No 18 Chambers

Financial Remedies Update

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Introduction

- Final update of 2024
- Developments over the past 3 months
  - Provisional Report of Duxbury Working Party in September 2024
  - Resolution's report on "Domestic Abuse in Financial Remedy Proceedings".
- Interesting recent case law
- Questions

Duxbury Report

- Provisional report published in Sep 2024
- Duxbury calculation addresses "*What lump sum, if paid now, would give the applicant something of equivalent value to future maintenance, enabling it to be capitalised without unfairness to either party?*'
- The calculation has three components:
- the annual maintenance payment;
- the discount rate (sometimes called the rate of return), roughly equating to 'the amount a person would give up, expressed in annual percentage terms, in order to have the money now rather than waiting for it in future'; and
- the term over which maintenance is payable (this can be whole life, joint lives or a term of years).

Duxbury Report Recommendations

- The existing underlying assumptions as to income yield (3%), capital growth (3.75%) and inflation (3%), remain essentially sound.
- The calculation should also include an allowance for the management charges (1% for funds up to £1m, 0.5% for funds above £1m) likely to be suffered on the investment of the fund.
- The calculation should no longer default to the life expectancy of the recipient (although there will be cases in which that is appropriate), rather the court should consider the likely duration of the periodical payments order which is being capitalised and apply that period to the quantum of the periodical payments that is being capitalised.
- The computation should not default to the inclusion of the State Pension, although the fact of such entitlement may impact on the quantum of the periodical payments being capitalised.
- It is neither necessary nor appropriate (where the appropriate duration for the calculation is a term of years and as State Pension age is now the same for men and women) to have separate tables for male and female recipients.
- Where whole-of-life is determined to be the appropriate duration for the calculation extreme caution should be exercised in undertaking a Duxbury calculation for any payee whose life expectancy is less than about 15 years, although we think that these will be very rare cases.
- Legal advisers to parties who are receiving Duxbury based awards, or awards with a Duxbury component, should ensure that their clients have a proper understanding of the basis of the calculation and disabuse them of the erroneous belief that it ensures a particular level of expenditure for a particular period.

Resolution's Report on DA

- Published on 8 October 2024
- Economic abuse defined at s. 1(4) of the DAA 2021 "any behaviour that has a substantial adverse effect on the victim's ability to (a) acquire, use or maintain money or other property or (b) obtain goods or services"
- C. 80% of professionals don't think economic abuse is sufficiently taken into account in FR proceedings.

Report Recommendations

- Change of FPR to ensure parties are safeguarded from ongoing domestic abuse
- Including consideration of amendment to OO so that dealing with case justly includes ensuring parties are safeguarded from domestic abuse.
- An amendment to part 9 so that every case management decision in applications for a financial remedy is conducted in a way that will safeguard parties from domestic abuse
- Clarity that the duty of full and frank disclosure start to engage in NCDR or negotiations
- Where there is ongoing economic abuse by a party's failure to disclose their finances within a reasonable timeframe, and/or a party does not have security…and there are allegations of ongoing domestic abuse the balance shifts away from NCDR continuing
- Further consideration should be given to measures to help ensure that victim-survivors are financially supported between the time of separation, and the final outcome of a financial remedies application,
- Financial thresholds and requirements for legal aid should be reviewed, so that victim-survivors can more easily access legal aid in financial remedy, Schedule 1, and TLATA cases.
- Legal aid rates in these areas should also be increased to make it commercially viable for legal aid providers to act for victim-survivors
- Lead Judges and the legal profession should co-operate to ensure that the consequences of any non-compliance with a financial remedy order should be decided at the time of the making of the order, especially if enforcement proceedings seem likely
- Expanding enforcement methods
- New costs rules
- An explanatory Practice Direction should be issued, in consultation with Resolution and others, setting out the approach in financial remedy proceedings where there is ongoing, or where there are allegations of, domestic abuse

N v J [2024] EWFC 184

- Peel J - it is unlikely that domestic abuse would have a material impact on the vast majority of financial remedy cases
- Conduct has to be “gross and obvious” remains the law [28]
- Increasing awareness of the incidence of DA does not lower the conduct hurdle [29]

N v J [2024] EWFC 184 para 38

1.Section 25 criteria are listed as signposts for the court to consider what orders to make. 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.

2.In the great majority of cases, the impact on the alleged victim can and ordinarily will be taken into account by reference to the conventional criteria regardless of whether domestic abuse has, in fact, taken place. It is doubtful that domestic abuse would have a material impact on the vast majority of cases, such that it needs to be litigated.

N v J [2024] EWFC 184 para 38

3. Personal vindication is not the function of the financial remedies court. Misconduct must be directly relevant to the distribution of finances to be entertained.
4. Courts should not expose an alleged victim of domestic abuse to a remorseless investigation into that very domestic abuse.
5. Courts need to look forward and not back, and where possible set the parties on the road to financial independence. A detailed inquiry into conduct is a retrograde step, even more so in the era of no-fault divorce.
6. If courts were to determine allegations of domestic abuse in financial remedy cases – the implications on the system of financial remedies would be profound

N v J [2024] EWFC 184 para 38

7. The s 25 factors will enable the court to arrive at a fair and balanced decision by reference to the usual factors such as needs, resources, contributions, health, age, and duration of relationship without any reference to conduct. It is unlikely that personal misconduct will have a material impact on the ultimate evaluation.
8. It is not the job of the financial remedies court to impose a fine, a penalty, or damages upon a party for conduct. Nor is it for the financial remedies court to moralise or apportion blame for how the parties behaved towards each other during their time together.

N v J [2024] EWFC 184 para 38

1. There is a two-stage test for conduct in financial remedies proceedings – *Tsvetkov v Khayrova*, [3].
2.Courts should continue to case manage conduct allegations robustly at the earliest possible opportunity; [40].
3.Paragraph [39]:
i) The high bar to conduct claims is undisturbed by the recent focus on domestic abuse in society and the family justice system.ii The statute does not specifically refer to a financial consequence; nevertheless, such cases will be vanishingly rare. iii) Financial consequences are a necessary ingredient of a conduct claim. This applies as much to domestic abuse allegations as to other types of personal misconduct. (See also para [37], where Peel J states there must be a causative link between the conduct and the financial consequence. (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 s 25 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.

Tsvetkov v Khayrova [2023] EWFC 130

1. Form E Box 4.4 should be used to set out any allegations of conduct clearly and in line with the two-stage test. Reserving your position on conduct or recounting a litany of prejudicial comments are practices that should be abandoned.
2. Courts should, at the First Appointment, case manage any alleged misconduct. The court is entitled to make an order preventing a party who pleads conduct from relying upon it, if the court is satisfied that the threshold required to bring it within s 25(2)(g) would not be met. The court should consider proportionality and whether, if proved, it would be material to the outcome.
3. Conduct that arises after the exchange of Form Es should be brought before the court as soon as possible so the case can be managed properly

A v R (Financial Remedy: NCDR) 2024 EWFC 218 (B) 5 August 2024

- A alleged domestic abuse that prevented recovery from medical condition with consequent financial impact
- A's allegations against R were that he:
- Undermined and belittled A's career.
- Limited her social activities and those of the children.
- Took steps to alienate the children including involving them in the financial settlement.
- Invaded A's privacy, using cameras to spy on her, monitored her phone, email and text messages.
- Accessed privileged information passing between A and her solicitor and also deleted evidence from her phone.
- Alleged that A lacked capacity and that he had thought of killing himself and A.
- Removed A's ill health retirement pension lump sum and critical illness money from the parties' joint account. He then went on to encash A's Hargreaves and Lansdown shares without her consent

A v R

- DJ Dodsworth determined at Conduct Case Management conduct should be excluded because:

1. The points of claim as raised, even taking them at their highest, are not of such exceptionality to meet the conduct threshold.
2. A accepted that the conduct as alleged is not the only cause of her ill-health or failure to make a sufficient recovery such that she could resume her career; it is, at its highest, a contributory factor.
3. This conduct does not 'jump off the page' as a factor for consideration in financial remedy proceedings, even if true.
4. The court is able to reach a fair distribution of the assets by weighing all the relevant factors and will largely rely on the sharing principles and needs (including A's health generated requirements), thus there being no need to take into account any conduct.
5. It is disproportionate to litigate conduct. There have already been considerable costs and the court is under a duty to manage cases so they take up the proper proportion of scarce court time

GH v GH[2024] EWHC 2547

- Peel J emphasised the importance of FDR
- Difficult to foresee circumstances when an FDR should be dispensed with completely save where there has been no engagement
- Appeal where an FDR had been dispensed with because of an ongoing dispute over W's earning capacity and W's position had not crystallised sufficiently for there to be an effective FDR

GH v GH[2-24] EWHC 2547

- Its value has been proved time and again. Its without prejudice status allows the judge to look behind the litigation posturing which is so familiar in these cases and give clear, robust views. Anecdotally, it facilitates settlement in a significant number of cases. 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.'

V v V [2024] EWFC 255

- HHJ Willans – 3 day final hearing
- 9 separate properties in India. They are a mix of residential, commercial, and agricultural land. At the heart of this dispute has been a disagreement as to: (a) the extent to which these properties are assets owned by the Respondent; (b) their respective values, and; (c) the extent to which they should be subject to any part of the ultimate distribution given the inherited nature of some of these

V v V [2024] EWFC 255

- Instructive case about different treatment of matrimonial assets and inherited assets overseas in India
- Court found £1,272,273 total pot excluding pensions
- Worth reading paragraph 11 of the judgment

Any Questions?