' (original emphasis).

It suggested the following approach, which modifies that set out in *K v L* [2010] EWCA Civ 125:

Situation	Sharing?
Where the percentage of the parties' assets (or of an asset), which were or which might be said to comprise or reflect the product of non-marital endeavour, is not sufficiently significant to justify an evidential investigation and/or an other than equal division of the wealth	The sharing principle would apply 'in the conventional way'
The extent to which and the manner in which non-matrimonial property has been mixed with matrimonial property mean that, in fairness, it should be included within the sharing principle	The court would ask itself whether fairness requires 'the asset being included within the sharing principle?' but this would not automatically lead to that asset being shared equally ([165]–[166])
Non-marital property has been used in the purchase of the former matrimonial home, an asset which typically stands in a category of its own	The court will typically, though not always, conclude the former matrimonial home should be shared

HHJ Hess's decision in *RM v WP* [2024] EWFC 191 (B), which we discuss below in relation to pensions, also addressed the issue of when a property becomes the family home and therefore matrimonialised, and whether, once matrimonialised, it can become un-matrimonialised. The family concerned had moved repeatedly among properties owned by the husband prior to the marriage. Courts should steer away from developing a concept of 'un-matrimonialisation', thought HHJ Hess. In assessing whether a property used as a matrimonial home is matrimonialised, the court should seek fairness by reference to all the s 25 factors. In any event, a court could depart from an equal division of matrimonial property, even a family home, where fairness required it.

The *Thwaite* jurisdiction

For those of you on the thornier end of financial remedies practice comes a case on the *Thwaite* jurisdiction. In *Rotenberg v Rotenberg & Ors* [2024] EWFC 185 Peel J summarised the jurisdiction as the court's power to 'adjust an executory order (i.e. before it has been complied with) if it would be inequitable not to do so, most commonly where there has been a significant and necessarily relevant change of circumstances since the order was made' (at [55]) – where the 'landscape on the ground was very different from that which was envisaged at the time' the original order was made.

This is notable because Mostyn J had expressed doubts about the jurisdiction in *SR v HR* [2018] EWHC 606 (Fam). Beware, however, the caveats to Peel J's decision: he had not heard arguments about whether the jurisdiction did in fact exist, but accepted for the purposes of the case that it did; and that any jurisdiction should be used sparingly. The facts of this particular case were exceptional.

Interpreting orders

Sir Jonathan Cohen's decision in *A v M (No 2)* [2024] EWFC 214 is a reminder that the correct approach to interpretation of orders is that set out by Richards J in *Barnard v Brandon & Ors* [2023] EWHC 3043 (Ch), namely that the issue is the natural and ordinary meaning of the words in their context. The reasons the trial judge gave in the judgment are 'an overt and authoritative statement' of the relevant circumstances and admissible as an aid to interpretation.

Domestic abuse as conduct

The extent to which courts should take domestic abuse into account as a s 25(2)(g) factor continues to be a matter of some discussion and differing viewpoints. The classic cases on 'gross and obvious' (*Wachtel v Wachtel* [1973] Fam 72) personal misconduct have tended to involve very serious physical attacks, resulting in life-changing physical or psychological injury, as in *Jones v Jones* [1976] Fam 8; *H v H (Financial Relief: Attempted Murder as Conduct)* [2005] EWHC 2911 (Fam); active encouragement of suicide, as in *Re K (Financial Provision: Conduct)* [1988] 1 FLR 469; financially predatory marriages (*Clarke v Clarke* [1999] 2 FLR 498); international child abduction (*Al-Khatib v Masry* [2002] EWHC 108 (Fam)); and, we suggest, holding one's spouse in modern slavery while misusing their assets, as in a case reported in the papers last year ('Wife and care worker found guilty of enslaving disabled husband in Chichester', *The Guardian*, 12 May 2023). The key issue has always been the financial consequences of the conduct: an inability to work as a result of injury, provision of a war chest to recover an abducted child, or forfeiture of a police pension, for example, and the court's approach is to treat the needs of the 'innocent' party as a magnifying factor.

As I have previously written (October [2023] *Family Law* 1228 at 1235), 'Most domestic abuse is, regrettably, within the norm and will not reach the level required to be "conduct"'. *A v R* [2024] EWFC 218 (B) is a recent example. The wife claimed that the husband's coercive and controlling behaviour worsened a chronic medical condition, forcing her early retirement. But, said DJ Dodsworth, the allegations taken at their highest were not sufficient to reach the necessary threshold; the conduct alleged was only a contributory factor; and the wife's needs included those relating to her health and would be satisfied without determining the cause of them. Conduct arguments were unnecessary and disproportionate.

In reaching this decision, the district judge had the benefit of Peel J's July decision in *N v J* [2024] EWFC 184, which in turn draws on the same judge's decision in *Tsvetkov v Khayrova* [2023] EWFC 130. In *N v J* Peel J concludes that 'It would be highly unusual to include a factor which has no financial consequence under the terms of an Act which is directed to reordering the finances of the parties' (at [38]) – such cases will be 'vanishingly rare' (at [39]); 'it is hard to see how a court will be assisted by detailed inquiry into the *cause* of the need' as opposed to what the need is (at [38]); and 'It is not for the financial remedies court to impose a fine, a penalty, or damages upon a party for conduct' (at [38]).

None of this is revolutionary: *N v J* is a summary of the preceding case-law, and the decision of DJ Dodsworth in *A v R* is a straightforward application of *N v J*. While the approach to conduct has been settled for now, the issue of

whether it has been settled correctly or conclusively remains. As Samantha Hillas KC, Olivia Piercy and Anita Mehta point out in their FRJ blog post on the subject ('*N v J*: the Last Word on Domestic Abuse as Conduct?', 24 July 2024), the current approach is at odds with the overwhelming majority of respondents to a Resolution survey, who consider that domestic abuse is not sufficiently taken into account by courts in financial remedies cases.

Pensions apportionment

Lastly, pensions, and specifically the problems associated with deciding a case without a PODE report and the failure of some schemes to produce timely cash equivalent transfer values. To this end, we have a number of judgments from HHJ Hess.

In *RM v WP* [2024] EWFC 191 (B) at [21] HHJ Hess used the Galbraith Tables in *At A Glance* to estimate the cash equivalent value of one of the husband's pensions, where the annual income was known, albeit that this was not for the purposes of pension sharing.

In *RN v TT* [2024] EWFC 264 (B) there was similarly no PODE report, apparently because of difficulties extracting information from the NHS, and further adjournments of what was already a much-adjourned final hearing were not proportionate. The court took old figures, and assumed some increase. There was no need for precision as the court was engaged in a rough apportionment of what had accrued during the marriage in circumstances in which there had been a 9-year delay in making the application in the first place. 'This should not be taken as any kind of general endorsement of the proposition that PODE reports are unnecessary', cautioned Hess.

The approach in this case, of apportioning pensions over the duration of the marriage, marks a departure from HHJ Hess's approach in the earlier case of *W v H* [2010] EWFC B10, a point made by Hess himself. In *W v H*, a long marriage case involving needs, he had noted that whether the pensions were accrued during the marriage or not would make little difference to their treatment. The present case, said Hess, was 'very different from the sort of facts I was envisaging in *W v H*. Here we have a marriage in the short to medium category with the vast majority of the pensions being accrued in the post-separation period.'

The extent to which the court should exclude a portion of a party's pension as outside the duration of the marriage will depend on whether it is a 'needs' case or a 'sharing' case: *SP v AL* [2024] EWFC 72 (B). But PAG 2 recognises that the other s 25 factors are relevant to this, most significantly the duration of the marriage and any seamless prior cohabitation.

A useful post on this case by George Mathieson is on the FRJ blog – 'A Brilliantly Logical Approach to Dealing with Pensions', 13 June 2024.

This article draws on the case summaries prepared by the FRJ summariser team.

The Summary of the Summaries

Liam Kelly

Deans Court Chambers

TY v XA [2024] EWFC 96 (Moor J)

Ripples from the decision in *Potanin v Potanina* [2024] UKSC 3. Moor J reiterated that *Potanin* had not changed the basic test for the grant of leave to apply for financial relief under Part III MFPA 1984, which should from now on be on notice. The test is as set out at the 1984 Act, s 13. *Potanin* had stated that applying a test based on 'compelling reasons' or 'knock-out blow' was wrong. *Keywords: overseas divorce and the 1984 Act; appeals*

TW v GC [2024] EWHC 949 (Fam) (Cusworth J)

This was an appeal of a final order in financial remedy proceedings. The appeal argued that HHJ Furness KC at first instance had pitched W's needs at too high a level, applied needs to capital but sharing to pensions, and included interest on a lump sum while H was also paying maintenance. Appeal allowed on issue of pensions and interest only. *Keywords: sharing principle; pensions on divorce; interest; Duxbury capitalisation; needs*

Re RA (Appeal: Validity of a Marriage: Finding of Fact) [2024] EWHC 1144 (Fam) (Henke J)

Successful appeal of a fact-finding, despite such an appeal being 'notoriously difficult'. Helpful summary of the law as to appeals. *Keywords: validity of marriage; appeals; setting aside orders (including Barder applications)*

BC v SC [2023] EWFC 307 (B) (DDJ Holmes-Milner)

FR decision at DDJ level. Consideration of treatment of critical illness payout for H's cancer. *Keywords: housing need; pensions on divorce; impaired life expectancy; costs*

V v W (Jurisdiction: Dissolution of Pacte Civil de Solidarité) [2024] EWFC 111 (Poole J)

The applicant applied for dissolution of a PACS in England & Wales claiming jurisdiction as he was domiciled in England & Wales. The respondent contended that the applicant was domiciled by choice in France, and therefore, the there was no Family Court jurisdiction or the court should decline to exercise that jurisdiction on grounds that the courts in France provide the most appropriate forum. Held that by the end of 2016, applicant had formed intention indefinitely and permanently to reside in France. Application dismissed. *Keywords: jurisdiction*

NA v LA [2024] EWFC 113 (Nicholas Allen KC sitting as a Deputy High Court Judge)

A 'paradigm' case for the court to exercise its new powers under FPR 3.4 to stay proceedings for the parties to engage in NCDR. *Keywords: stay of proceedings; NCDR*

C v S [2024] EWFC 109 (Peel J)

H's D11 application in relation to the implementation of a final order in matrimonial finance proceedings. H awarded costs on a 'clean sheet' basis owing to W's litigation conduct. *Keywords: personal injury awards; mortgages; Financial Remedies Court (FRC); costs*

WJB v HJM [2024] EWFC 116 (B) (DJ Ashworth)

This was an application by W for a *Hadkinson* order preventing H from pursuing his application to vary an order for periodical payments made in 2017 ('the order'). *Hadkinson* order made. *Keywords: Hadkinson orders; contempt of court; periodical payments; costs; legal services payment orders; enforcement*

AT v BT [2023] EWHC 3531 (Fam) (Francis J)

Final hearing in a financial remedy application in which issues included undue pressure reducing weight of PNA, compensation, and non-matrimonial assets. *Keywords: compensation; assets; needs*

UD v TQ [2024] EWFC 119 (B) (HHJ Hess)

Final hearing in case involving footballer. Application of

Moher in light of H's misconduct and attachment of earnings order made to secure maintenance. *Keywords: child maintenance; conduct; costs; disclosure from third parties; enforcement*

AH v BH [2024] EWFC 125 (Peel J)

Final hearing judgment in high-net-worth FR case in which the parties had entered into a pre-nuptial agreement which purported to 'severely limit W's financial remedy claims in her own right and the financial needs of W and the children'. *Keywords: spousal maintenance (quantum); agreements; needs*

SK v RR [2024] EWHC 1418 (Fam) (HHJ Moradifar)

The primary issue in this case was forum and convenience, which arose from two sets of divorce proceedings. *Keywords: forum conveniens; divorce; jurisdiction*

JK v LM [2024] EWHC 1442 (Fam) (Cobb J)

The case concerned four applications by the mother for an LSPO to cover the costs of her legal representation in ongoing proceedings under Sch 1 (where she sought financial provision for the 6-year old child) and s 8 CA 1989. *Keywords: freezing injunctions; Land Registration Act 2002; Children Act 1989 Schedule 1 applications; legal services payment orders*

WXT v HMT (leave to claim financial relief following overseas divorce) [2024] EWFC 136 (B) (HHJ Vincent)

The case concerned an application by W for leave to make a claim for financial relief following an overseas divorce under Part III MFPA 1984. Permission granted. *Keywords: Part III; overseas divorce and the 1984 Act; leave application*

TI v LI [2024] EWFC 163 (B) (Recorder Allen KC)

Recognition of Pakistani divorce. *Keywords: jurisdiction; overseas divorce and the 1984 Act*

AB v BA [2024] EWHC 1179 (Fam) (Cusworth J)

Appeals allowed against instalment quantum for payment of costs and the requirement for permission to enforce further costs orders. *Keywords: costs; enforcement*

Simon v (1) Simon (2) Integro Funding Limited ('Level') [2024] EWFC 160 (Peel J)

The last instalment in the *Simon v Simon & Level* Family Court litigation. Level's civil claim is yet to be determined. Peel J found that the Family Court cannot make a distributive order upon application of an intervenor to require one party to pay the other party such sum as the third-party intervenor says it is entitled to. *Keywords: litigation funding; joinder of third parties; setting aside orders (including Barder applications)*

Gudmundsson v Lin [2024] EWHC 1576 (Fam) (Peel J)

Peel J does his best to put into practice the intention of the original financial remedies order, despite H depriving W of 50% of the FMH by not informing the court that there was a bankruptcy order. *Keywords: bankruptcy*

Brown v Brown [2024] EWFC 181 (B) (DJ Dodsworth)

A useful insight to a district judge level approach to contempt proceedings in financial remedies. H's failure to file a Form E and CETV for pension. *Keywords: committal applications and judgment summonses*

Rotenberg v Rotenberg & Ors [2024] EWFC 185 (Peel J)

Peel J accepts the existence of the *Thwaite* jurisdiction. Where the landscape on the ground was very different from that which was envisaged at the time of the order an executory order could be reframed under the *Thwaite* jurisdiction. The jurisdiction should be used sparingly. *Keywords: Thwaite jurisdiction*

NM v PM [2024] EWFC 199 (B) (DDJ Nahal-Macdonald)

Preliminary issues hearing in relation to interpretation of a clause in a prenuptial agreement. *Keywords: matrimonial and non-matrimonial property; agreements*

VS v OP (Litigation Misconduct, Quasi-Inquisitorial Approach and Inferences) [2024] EWFC 190 (B) (Recorder Chandler KC)

Recorder Chandler KC's final order was 67% to H and 33% to W, the non-compliant party, and an SPP order in W's favour even though she did not attend, had not made full disclosure and adverse inferences had been made. *Keywords: disclosure; costs*

RM v WP [2024] EWFC 191 (B) (HHJ Hess)

HHJ Hess considers when a property becomes the family home and therefore matrimonialised, and whether, once matrimonialised, it can become un-matrimonialised, and makes use of the Galbraith Tables while doing some heavy lifting to get the case to a practical, workable conclusion without further delay. *Keywords: sharing principle; matrimonial and non-matrimonial property; matrimonialisation; Galbraith Tables*

A v R [2024] EWFC 218 (B) (DJ Dodsworth)

This judgment examines the legal principles relevant to raising conduct arguments in financial remedy proceedings. *Keywords: domestic abuse; conduct*

Nilsson & Anor v Cynberg [2024] EWHC 2164 (Ch) (James Pickering KC sitting as a Deputy High Court Judge)

A declaration of trust is conclusive unless varied by subsequent agreement or affected by proprietary estoppel. A 'subsequent agreement' is not limited to those compliant with the LP(MP)A 1989 but can include informally arising constructive trusts. *Keywords: TLATA applications; agreements; bankruptcy*

GH v GH [2024] EWHC 2547 (Fam) (Peel J)

Successful appeal against decision not to order FDR. Although FPR 9.15(4)(b) allows a judge to dispense with an FDR in exceptional circumstances, 'It is very hard to envisage a situation where the FDR should be dispensed with … The FDR (which for these purposes includes the increasingly popular Private FDR) is an integral part of the court process.' *Keywords: FDRs; Financial Remedies Court (FRC); appeals; efficient conduct*

Interview with Nigel Shepherd

Joanne Edwards

Partner, Head of Family and Mediator, Forsters LLP

Nigel Shepherd is a former partner and national head of Family Law at Mills & Reeve, retiring as a consultant at the firm in October 2024.

He was national Chair of Resolution 1995–1997 and again 2016–2018, the only person to have held that role twice and was given lifetime membership of Resolution in 2018. He received the John Cornwell Award at the Family Law Awards 2019 and Lifetime Achievement Award from Manchester Law Society in 2022, recognising his contribution to family law particularly in relation to his campaigning work on no fault divorce.

Jo: Nigel, it's an honour to be able to sit down with you to talk about your life and career. Going right back at the beginning, you started your training contract in 1979. I'm interested to understand your journey into law.

Nigel: I did my A levels and didn't do very well; I was fast-streamed at school and I think it would have been better if I'd just been in the normal stream and not taken everything a year early and probably would have been better if I'd worked a bit harder! In those days if you got A levels you were guaranteed a job, but it's very much different now. That's one of the things that's changed enormously.

So I took a year out because I was too young to go to university and I started work at a bank in the City, Lloyds Bank International on Queen Victoria Street, and doing an evening course for the banking exams with an idea that I might then go into banking as a career. One of the modules was law and as I was doing that, I enjoyed it and the person teaching it said 'I think you've got a bit of a flair for this, why don't you consider doing it?' So I thought I'd give it a go, but with rather dismal A levels I knew that getting in to do law was going to be problematic. I ended up going for an interview at Manchester Polytechnic, now Manchester Met, and they were offering a new course, law and a language, of course quite common now. I ended up doing law and German and got a 2(1). It's a bit of a lesson; it's much harder nowadays to get anywhere if you don't get good A levels, but I found a route in that way, which was great.

Jo: As an aside I was going to ask you Nigel, you've become a native Mancunian. Did you stay there from when you went to Manchester Poly?

Nigel: Yes. I met my wife Sandra in the first 6 weeks of starting my studies there. We're coming up to 50 years together next year. She's from Lancashire and I think the idea of moving too far south was anathema to her, and I loved it up here. So yes, I came and stayed.

Jo: You started out, I understand, doing crime or spending part of the time doing crime at the beginning of your career. Tell us a little bit about that. I know one of our editors mentioned the 'chicken nicker' story…

Nigel: I did my articles in a small High Street practice, with two partners, and so you basically did everything and there wasn't this sort of rotation or seats. But from the word go I always had a bent for litigation rather than conveyancing or probate. Contentious rather than non-contentious work always floated my boat. And when I qualified, I got a job doing mainly criminal work, but it was a mixture of everything.

And so the chicken nicker… well, I had this client that came in, Fred, and he had been charged with stealing a frozen chicken from the Co-op in New Mills in Derbyshire, which was where we had one of our offices. Fred told me he hadn't done it. He said he'd just forgotten to pay as he was distracted by putting his umbrella in his bag (along with said chicken). I knew enough about mens rea and thought that this was a solid defence. So I said we'll rock up at the Magistrates' Court in New Mills and plead not guilty.

Come the day I arrived at court with Fred, feeling confident, in my three-piece suit and with my briefcase, thinking this is a slam dunk. But as soon as we got into court, the usher shouted loudly, 'hey up, chicken nicker's in!'. At that point I looked at Fred's antecedents for the first time and it transpired that he had seven previous convictions, all for stealing frozen chickens from the Co-op in New Mills. I'd had no idea he had a penchant for pinching poultry. Anyway, we ran the trial and in my mind, my cross-examination was fantastic and on the basis of the prosecution evidence it was clear as day that the verdict should be not guilty. You can imagine my shock and disappointment when the Chairman of the Magistrates said 'guilty'. Fred simply said, 'fair enough'.

And then we went on to the plea in mitigation and he'd told me he was treasurer of the over-60s club in New Mills, which I pointed out was a problem – first, the role of treasurer isn't normally associated with habitual stealers of frozen poultry and, secondly, he was only 58. Anyway, he got a fine and it was all over, but it was a lesson in the importance of preparation!

Jo: Absolutely, preparation is key, but a good day for Bernard Matthews, I guess, that Fred didn't get away with stealing another frozen chicken.

And at what stage did you decide that crime wasn't where you wanted to focus your attention and that family law was where you wanted to specialise?

Nigel: I'd always done family and eventually I got a bit disillusioned with the criminal work. The clients changed and I felt increasingly that the work we were doing wasn't being appreciated in the same way as before. It was becoming more and more difficult to balance things and there were the pressures on legal aid and pay rates and things like that. So I started doing more and more family work before focusing exclusively on that from about the early 1990s. I made a tough decision to leave the firm I was at in Stockport and went into the centre of Manchester and at that point I was recruited as a partner purely to do family law.

Jo: I'd like to segue into your reflections on how the profession has changed during the lifetime of your career, because I know one of the things we talked about was people becoming increasingly specialised.

Nigel: It's changed enormously. More people were general practitioners when I started out and legal aid meant that we could help people with a wide range of problems. High Street practices were central to the help the public could get with a very wide range of legal issues. The High Street remains important in large areas of the country of course and those of us in large firms and with the luxury of specialising mustn't forget that, but we now have through consolidation and for other reasons far more large firms and larger family teams.

I think the law has become that much more complex, and even within family law now, you'll find people that will only do children or they will only do money and you've got more and more specialisms that we simply didn't have when I was starting out, like the issues facing modern families (e.g. surrogacy) etc. The issues facing modern families weren't really on the radar then so I think that's changed a lot.

I do feel that a broad idea about how things work in other disciplines in other spheres actually informs your practice and with increased specialisation I think we've lost some of that. But you can't put the genie back in the bottle. Also different is that the knowledge that many clients have is vastly greater than it was even 20 years ago. It used to be that you nearly always knew more than your client. But now you know that they're able to look online, they're able to find out much more about it. The nature of our advice and the pressures on how we practise have changed. We used to be thrown in at the deep end much more than those at the beginning of their careers are now. The regulatory framework and the greater knowledge of many clients including about their rights as consumers and their expectations when it comes to the service they receive from professionals means we're much more risk averse. There's less scope for making mistakes and I think understandably people are much more protected at an earlier stage now. Firms have to balance giving people responsibility against that risk for the business.

Also legal aid was available and things have been hugely different since that was largely scrapped in 2013. That, along with the huge advances in the use of technology, are probably the biggest changes in the way that we can help people.

Jo: Another thing I wanted to pick up on, Nigel, in the spirit of how things have changed in recent years is the emphasis on employee well-being and the increased focus on that. I'm particularly interested to hear your thoughts as I think you've been quite open in discussing with people periods of difficulty that you've had in the past and how you've had to manage that during your career.

Nigel: I mean it's hugely better now in terms of the understanding of the importance of well-being and the pressures of the job. The job was always pressurised, but I think it's a lot more pressurised now than it was. You used to have time because we didn't have emails. We didn't have mobile phones. Basically in my early days, you sent a letter and you had 3 or 4 days go by with nothing happening unless somebody picked up the phone.

Jo: And I remember I also used to panic if you got a fax in, you thought, gosh, this must be really urgent because somebody is sending a fax rather than just a letter in the DX!

Nigel: Well, yes, and fax was the new kid on the block for me, after telex. So I mean, I'm not that ancient, but really it has changed enormously and so the focus on well-being is absolutely crucial.

I've had two periods of kind of burnout or depression, both caused by intense periods of work. The first time was when I stepped down as Resolution chair for the first time in 1997, when I'd basically worked at a fever pitch for a couple of years and running my practice 5 days a week without any concessions for the work that I was doing for Resolution. And we didn't have the Resolution staff team then that we have now, and when it stopped and something wasn't coming across my desk all the time from Resolution, it was like a guillotine. And I didn't know what had hit me. I felt that was the end of my career. Genuinely, I thought it's never going to get better because that's the way you are if you're in that trough. You didn't talk about it and the support professionally wasn't there and it felt like there was a stigma.

The second time it happened also followed a period of intensive work in the early days after our family teams' move to Mills & Reeve in 2008, but the difference in the way it was dealt with was enormous. I knew what was happening. I knew that I had to ask for help and I got it. I appreciate that I may have been fortunate being in that firm and know that many others may not have the same experience, but I am sure that the development in our profession's understanding of mental health and well-being even in the decade between my two episodes was a significant factor and clearly since then this understanding has moved on even more. The support structure is much greater, so that's a real change in the right direction.

My only word of caution is that some stress is normal. I wouldn't want the focus on well-being to mean that normal stress suddenly becomes perceived as being worse than it is. It's important to talk about it, but it's also important to recognise that you'll come through it with that support. And there's a difference between stress and depression and burnout. The key is to manage the stress so it doesn't turn into something more. And again, talking to people and getting support is all part of that. So we're in a much better place now.

Jo: That's incredibly open and honest of you to share in that way and something I'm sure people reading this will find

really helpful. If I may, looking back to the first period you've described in, I think 1997, what support do you wish you had had then that perhaps is more available now?

Nigel: There were a couple of people, including my former principal, who were brilliant, you know, and I was able to go and talk to them, but I didn't feel able to talk to anybody in my firm at the time more widely about it. And I don't think that's gone completely, although now many firms have got employee assistance schemes or similar arrangements so there's an external helpline number that you can call if you don't feel that you can share with your line manager.

But Mills & Reeve is an incredibly supportive environment; it is a great place to be in terms of well-being and many other firms have the same commitment to their people. You can talk to people without thinking you're going be treated as some kind of pariah and that that's the end of your career. So the first time I was hit with depression I really, really thought that it was never going to get better, that the whole stigma would follow me around forever and it didn't. And of course, that's the lesson that you learn. And you know, I think that support is one of the biggest changes for the better that we've had, as long as you don't catastrophise things that don't need catastrophising and give yourself time. Talk to people if you're feeling a bit rough, but manage it as best you can.

Jo: That's all good advice. And in the spirit of good advice, for any young family lawyers reading this interview now, who are just starting out in their careers, what advice would you give them?

Nigel: It's always very difficult because it can sound a bit patronising. I think everybody has to find their own way. A couple of things occur to me though, and the first is, push yourself. Don't sit in a comfort zone. Volunteer for things: join Resolution; join the FLBA; join both if you're qualified for both, but volunteer for things and take yourself out of that comfort zone. I think that way you do expand your horizons. Our work is very intense and it would be very easy to sit there and just do the job. Find something outside the day job that enthuses you and get that more rounded experience. And the other thing is that we're rightly keen on teamwork and there's a focus on that and it's far better than it used to be. We don't want people sitting there and grabbing all the work and keeping it all to themselves, but what I would say is be a little bit selfish, because at the end of the day you are responsible for what happens in your career despite all the help. Be a team player but find your own niche and make sure that people know about it. I know 'selfishness' sounds rather counterintuitive in our collaborative world, but the reality is people notice what you do if *you* do it, not if you give it to somebody else to do!

Jo: Yes. The other thing I often say to young people entering the profession now is that looking back I wish I hadn't rushed to qualify in the way I did. I never had any time out. I didn't have any gap year at any point. It wasn't really a thing back then when I was starting out in the job 30 years ago in the way it is now and I think one begins to realise that this job is a marathon, not a sprint, and you've got a long career in front of you. And actually I think it's good for young people to take the opportunity to travel, to go see the world, to have new experiences before they fully embark on their careers.

Nigel: Yes gap years are the norm now it seems and we did have interrailing in my day (and still do I think!). I had to have a year out before I started at Man Met, but I wanted to work. I wanted my own money. Then I got married during articles, we had a house and there was no way that I was ever going to be able to take any time off. I had to work. We mustn't forget also that there are a lot of people in that situation today that don't have the luxury of being able to take time out.

But yes, it's good to take some time off. It is a long haul but lots of other jobs are long hauls and lots of people don't take time off. So if you can, great.

I think that's changed a lot, the expectation from those working and those employing them is completely different. When you joined a firm previously, you genuinely thought that you were probably going to stay there. People move around a lot more now but also we now accept much more that people might not see spending their whole life doing one thing as very appealing. We've seen people leaving firms and then coming back later and being welcomed with open arms because firms want to retain talented people and adapting to changed expectations and how people see their careers makes business sense.

Jo: Yes, absolutely. And indeed, many firms are trying to attract and retain their talent by formalising sabbaticals policies and that's something new.

Nigel: Yes, we never had those back in the day. Rather annoyingly I didn't get the required years in to qualify for my sabbatical under the criteria at Mills & Reeve or my previous firm but If I'd had the sabbatical later on, I would have worried about whether I would have wanted to come back. I would have taken it had I had the option, but I think I might have found it really difficult, having had 3 months, not enforced by being off through burnout, to actually sort of figure out, I've got to go back to all of this again, update my training. Now everything moves so fast that 3 months off… I mean it's managed, people do it and the firms like ours, they'll get you back and you'll have time to get back into it and you've got teams that look after your files, so it works. Clients understand it much better and you know a lot of clients actually now want their lawyers to have that time out. And it's actually part of the pitches and the tenders that law firms do, that clients want to know how you're going to protect your team from burnout, how your time off is managed. And that's all completely different to what it used to be.

Jo: Yes, absolutely. Tell me, on a slightly lighter note, what's the most embarrassing moment of your career?

Nigel: Well, my career's been 45 years, so there's been lots of them. I sent a letter to the wrong place years and years ago and I thought, that's going to be a disaster. But I actually managed to go and retrieve it. Then you could just phone somebody up and say, look, I've sent you this letter by mistake. Now of course, you have to report it. You mustn't hide your mistakes and that's absolutely right. And a while back I sent a message to a client about a meeting the next day but unfortunately, I sent it to her husband by mistake…

Jo: What was the response you got?

Nigel: I immediately realised and then I was frantically trying to recall the message but couldn't. To be fair to him

he replied and just said, I don't think this is for me. Of course I told my client and the good thing is I hadn't said anything along the lines of 'I know you'd like £2m but we'd accept £1.5m', which would have been the end of my involvement in the case and we would have had to have dropped out. I think it might actually have helped the meeting in a way because I'd said in the message that we were there to do a deal, which was what his big panic was: that we weren't serious about trying to settle. So it was a lucky break, but that moment of horror when you actually press send and realise. Again with emails, now we've all got protocols about things and you get warnings saying 'this is a new recipient, are you sure?'. So there's a lot more help available, but yes, that was a nervy moment.

Jo: One of those heart-stopping moments and we've all had them.

Nigel: We all get them and you will get them if it hasn't happened to you yet. That's one of the things to say to people – you will make mistakes. Admit them. Learn from them. You'll get help. It probably won't be the disaster you think at the time. And the longer it takes to happen in your career, the worse it might feel. It's almost better to get a horrible one out of the way early and get over it.

Jo: Agreed. On a different note, in speaking to some of your Mills & Reeve colleagues ahead of this chat today they spoke, among other things, very fondly of your competitive nature. In fact, one of them mentioned you subbing him halfway through a table football match on one occasion! So I'm quite keen to know where does that competitive nature come from? And do you have an occasion where you can think of it being particularly pronounced?

Nigel: Yes, I've always been like that. And I see it as much as a fault as an advantage. I can't help it. I think I might just have mellowed a little bit now but I've always been that way. It comes from school and sport; I was surrounded by quite a lot of talented people at school and talented in different ways. And I think you're always trying to keep up with it, but it's always been like that. I always joke about it. You know when your children are growing up and you play games with them, I always wanted them to play by the rules. I used to joke that I used to bowl bouncers at the kids when we were playing cricket in the garden, and they were only 3. So there's a downside to it, but it can be an advantage because you push yourself and you want to be competitive. But I'm sure it can be irritating at times as well.

Jo: Moving on to a totally different topic, we can't do this interview without talking about your role at Resolution. You're the only person who has chaired the organisation twice. So I'm interested to understand when you first became involved in Resolution and your observations on how the organisation has changed during the time that you have been involved with it.

Nigel: Resolution started in 1982, of course, as the Solicitors Family Law Association but my training contract (articles) principal already subscribed to the Code of Conduct ethos before that. The SFLA came to Manchester in about 1984/1985. We had a steering committee and we had James Harcus, then treasurer, and the late Mr Justice Bush came to address an open meeting which was really well attended. So I became the first Manchester chair after the steering committee had stepped down and I stayed chair for a few years until I got onto the National Committee in 1991.

Jo: And how do you feel the organisation has changed over the years?

Nigel: Well, hugely. In the early days we had one member of staff, the wonderful Mary I'Anson, and that was it. When I was chair the first time we were dealing with the Family Law Act 1996 work and we actually got members to pay a voluntary levy for outside consultants that did our parliamentary lobbying work and PR. It was so different by the time of my second term where we all had the support of a dedicated staff team as partners in everything we were doing.

And so it's changed vastly, but at its core, everything that was great about Resolution in the early days is still there. It's still the Code of Practice. It's still the approach of wanting to help people by doing things the right way, so the core hasn't changed. It's just the support structure to enable us to deliver it has changed.

Jo: It's incredible, isn't it, how the size of the membership has grown over the years to be about 6,500 today and how it's a much broader church membership today to reflect how we practise family law now, so that we do embrace therapeutic professionals and financial advisers, mediators, obviously barristers and solicitors coming together. So what's your reflection on those changes and how everything has moved on?

Nigel: We've moved away from saying we are a family law organisation to saying we're a family justice organisation. That's absolutely right. And I was heavily involved in the change of the name to Resolution, which was quite was an interesting period and there were many who weren't keen on losing the Solicitors Family Law Association. But it was absolutely essential, because we were no longer just about solicitors, we were no longer just about family law, it was much, much wider than that. In terms of barristers, when I first got going barristers weren't allowed to set foot in solicitors' offices. There was that demarcation, it was so different. And now we're working together and it's brilliant that we've got barrister members and we've got mediator members and we've got therapists that can join us. It's wholly different and for the better.

Jo: Now tell us, Nigel, in 2016, you became National Chair for a second time of asking, the only person ever to do so. What persuaded you to do that?

Nigel: I was asked and knew I had unfinished business.

Jo: What persuaded you to say yes?

Nigel: Put simply, no fault divorce. I'd been heavily involved back in the mid-1990s and we had it in a completely different form. The Family Law Act 1996 was imperfect to say the least. But you know, we succeeded, but it just never got implemented. We carried on the campaign. We never gave up and it just seemed that the mood music was right. I never lost faith that it was really achievable and I thought that would be a nice kind of bookend, if we could achieve it having got it and worked on it so hard 20 years before or whatever it was. And I'm glad I did.

Jo: It's a phenomenal job that you did over decades and you

are known as Mr No Fault Divorce. Was there ever a moment when you thought, this is never going to happen?

Nigel: No, I don't think there was. You know when you get the perfect storm of *Owens* and the Finding Fault research from Liz Trinder and her team and I think you know, what are the key things? Even the *Daily Mail* were on board by the end! They had been opponents of reform and in the past there had been vitriol and abuse, especially about Lady Hale at the time as the original architect of no fault divorce when she was at the Law Commission. But with *Owens*, the mood changed in Parliament and there was cross-party support.

So we knew the second time around that if we could get it before Parliament, it would go through. And as it turned out, that was what happened.

Jo: Absolutely. I think our biggest disappointment at the end was because, as I remember it, the final reading and the passage of the bill all happened during one of the early COVID-19 lockdowns, we all had to raise a virtual glass of champagne in our respective homes to celebrate.

Nigel: I remember sitting there when it went through the final reading and sending still my most popular tweet; you know I'm not up there with Taylor Swift or Elon Musk, but I tweeted that it's passed. I remember being in Parliament the first time when it went through the final reading, and coming out to fluffy microphones from Sky News outside at 11:30 pm. But it was nice that this time it stuck and we actually got it and I should say it was it was very, very much a team effort. I mean, you put an enormous amount into it, the Family Law Reform Committee, the staff team, Rachel Rogers and Matt Bryant; it was a phenomenal team effort and it was a privilege to be involved in it.

Jo: And what next for law reform? For you? What do you think is pressing now?

Nigel: I still think legal aid. I know that there's been a commitment made to the funding of initial legal advice before the election got in the way of that. I don't think we're ever getting proper legal aid provision back, even though you can show economically that it saves money down the line and at least some solid early advice is invaluable. I grew up in the days of the green form, where you sign somebody up and you know you could help them. You could give them 2 hours' advice or 3 hours if you were drafting a divorce petition, irrespective of means. My charging rate was the same when I started off for legal aid and for private. The only difference is whether you had some forms to sign or not. So getting something back to give people a steer in the early stages is crucial I think.

The other big thing is cohabitation reform and we did have a cross-party commitment to that at the Resolution awareness week event in November 2023. It's just, I hope, a question of when and parliamentary time.

Jo: And moving away from family law to family justice, I wanted to touch upon arbitration. You were one of the first people to qualify as an arbitrator and I'm interested in your reflections on the future of family arbitration – whether you'd make any changes to the scheme as it is and what you think might be holding arbitration back.

Nigel: It's a surprise that it hasn't taken off more than it has, though obviously it's talked about a lot more. There still seems to be a problem with one side suggesting it and the other side having a reason for not going for it. Some of the reasons given are spurious, largely; I think the main reason is that delay often suits one side and it doesn't suit the other.

So I think the key to unlocking it is going to be the attitude of the courts, which is changing and now the NCDR encouragement under the new rules and the need to give an explanation for why you haven't explored NCDR. But at the end of the day there's always a risk that increased focus on what is effectively private justice is a get out of jail card for not funding the courts properly and people have a right to go to court to have their issues resolved. You can encourage, and you should encourage, NCDR. Of course, in the vast majority of cases there should be an answer, but at the end of the day the courts are there to resolve disputes that can't be dealt with by agreement. Of course, there's a two-tier system argument about whether it's fair for those who can afford it being able to get a fast-track bespoke family justice service, but if you can afford it and you want to get a solution, which you should do, then it is an option that should be used much more than it currently is.

Jo: Out of interest and for whatever reason, one of those potentially being the pressure that the family courts remain under, do you think there are any circumstances in which the court should be able to mandate family arbitration?

Nigel: I'm very uncomfortable with the idea of our justice system requiring people to pay privately. As I've said, people are entitled to use the courts and they should be funded so that they operate effectively. I just think that it's not the same as commercial contracts that have arbitration clauses. I don't think compulsory NCDR is the answer

personally. Strong encouragement, yes. Mandatory? No, not for me.

Jo: I have to ask – what next for Nigel Shepherd?

Nigel: Well, we're doing this interview when I'm in my last 2 months at Mills & Reeve. We've agreed that I should end my consultancy at the end of October, which I'm ready for although of course it will be a big wrench after so long there and working in family law generally. I'm still involved with Ampla Finance, which is continuing so I'll have that connection with the family law profession as a result of that being one of the products we offer. Sandra and I have five grandchildren and we will spend more time in Anglesey, which people who follow me on Twitter will know about from me boring them with pictures of it occasionally. And I will play more golf! So yes, it is time for the next chapter, but as a life member of Resolution I will definitely be keeping in touch and I hope I'll still go to some events and particularly the annual conference because I've never missed one! As well as being the only person to have chaired Resolution twice, I'm the only person to have been to every single Resolution conference since they started in 1989.

Jo: Which is quite an achievement and one you have to keep up, definitely.

Nigel: Yes, I'm hoping that I can find good reasons to do so and to be in Birmingham next year.

Jo: And on a related topic, do you have any advice for people who are approaching the end of their career? I have colleagues who really look forward to retirement and then I know others who have really struggled to get their head around retiring and suddenly stopping a career that they absolutely love. So have you got advice for how people might prepare themselves for that transition to retirement?

Nigel: Yes. I think you have to make your mind up whether you're going to step back and do it gradually or just stop. Personally, I was lucky because I was asked to do the Resolution chairing again in 2016. And I knew from previous experience that if I tried to do that and carry on full-on as a partner, it wouldn't work. It wouldn't be right for me, for the firm or for Resolution. So I stepped back to a consultancy at that point, on 2 days a week, but with Resolution it was still pretty much a full-time job, but I was able to keep going with client work. My team were great. I was passing things over and then in 2020 I stopped doing client work apart from arbitrations and private FDRs and that coincided with COVID-19 which for me was a relief because I looked at how people were having to juggle things, colleagues who were sitting in a one-bedroom flat trying to work, sitting on their bed and then remote hearings and all the stuff around that. And I was just looking at it from afar, thinking, thank goodness I don't have to be dealing with this because I think I would have gone mad. I know I would have managed like everybody else did, but I think it must have been enormously stressful and enormously difficult and bluntly I was quite glad I was sitting in my garden during that time. And then of course things have moved on from there. We've learned a lot about this remote working and all the issues around that and all the benefits around that. But ultimately, with retirement, I think you've got to decide whether you're going to try and take a glide path or just stop. One of my former partners has just retired and he just stopped, went from 5 days to just stopping and he's loving it. But I think everybody's different.

You have to find what's right for you and talk to your colleagues. There are courses you can go on. A lot of firms will do that and there'll be programmes that you can go on to help you find something you want to do. My advice is, don't just drift into it. Try and work out what you're going to do with your time, because it's a huge change.

Jo: Yes, of course. And finally, how would you want people to remember the mark that you have made?

Nigel: I think it's likely to be the no fault divorce stuff. I mean there are far more talented family lawyers than me, including within my own team.

Jo: Very self-effacing as ever!

Nigel: OK I suppose I did alright, but I think probably in terms of my mark, it's the stuff with Resolution and no fault divorce. It's how I'd like to be remembered and it's probably also inevitably how I will be remembered, which is nice to have a legacy in that sense.

Jo: I don't think there's anybody who wouldn't agree with that sentiment, Nigel, after the huge, huge work that you put into that over a number of years.

It's been an absolute pleasure to have this interview with you and actually, despite having known you for a number of years, to have learned so much about you and about your career through this discussion, and the anecdotes that you've got. I know that you're carrying on sharing them and will be speaking at the YRes conference in November.

Nigel: I am, yes, and the timing is perfect as it will be the week after I've stopped at Mills & Reeve. So it's really quite nice to go and talk to the next generation about some of the issues we've discussed today.

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