

Regarding Your Ex: Y v Z [2025] EWFC 221 & non-financial misconduct in financial remedies

Tom Gilchrist: Hello and welcome to *FortyTwoTalks*, the podcast which takes a deep dive into the legal world, led by experienced members of 42BR Barristers.

I'm Tom Gilchrist, a member of the Family and Property Teams at 42BR, and I'm delighted to be joined today by...

Charlotte McDonald: Hi, I'm Charlotte McDonald and I'm also a member of the Family Team.

Today we are going to be talking about the non-financial or non-litigation misconduct within financial remedy proceedings.

We want to start off with a slight trigger warning for today. There will be discussions of that misconduct because that is within relationships, there will be discussion of sexual abuse and other sorts of domestic abuse. If that's not for you - absolutely fine. Please have a listen to one of our other podcasts, which you can find on any streaming platform that you can find this podcast on.

Well, I'll start off today just talking about what that conduct is.

So Tom, what is conduct in financial proceedings and what are the types of misconduct?

TG: Well under the Matrimonial Causes Act, which deals with finances upon divorce, amongst other things, there's a list of factors that the court can and has to take into account when dealing with finances. One of them under Section 25 2G is essentially conduct that would be inequitable for the court to disregard.

Now, over the years, that has been broken down into kind of different types of conduct. Some people have two categories, some people say it's three, some people say it's even four.

We have litigation conduct, so bad behaviour during the course of litigation.

There is non-disclosure of assets.

There is what we call add back. So when someone dissipates property, otherwise known as financial misconduct.

And then the fourth form of conduct, which we'll be focusing on today, is what some people call non-litigation misconduct or non-financial misconduct. Basically just general bad behaviour that hasn't to do specifically with the litigation or pieces of property,

CM: And we should say that in in Miller and Miller, this type of conduct that we are discussing today, that case confirmed that that conduct will only be taken into account in the rarest of circumstances and what those circumstances are can be debated, and that is what we're going to discuss today, and whether there has been any change, particularly with the recent case that has come out of Y and Z, and whether that changes, what we know so far about non-litigation misconduct.

TG: Charlotte, you talk about non-litigation misconduct, do you have any examples of cases where it's actually succeeded?

CM: So there are cases that either, the conduct of the person in itself has been so egregious that it has to be taken into account, but they're also ones that there have financial consequences to the conduct. Examples can include Armstrong and Armstrong back in 74, where the wife shot the husband with his own shotgun, but then also going through to more recent cases where serious assault, which led to

imprisonment such as H and H, had financial consequences because the wife's police career was destroyed in that example.

But there are many examples where it has succeeded, but they are really the most egregious.

TG: That's what they call the gasp factor, isn't it?

CM: Yes. There's been many ways that it's been described and the gasp factor is how we sort of say it now, slightly colloquially. Going back to *Wachtel v Wachtel* in 73, that was the conduct must be obvious and gross so much to order one party to support another whose conduct falls into that category is repugnant to anyone else's sense of justice, which is a phrase I like.

But moving forward to *S v S* in 2006, Burton J suggested it must be the sort of conduct which would cause the ordinary mortal to throw up their hands and say, surely that party's not going to get the full award.

And then suggested what he called the gasp factor, so that's where we get that term from, and that has been used since as being quite an extreme description of what that conduct has to be. And then there was also a debate that beyond that really does it affect financial remedy proceedings. And there are, you know, instances that those practitioners will come across where people will have undoubtedly serious instances within their marriage, within their relationship that, particularly within, in regards to domestic abuse, that they want that to be a part of these proceedings.

But whether this is the right forum for that can be quite difficult to explain to them and the high level of what that gasp factor is unusual is very extreme or certainly has a big financial consequence.

TG: And that brings us to the somewhat semi recent case of *Tsvetkov v Khayrova* 2013 EWFC 130 before Mr Justice Peel.

And then obviously the follow up case, again, by Ms. Justice Peel of *N v J*, which almost set out a kind of code how to deal with these cases. So it hasn't got rid of the gasp factor, which is near the shorthand test, but essentially says the misconduct needs to be pleaded properly, usually in the box 4.4 of the Form E, and that that has to be raised early as possible than say how the threshold is met upon that, and essentially if it's not raised early, there's the real risk of it not being heard at all. Essentially, the court says that you can't raise it later as just part of the general facts of the case. So it is essentially turning to essentially a strikeout or almost summary judgment if we're talking in civil terms at the start of a case, unless you run conduct properly.

CM: And particularly in regards to this type of non-litigation conduct, of course, that will have already happened, and therefore raising it at the first available opportunity is vital to make sure that that can be a part of the case and can be raised it at the earliest opportunity because if not, it's unlikely to have met the gasp factor because it would've been something so extreme that it should have come up right from the start.

In the cases that Tom has outlined there, Peel J has set out that the party asserting that conduct has to prove the facts that are relied on by them, and must then meet that conduct threshold, which he describes as being consistently high or exceptional. And then after that, is there any identifiable, if not always equally measurable, negative financial impacts on the parties and some causative link, and sometimes that loss, he says, can be precisely quantified and sometimes it can't be. But does it really impact the financial remedy proceedings? Only after that should it then look at whether it does impact the outcome of the financial remedy proceedings, because it could come under other categories, such as needs, that could be addressed in other ways.

TG: Moving on to the slightly more recent case of *N v J* 2024 EWFC 184 again, Mr. Justice Peel kind of adds to his two stage test of *Tsvetkov*, essentially repeats himself a little bit in terms of how high the bar needs to be. He does leave the door open ever so slightly. So the recent case law is basically saying there needs to be some kind of financial impact.

Mr. Justice Peele does say, well it is theoretically possible that there can be conduct so egregious, absent a financial impact and would be taken to account. But he refers to those as being vanishingly rare. So it seems in conduct, it's legally possible to make an argument without some form of quantifiable financial loss, but that would have to be truly, truly exceptional.

CM: And this is a good point to mention that of course some clients in a practical sense will want what has gone on within the marriage to be in some way put out into this forum. And Peel J in *N v J* says, he addresses the difficult and sensitive topic of interplay between domestic abuse and conduct in the context of financial remedy.

But the question isn't whether domestic abuse per se is vile and indefensible because it indubitably is, the question then is just whether it potentially has a relevant factor in those financial remedy litigation proceedings, and that's sometimes can be quite a difficult bar to work out with clients who really believe that the conduct should be taken into account and might put it in 4.4.

TG: And perhaps there are remedies elsewhere, you know, in in tort law or certainly the criminal law as well. There may be other remedies, but it appears in financial remedies unless it truly meets that exceptional high bar, it's just not really something that can be argued.

CM: Turning then to the very recent case of *Y v Z* 2025 EWFC 221, which was before Mr. Justice Cusworth from the 4 of June, so just last month,

recently published. And whether this case really changes anything that we've mentioned so far today and any of the previous case law for moving forward. And the principle issue in this matter was whether the wife should be permitted to amend her case to rely on Section 25 2G Conduct, where in the first appointment it was recorded that she wasn't advancing a case under 25 2G, and whether at that point she could then rely on it later on.

TG: The main issue in the case is that there was a prenup between the parties and that the husband was entitled to a certain amount of property. The parties both agreed that the prenup was valid, just the wife was running the argument that essentially the husband had without her knowledge surreptitiously taken some of her property and therefore that should go towards his property entitlement, essentially arguing that part of the property that he was owed under prenup he already received. At an earlier hearing the wife agreed to recital, essentially saying that she was not running a conduct case.

So dealing with the way to case manage these cases laid down by Mr. Justice Peel previously, after this first appointment, it came to the wife's attention that the husband had allegedly modified or forged emails to make it look like she had agreed to various property transfers. The matter came back to court and the husband's case was essentially that the wife had given up her right to argue conduct and that therefore, she should be prevented from running this case.

On one interpretation, that's not really what happened.

The case makes it clear that the wife was always running the case, that the husband had taken this money away and that he had already received part of his entitlement and that she had no knowledge of it.

Mr. Justice Cusworth pointed out that issues surrounding prenuptial agreements don't usually rear their heads under conduct. They

usually rear their heads under other factors, and Mr. Justice Cusworth was saying how essentially, whether you're arguing the prenup is unfair, or if there was some kind of undue pressure or maybe coercive control that is not normally argued under conduct or standalone.

It's also pointed out that many factors that could come under conduct often come up in other areas; needs, financial resources, et cetera. So this case doesn't really say, oh, we are changing the law and letting people argue conduct later. It's more saying, well, this was the case she was always running, doesn't really matter in relation to this prenup argument, which head it comes under.

So it seems that despite it being on one hand, interpreted as, well, you can still argue conduct after the first hearing, the case doesn't really say that it's really saying well, the law by Mr. Justice Peel, *Tsvetkov and N v J* is still good law and this needs to be case managed properly.

CM: And although this is based around financial factors, this is a case that Mr. Justice Cusworth comments on the current debate about conduct allegations within financial remedy claims generally, and he says that it must be right that in the vast majority of cases, there is no place for fault based financial determinations, but finishes with an interesting line, which is that he has *every confidence that the courts will continue to adopt a common sense and proportionate approach to the question in each case, keeping well in mind that the financial provision is determined primarily by the criterion of fairness, which includes proportionality amongst its facts, but also that every case must be considered very specifically on its own facts.*

And that of course leaves everything very open to the courts in the future, really focusing on conduct for the facts of each individual case. And there isn't a set criteria, there still isn't a set list of what comes under conduct and what will be successful in conduct more explicitly.

And so, it might be helpful at this point to talk about, as Tom's mentioned throughout these cases, talking about how to case manage cases with conduct or how to case manage clients as well on what would be successful in conduct claims.

TG: What is this common sense approach from the courts and how do we case marriage?

Well, it seems realistically, and of course, all cases will be different. Every case turns on its own facts. Every client is unique, of course, but it seems that first in paragraph 4.4 of the form E, unless you are actually running conduct, leave it blank.

CM: On that point, it's going to be really likely that clients will want to put in matters that for them are really important of their own treatment within a marriage, but that box, really, reserve it for the matters that really could be raised as conduct. Of course, not everything that goes into that box will eventually be a full conduct argument, but certainly that is the test that should be thought about before anything goes into that 4.4 of the form E.

TG: Number two, it seems that the first appointment for the vast majority of cases is going to be critical.

If at the first appointment you want to rely on conduct, that's when you raise it, and that's when you seek statements. On the other hand, if you want to try and knock conduct out, again, that's the place to raise it and try and get an order barring conduct being raised.

Three, well, what happens if conduct arises during the proceedings?

Well, in terms of litigation misconduct, it's made very, very clear in Tsvetkov that that can be dealt with at any final hearing. However, it seems that if you want to allege any other form of conduct that arises during the proceedings, one might need to apply back to court.

Mr. Justice Peel has said that, alleged conduct may rear its head after provision of forms E one instance is when a party wantonly, or at least allegedly wantonly dissipates monies in the lead of the trial. In that case, a party, if they seek to advance a conduct claim, they need to bring it before the court as soon as possible so that it can be case managed appropriately.

Sounds like if you don't raise the first appointment and it happens afterwards, you'll have to make an application to court to rely on it.

CM: Case management on this matter is really important, as is client management. It's a very difficult area to try and explain to clients what conduct really is and its financial impact, and that there might be other parts, including in their needs where that might be made up.

For example, if there has been serious sexual or domestic abuse and therapy was needed and therapy is continuing, that might come under needs. So there are ways that clients can certainly be managed in that.

In *N v J*, there's a very good paragraph, which I'll read now where Peel J says, *I occasionally have the sense that the parties who wish to rely on conduct do so in order to seek from the court validation and justification of their own sense of ill treatment at the hands of their partner during the marriage and or condemnation of the other party. In short, personal vindication. Whilst that may be understandable at a personal and human level, it is not the function of the court to make findings for the sake of it and simply to assuage one or other party's sense of grievance and injustice. I repeat misconduct must be directly relevant to the distribution of finances to be entertained.*

And that is something that we come across as barristers with trying to get clients to understand and it can be very difficult to, in their head, separate finances and other matters that have happened in their marriage and their lives, which isn't always possible, but certainly

client management on that is a big part of making sure that cases are case managed appropriately and are smoothly run going forwards.

TG: Thanks, Charlotte. And thank you for tuning into *FortyTwoTalks*. We hope you enjoyed the podcast.

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CM: Thank you very much.