Financial Remedies Update

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Non-court dispute resolution

FPR Pt 3 & PD3A

- On 29 April 2024, important changes were made to promote non-court dispute resolution (NCDR)
- FPR r. 3(1A): *"When the court requires, a party must file with the court and serve on all other parties, 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 the matters raised in the proceedings."* (Form FM5)

Non-court dispute resolution

X v Y (Financial Remedy: Non-Court Dispute Resolution) [2024] EWHC 538

- *"To 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. Furthermore, I want to signal that, at all stages of the proceedings, the court will be active in considering whether non-court dispute resolution is suitable. Changes to the Family Procedure Rules 2010 ("the FPR") which are due to come into effect on 29 April 2024 will give an added impetus to the court's duty in this regard."*

NA v LA [2024] EWFC 113

- *"This is a paradigm case for the court to exercise its new powers. I consider NCDR to be appropriate and I wish to encourage the parties to engage in the same. This would be to their emotional and financial benefit as well as to the benefit of their children."*

Transparency

The Transparency Pilot

- Extended to include Financial Remedy proceedings in the CFC, Birmingham and Leeds, with roll out to High Court Level at RCJ in November 2024
- Applications for financial remedies upon divorce, applications under Sch 1 of the CA 1989 and applications under Pt III of Matrimonial and Family Proceedings Act 1984

Transparency

FPR r. 27.11 and PD27B

- *"(1)(a): This rule applies when proceedings are held in private, except in relation to – (a) hearings conducted for the purpose of judicially assisted conciliation or negotiation"*
- *"(1)(f): duly accredited representatives of news gathering and reporting organisations; & (ff) a duly authorised lawyer attending for journalistic, research or public legal educational purposes"*

Transparency

- *"(3) At any stage of the proceedings the court may direct that persons within paragraph (2)(f) and (ff) shall not attend the proceedings or any part of them, where satisfied that – (a) this is necessary – (i) in the interests of any child concerned in, or connected with, the proceedings; (ii) for the safety or protection of a party, a witness in the proceedings, or a person connected with such a party or witness; or (iii) for the orderly conduct of the proceedings; or (b) justice will otherwise be impeded or prejudiced."*

Transparency

Re S (FC) (a child) (Appellant) [2004] UKHL 47

- *"The interplay between articles 8 and 10 has been illuminated by the opinions in the House of Lords in Campbell v MGN Ltd [2004] 2 WLR 1232. For present purposes the decision of the House on the facts of Campbell and the differences between the majority and the minority are not material. What does, however, emerge clearly from the opinions are four propositions. First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test."*

Part III applications

Potanin v Potanina [2024] UKSC 3

- *"I would not wish to cast any doubt on the primary guidance given in Agbaje that in the context of section 13 the word "substantial" means "solid". Nor would I suggest that courts which have applied the test as stated by Lord Collins have applied the law incorrectly. But I think that some clarification is called for of what was said in the first two sentences of the passage quoted at para 86 above. It should be made clear that the threshold is higher than merely satisfying the court that the claim is not totally without merit or abusive. It does not seem to me necessary, or advantageous, to further explain the test by comparing it with tests applied in other procedural contexts. If any such comparison is to be made, however, as it was by Lord Collins, the closest analogy seems to me to be with other contexts in which a court has to decide whether a claim should be allowed to proceed to a full hearing or should be dismissed summarily. …*

Part III applications

- *… In ordinary civil proceedings such a question arises when an application is made for summary judgment against a claimant; or to set aside a judgment entered in default; or (as mentioned above) in deciding whether a claim is of sufficient merit that the court should permit service of the proceedings on a foreign defendant. In each of these contexts the test applied is whether the claim has a "real prospect of success". That is also in substance the test which the court applies in deciding whether to give permission for a claim for judicial review to proceed to a full hearing."*

Part III applications

- *"For the reasons given, the test applied by the Court of Appeal in determining whether the judge was entitled to set aside his order made at the without notice hearing was wrong in law. The true position is that on an application, such as the husband made here, under FPR rule 18.11 to set aside an order made without notice, the court is required to decide afresh, after hearing argument from both sides, whether the order should be made or not. There is no requirement for a party applying under FPR rule 18.11 to set aside leave to demonstrate a "knock-out blow", or a compelling reason why the court should exercise the power to set aside, or that the court was materially misled. The onus remains on the applicant for leave to satisfy the court that there is substantial ground for the making of an application for financial relief under Part III."*

TY v XA [2024] EWFC 96

- First reported Pt III MFPA leave/set aside case since Potanina v Potanin

Conduct

Tsvetkov v Khayroya [2023] EWFC 130

- Helpful summary of the law on conduct at paras 40 – 48
- S25(2)(g) MCA 1973: *"such that it would in the opinion of the court be inequitable to disregard it"*
- **OG v AG [2020] EWFC 52**, Mostyn J:
  - *"gross and obvious personal misconduct"*
  - *"add-back jurisprudence"*
  - *"litigation misconduct"*
  - *"evidential technique of drawing inferences as to the existence of assets from a party's conduct in failing to give full and frank disclosure"*

Conduct

Tsvetkov v Khayroya [2023] EWFC 130

- *"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. … causative link between act/omission and financial loss.*
- *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 remedy proceedings."*

Conduct

- *"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 requite 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."*
- *"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****."*

Conduct

- *"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."*

Matrimonialisation

Standish v Standish [2024] EWCA Civ 567

- First case to consider in detail the concept of matrimonialisation since **K v L (Ancillary Relief: Inherited Wealth) [2011] EWCA Civ 550**
- *"It would be to return to the pre-White days and, as the judge also noted at [74], contrary to the clearly established approach that the sharing principle will apply with equal force to an asset in the sole name of one spouse as it does to an asset in joint names. The discriminatory effect of the wife's proposed approach is, in my view, self evident. It would place undue weight on legal and beneficial title when this is unlikely, or at least may well not, reflect whether the wealth has been generated during the marriage because experience shows that such wealth will often be largely or significantly in the name of the "money-maker" who remains much more likely to be the husband than the wife. To adopt what was said in Charman in respect of what Judgment Approved by the court for handing down. Standish v Standish were called "unilateral assets", to base an award on title "would be deeply discriminatory and would gravely undermine the sharing principle"."*

Matrimonialisation

- *"I consider that it would be wrong to state that, as a matter of principle, property which has a non-marital source can never be subject to the sharing principle. There may well be situations when, as referred to above, fairness justifies this. However because, as Mr Bishop submitted, it is a derogation from the principle that sharing applies to matrimonial property and does not apply to non-matrimonial property, it should be applied narrowly. This is so that it is not used by parties in a way which would undermine the clarity of the sharing principle, namely that it is the sharing of property generated by the parties' endeavours during the marriage."*

Matrimonialisation

- *"Thus, with respect to Lady Hale, I believe that the true proposition is that the importance of the source of the assets may diminish over time. Three situations come to mind: (a) over time matrimonial property of such value has been acquired as to diminish the significance of the initial contribution by one spouse of non-matrimonial property. (b) Over time the non-matrimonial property initially contributed has been mixed with matrimonial property in circumstances in which the contributor may be said to have accepted that it should be treated as matrimonial property or in which, at any rate, the task of identifying its current value is too difficult. (c) the contributor of non-matrimonial property has chosen to invest it in the purchase of a matrimonial home which, although vested in his or her sole name, has – as in most cases one would expect – come over time to be treated by the parties as a central item of matrimonial property."*

Child maintenance

James v Seymour [2023] EWHC 844

- Adjusted Formula Methodology ('AFM')
- *"I continue to believe that the formula provides a useful and logical starting point in a child maintenance case, whether heard under the Matrimonial Causes Act 1973 or under Schedule 1 to the Children Act 1989, where:*
- *i) the income of the father for child support purposes is more than the statutory ceiling of £156,000 but less than £650,000; but*
- *ii) where the application does not seek a HECSA but a conventional assessment of the quantum of CSM; and*
- *iii) where it is not a variation application."*

Child maintenance

- *“While the formula does make adjustments for the number of children, its primary driver is the percentage of F’s adjusted gross income to be paid in child support maintenance. This leads to the per capita anomalies identified by Moor J. The amount that would be payable under the formula where the father’s income is £650,000 (and there is no shared care, and no other child living with him) is (when rounded to the nearest £1,000) £60,000 for a single child, £40,000 for each of two children, and £33,000 for each of three children. While it is true that there will be economies of scale where there is more than one child in a family unit, it is obvious, at least to me, that a single child does not cost anything like 50% more to rear than each of a pair of children, let alone 80% more than each of a trio of children."*

Child maintenance

- *"The second, and arguably more important criticism, which I also acknowledge having subjected the data to intense scrutiny, is that the amounts generated by an extension of the formula to incomes up to £650,000 are consistently higher, in my fairly considerable experience, than the levels of awards typically made by the court, whether by consent or otherwise, in conventional (i.e., non-HECSA) cases. It is true that the figures would be reduced if there was a degree of shared care but that mitigation does not alter the fact that the headline figures produced by an extension of the formula to incomes in the range £156,001 - £650,000 are unrealistically high and are in my opinion unhelpful as starting points. In the Appendix to this judgment, I have included a table (Table 1) which gives the full range of figures produced by the application of the formula to that range. This shows that at every level the figures produced are plainly excessive and that the calculation for a single child is not reasonably proportionate to the calculation for a child in a sibling duo or trio."*

Child maintenance

- *“I make it clear, however, that if: (i) there are 4 or more children for whom CSM is to be paid, or (ii) E is more than £650,000, or (iii) F’s income is largely unearned, or (iv) F lives on capital, then use of the AFM is not apt."*
- *"If the application is for a variation of an existing child maintenance order, the AFM should not be used. The terms of section 31(7) Matrimonial Causes Act 1973, and of para 6(1) of Schedule 1 of the Children Act 1989, require identification of the changes of circumstances since the original order was made. This means that the value of the original order adjusted by inflation should normally be used as the CSSP."*

TABLE 1: CSSP per child, FORMULA UNADJUSTED (no shared care)

	Number of children		
E	1	2	3
156,000	15,300	10,200	8,400
175,000	17,000	11,300	9,300
195,000	18,800	12,500	10,300
215,000	20,600	13,700	11,300
235,000	22,400	14,900	12,300
255,000	24,200	16,100	13,300
275,000	26,000	17,300	14,300
295,000	27,800	18,500	15,300
315,000	29,600	19,700	16,300
335,000	31,400	20,900	17,300
355,000	33,200	22,100	18,300
375,000	35,000	23,300	19,300
395,000	36,800	24,500	20,300
415,000	38,600	25,700	21,300
435,000	40,400	26,900	22,300
455,000	42,200	28,100	23,300
475,000	44,000	29,300	24,300
495,000	45,800	30,500	25,300
515,000	47,600	31,700	26,300
535,000	49,400	32,900	27,300
555,000	51,200	34,100	28,300
575,000	53,000	35,300	29,300
595,000	54,800	36,500	30,300
615,000	56,600	37,700	31,300
635,000	58,400	38,900	32,300
650,000	59,700	39,800	33,100

TABLE 2: FORMULA ADJUSTED		A CSSP per child no shared care			B CSSP per child: 1/7th shared care			C CSSP per child 2/7ths shared care			D CSSP per child 3/7ths shared care			E CSSP per child equal shared care		
	No. of children	1	2	3	1	2	3	1	2	3	1	2	3	1	2	3
Amount of E	156,000	15,300	10,200	8,400	13,100	8,700	7,200	10,900	7,300	6,000	8,700	5,800	4,800	7,300	4,400	3,100
	175,000	15,700	10,800	8,900	13,500	9,300	7,600	11,200	7,700	6,400	9,000	6,200	5,100	7,500	4,700	3,400
	195,000	16,200	11,400	9,500	13,900	9,800	8,100	11,600	8,100	6,800	9,300	6,500	5,400	7,700	5,000	3,700
	215,000	16,700	12,000	10,100	14,300	10,300	8,700	11,900	8,600	7,200	9,500	6,900	5,800	8,000	5,300	4,000
	235,000	17,200	12,600	10,700	14,700	10,800	9,200	12,300	9,000	7,600	9,800	7,200	6,100	8,200	5,600	4,300
	255,000	17,700	13,200	11,300	15,200	11,300	9,700	12,600	9,400	8,100	10,100	7,500	6,500	8,500	5,900	4,600
	275,000	18,100	13,800	11,900	15,500	11,800	10,200	12,900	9,900	8,500	10,300	7,900	6,800	8,700	6,200	4,900
	295,000	18,600	14,400	12,500	15,900	12,300	10,700	13,300	10,300	8,900	10,600	8,200	7,100	8,900	6,500	5,200
	315,000	19,100	15,000	13,100	16,400	12,900	11,200	13,600	10,700	9,400	10,900	8,600	7,500	9,200	6,800	5,500
	335,000	19,600	15,600	13,700	16,800	13,400	11,700	14,000	11,100	9,800	11,200	8,900	7,800	9,400	7,100	5,800
	355,000	20,100	16,200	14,300	17,200	13,900	12,300	14,400	11,600	10,200	11,500	9,300	8,200	9,700	7,400	6,100
	375,000	20,500	16,800	14,900	17,600	14,400	12,800	14,600	12,000	10,600	11,700	9,600	8,500	9,900	7,700	6,400
	395,000	21,000	17,400	15,500	18,000	14,900	13,300	15,000	12,400	11,100	12,000	9,900	8,900	10,100	8,000	6,700
	415,000	21,500	18,000	16,100	18,400	15,400	13,800	15,400	12,900	11,500	12,300	10,300	9,200	10,400	8,300	7,000
	435,000	22,000	18,600	16,700	18,900	15,900	14,300	15,700	13,300	11,900	12,600	10,600	9,500	10,600	8,600	7,300
	455,000	22,500	19,200	17,300	19,300	16,500	14,800	16,100	13,700	12,400	12,900	11,000	9,900	10,900	8,900	7,600
	475,000	22,900	19,800	17,900	19,600	17,000	15,300	16,400	14,100	12,800	13,100	11,300	10,200	11,100	9,200	7,900
	495,000	23,400	20,400	18,500	20,100	17,500	15,900	16,700	14,600	13,200	13,400	11,700	10,600	11,300	9,500	8,200
	515,000	23,900	21,000	19,100	20,500	18,000	16,400	17,100	15,000	13,600	13,700	12,000	10,900	11,600	9,800	8,500
	535,000	24,400	21,600	19,700	20,900	18,500	16,900	17,400	15,400	14,100	13,900	12,300	11,300	11,800	10,100	8,800
	555,000	24,900	22,200	20,300	21,300	19,000	17,400	17,800	15,900	14,500	14,200	12,700	11,600	12,100	10,400	9,100
	575,000	25,300	22,800	20,900	21,700	19,500	17,900	18,100	16,300	14,900	14,500	13,000	11,900	12,300	10,700	9,400
	595,000	25,800	23,400	21,500	22,100	20,100	18,400	18,400	16,700	15,400	14,700	13,400	12,300	12,500	11,000	9,700
	615,000	26,300	24,000	22,100	22,500	20,600	18,900	18,800	17,100	15,800	15,000	13,700	12,600	12,800	11,300	10,000
	635,000	26,800	24,600	22,700	23,000	21,100	19,500	19,100	17,600	16,200	15,300	14,100	13,000	13,000	11,600	10,300
	650,000	27,100	25,000	23,200	23,200	21,400	19,900	19,400	17,900	16,600	15,500	14,300	13,300	13,200	11,800	10,500

Child maintenance

De Renée v Galbraith-Marten [2023] EWFC 141

- *"the "guideline" earlier promoted by Mostyn J has effectively been abandoned by his judgment in James v Seymour"*
- *"This is a most unusual situation. I have considered carefully whether it can be said that the judgment in James v Seymour, in which the judge effectively rescinded the guidance which he himself had first formulated more than 20 years ago in GW v RW [2003] EWHC 611 (Fam) and expanded in 2020 in CB v KB, and which he had explicitly proposed to these parties, and which – crucially – had in my assessment led to settlement of the claim in the precise terms set out at [4] of the order, can truly be said to have "invalidated" the "fundamental assumption" on which the consent order was made. … I am satisfied that this development does indeed "invalidate" that "assumption""*

Companies

HO v TL [2023] EWFC 215

- *"First, it is for the court to determine the value, not the expert. Second, valuations of private companies can be fragile and uncertain …Third, I suggest that the reliability of a valuation will depend on a number of factors …Fourth, in practice the choices for the court will be, per Moylan LJ in Martin v Martin [2018] EWCA Civ 2866 at para 93: (i) "fix" a value; (ii) order the asset to be sold; and (iii) divide the asset in specie. The latter option (divide the aspect in specie) is commonly referred to as Wells sharing (Wells v Wells [2002] EWCA Civ 476). Fifth, whether a business should be retained by one party, or sold, or divided in specie will depend on the facts of each case. … Sixth, as was pointed out in Wells (supra), Versteegh (supra) and Martin (supra), there is a difference in quality between copper-bottomed assets and illiquid/risk-laden assets. Seventh, when deciding how to reflect the illiquidity or risk in a private company, the court has three choices …"*

Costs

HO v TL [2023] EWFC 216

- *"Litigation is expensive and personally demanding for lay clients. I see no reason why the court should not visit a costs order if one party makes unreasonable open offers. The authorities make plain that a costs order may be made even if it reduces the needs as found by the court. These comments apply particularly to big money cases, although I take the view that in smaller value cases the court should also be willing, in the right case, to make an award for costs, even if only in a modest amount, to register condemnation of the party whose open proposals are far removed from the eventual outcome. The message must get across that although the starting point is no order as to costs, the courts are increasingly willing to depart from that so as to do justice to the party who has been put to unnecessary costs by the other party's overstated proposals."*

Costs

- *“W did not formally pursue conduct, but included in her documents personal criticisms of H. This practice of making pejorative comments about the other party which have absolutely no relevance to the outcome of the financial remedy proceedings and are probably hurtful, must cease. Apart from anything else, it is unfair to the party who has refrained from making personal criticism to be met with a litany of complaints about their own personal behaviour. The court’s function is not to pick over the bones of the marriage and attribute moral blame. I doubt this in fact added significantly to the costs, but it is not appropriate to make unnecessary allegations, and ordinarily this too might justify a costs order."*

Negligence

Lewis v Cunningtons Solicitors [2023] EWHC 822

- W claimed she had reached an unfair financial settlement with H. In particular, the settlement omitted a PSO where H's police pension was the substantive capital resource. W claimed damages for c. £500,000 for professional negligence
- W and H had lived together from 1991, married in 1993 and separated in 2012
- W had an initial consultation in 2012 with her solicitors. There was a written retainer recording basic information (H earned £47,000 per year gross, had a business interest re website development and a high value private pension (he was due to receive lump sums of £120,000, then £67,000 and thereafter £22,000 per year in respect of his pension)

Negligence

- W was told by the solicitors they could not advise she accept the offer without yet having sight of disclosure
- In 2014, W told the solicitors she had reached a settlement. It was on the basis of a CB and she was to receive £62,000 (later actually to be less £11,500, as H had already paid that amount) on the basis she would sign over a joint endowment policy to H valued at over £15,000 and to mature at £31,000 in 3 years
- Solicitors responded they could not advise her whether the settlement was fair or reasonable without financial disclosure and required her to sign a disclaimer
- The solicitors acted for her in obtaining the consent order prior to which there was an exchange of statement of financial information, which revealed H's pension had a CEV of over £540,000 (total capital of £590,000) whilst W had total assets of -£4,500

Negligence

- *“I find that the contents of this disclaimer do not accurately reflect the position between the parties at this date. I find that the attempt to limit the defendant's responsibilities with a "one-size fits all" disclaimer was not appropriate at this stage in this case.*
- *I accept the claimant's submission and I find that with a 23 year relationship and no property ownership and given that the husband's police pension was by far and away the largest asset, a court would almost as a certainty have made a pension sharing order and that the inevitable starting point (and probable finishing point) would have been an equal division of that pension fund. That likelihood was so strong that the claimant should have been advised in the clearest possible terms that that was the course she should pursue.”*

Pensions

SP v AL v PL & CL [2024] EWFC 72 (B)

- Helpful summary on the law re pensions on divorce
- *"in needs-based cases, the timing and source of the pension saving is not necessarily relevant, but the Court will nevertheless have regard to the length (or shortness) of the seamless cohabitation/marriage in determining the extent to which the needs of the claiming party will justify a division of the pre-cohabitation/marriage element of the pension… The requirement of a nexus between the relationship and a financial need to be met by a matrimonial claim has long been recognised by the case law'."*

Pensions

- *"It should be remembered that these are options provided in the specimen letter and it is not necessary for both of them need to be included in the actual letter sent to the PODE. In the notes accompanying the specimen letter it is stated that "equalisation of benefits by reference to projected income will in most circumstances be the appropriate approach." There may be cases where, for particular reasons, equality of capital is a suitable measure; but in my view these are uncommon and thought should be given to what is the appropriate question before the PODE report is commissioned, if necessary with the judge at the First Appointment determining the issue, and that in most cases the only question which needs to be asked is what level of pension sharing order will produce an equal level of income on retirement. Asking more questions than are necessary will certainly add to the cost of the exercise and almost inevitably lead, further on down the line, to each party advocating the figure most helpful to themselves (as happened in the present case) and making compromise less likely."*