



No 18 Chambers

Financial Remedies Update

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Introduction

- Second of a bi-monthly update on developments in financial remedy applications
- Developments over the past 3 months
- Interesting recent case law and relevant legal concepts
- Costs orders against legally represented parties and costs protection
- Questions

FPR Part 3

- FPR 1.4(1) provides that the court ‘must further the overriding objective by actively managing cases’
- FPR 1.4(2)(f) states that active case management includes ‘encouraging the parties to use a non-court dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure

Revisions

- Definition of “non-court dispute resolution” (NCDR) widened:
- FPR 2.3(1)(b):
 - ‘methods of resolving a dispute other than through the court process, including but not limited to mediation, arbitration, evaluation by a neutral third party (such as a private Financial Dispute Resolution process) and collaborative law.’

New FPR 3.3(1A)

- Allows the court to require parties to file and serve 'in the time period specified by the court, a form setting out their views on using non-court dispute resolution as a means of resolving matters raised in the proceedings
- Form FM5
- Open form – i.e. not WP like an Ungley Order

FM5 Process – PD 3A

- at 10A, that while the FPR does not give the court the power to require parties to attend NCDR, ‘the court does have a duty to consider, at every stage in the proceedings, whether non-court dispute resolution is appropriate
- at 10B, that the court ‘will want to know the parties’ views on using non-court dispute resolution as a way of resolving matters’; and
- at 10C, that each party must serve on all other parties a standard form setting out their views on using non-court dispute resolution, i.e. an FM5, (i) at least seven days before the first hearing in the proceedings held on notice (i.e. the First Appointment in financial remedy proceedings and the FHDRA in private law children proceedings) or within such other period before that hearing as the court may direct; and (ii) if required by the court, at least seven days before a subsequent hearing or within such other period before a subsequent hearing as the court may direct. The form must be verified by a Statement of Truth
- 10D of PD 3A states that the court also has general powers to adjourn proceedings (FPR 4.1) which could be exercised to encourage the parties to attend non-court dispute resolution
- the power to ‘encourage’ at FPR 3.4(1A) is now backed by an amended FPR 28.3(7), which will expressly make a failure, without good reason, to engage in NCDR a reason to consider departing from the general starting point that there should be no order as to costs.
- New paragraphs will be inserted into the Standard Financial Order and will be announced shortly by Peel J.

X v Y (Financial Remedy: NCDR)

2024 EWHC 538

- [4]) ‘understand the court's expectation that a serious effort must be made to resolve their differences before they issue court proceedings and, thereafter, at any stage of the proceedings where this might be appropriate’
- ‘at all stages of the proceedings, the court will be active in considering whether non-court dispute resolution is suitable’ and the changes to Part 3 ‘will give an added impetus to the court's duty in this regard’.

X v Y

- It was also said by Knowles J that to assume that the decision in *Churchill v Merthyr Tydfil CBC* was of limited relevance to family proceedings (at [15]) ‘is unwise’ as:

‘[t]he active case management powers of the CPR mirror the active case management powers in the FPR almost word for word and both the civil and the family court have a long-established right to control their own processes. The settling of cases quickly supports the accessibility, fairness and efficiency of the civil, and I emphasise, the family justice system.

BR v BR

- [2024] EWFC 11
- Peel J
- Addresses use of SJE's
- High value involving substantial business assets built up during the marriage.

Why SJE

- At [18] – why SJE – 8 reasons
 - Cost
 - Experts duty to court – SJE less likely to truly impartial
 - Uniform information, documents and instructions limit risk of different experts reaching different conclusions
 - Shadow experts can be used alongside
 - FPR 25.10 is a mechanism for a party who is concerned the issues have not been fully addressed
 - The availability of *Daniels v Walker* applications

Daniel v Walkers applications

- *Daniels v Walker* [2000] 1 WLR 1382, CA – Lord Woolf:

'In a substantial case such as this, the correct approach is to regard the instruction of an expert jointly by the parties as the first step in obtaining expert evidence on a particular issue. It is to be hoped that in the majority of cases it will not only be the first step but the last step. If, having obtained a joint expert's report, a party, for reasons which are not fanciful, wishes to obtain further information before making a decision as to whether or not there is a particular part (or indeed the whole) of the expert's report which he or she may wish to challenge, then they should, subject to the discretion of the court, be permitted to obtain that evidence.'

ZU v LT

- [2024] EWHC 778 (Fam)
- Schedule 1 – appeal of arbitral award
- HHJ Evans-Gordon held that power to order a settlement of property extended to property to which either parent was entitled in possession or reversion
- Party could not be ordered to take out a mortgage
- Reversed by Cobb J

Cobb J's reasoning [1]

- Borrowing capacity by mortgage is a resource with s. 25(2) MCA 1973
- Relying on s. 54 FLA 1996 – beneficial entitlement extends beyond the equity and includes occupation of the whole
- Settlement under MCA 1973 can include property which is subject to a mortgage
- Court has the power to order the release of parties from a mortgage and indemnify the other against liability.

Cobb J's reasoning [1]

- Provision of housing under a Sch 1 settlement can include provision raised by way of a mortgage
- In proceedings of this kind, a parent can be compelled into a joint property purchase, into an insurance contract, and to discharge or indemnify a debt for which they are not contractually responsible. These are essential ancillary powers for carrying out property adjustment into effect, even though none are expressly set out within the statute [105]

Cobb J's reasoning [2]

- Courts powers “not confined to the 4 corners of the statute” [100] – the court had power to order a sale of property and to direct a new property be purchased on trust, despite lack of express statutory provision
- Possible to for a settlement to include provision for a replacement property w/o offending principle there can only be one settlement of property order

Costs orders against legally aided parties

- Section 26 LASPO 2012
 - 1) Costs ordered against an individual in relevant civil proceedings must not exceed the amount (if any) which it is reasonable for the individual to pay having regard to all the circumstances, including—
 - (a) the financial resources of all of the parties to the proceedings, and
 - (b) their conduct in connection with the dispute to which the proceedings relate.
 - (2) In subsection (1) “relevant civil proceedings”, in relation to an individual, means—
 - (a) proceedings for the purposes of which civil legal services are made available to the individual under this Part, or
 - (b) if such services are made available to the individual under this Part for the purposes of only part of proceedings, that part of the proceedings.
 - (3) Regulations may make provision for exceptions from subsection [\(1\)](#).

Civil Legal Aid (Costs) Regulations 2013

- Reg 5:

Except as provided by this Part, cost protection only applies to costs incurred by the receiving party in relation to proceedings which are, as regards the legally aided party, relevant proceedings

Reg 6

- **6.** Cost protection does not apply in relation to—
- (a) parts of proceedings for which civil legal services are provided in the form of—
 - (i) help at court;
 - (ii) legal help, help with family mediation or family help (lower), except in the circumstances described by regulation 7;
- (b) parts of family proceedings for which civil legal services are provided in the form of—
 - (i) family help (higher);
 - (ii) legal representation

Reg 7

- 7. Cost protection applies where a legally aided party receives legal help, help with family mediation or family help (lower) in relation to proceedings (other than family proceedings) and later receives, in respect of the same proceedings—
 - (a) family help (higher); or
 - (b) legal representation

“Family Proceedings” Reg 2 CLAR

2013

- family proceedings” means—
 - (a) a matter described in paragraph 12 (victims of domestic violence and family matters) or paragraph 13 (protection of children and family matters) of Part 1 of Schedule 1 to the Act; or
 - (b) a matter arising out of a family relationship in respect of which the Director has made an exceptional case determination under section 10 of the Act and which is under—
 - (i) a family enactment; or
 - (ii)
- the Trusts of Land and Appointment of Trustees Act 1996

S. 8(3) LASPO 2012

- (3) In this Part “civil legal services” means any legal services other than the types of advice, assistance and representation that are required to be made available under sections 13, 15 and 16 (criminal legal aid)

Part 1 Sch 1 LASPO 2012

- 12(1) Civil legal services provided to an adult (“A”) in relation to a matter arising out of a family relationship between A and another individual (“B”) where—
 - (a) there has been, or is a risk of, domestic violence between A and B, and
- (b) A was, or is at risk of being, the victim of that domestic violence.
- *General exclusions*
- (2) Sub-paragraph [\(1\)](#) is subject to the exclusions in Part 2 of this Schedule, with the exception of paragraph [11](#) of that Part.

Ctd

- (7) For the purposes of this paragraph—
 - (a) there is a family relationship between two people if they are associated with each other, and
 - (b) “associated” has the same meaning as in Part 4 of the Family Law Act 1996 (see section 62 of that Act).
- (8) For the purposes of this paragraph—
 - (a) matters arising out of a family relationship include matters arising under a family enactment, and
 - (b) (subject to paragraph (a)) the Lord Chancellor may by regulations make provision about when matters arise out of a family relationship

Sub-para (g) – family enactments

- (a) section 17 of the Married Women's Property Act 1882 (questions between husband and wife as to property)
- (g) MCA 1973

Conclusion on costs protection

- If no domestic abuse/risk of domestic abuse then costs protection applies.
- If domestic abuse/risk of domestic abuse then it does not.
- Perverse?

Any Questions?

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