CONDUCT

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> ***That a spouse's bad behaviour will be disregarded in the financial settlement is already a bitter pill for some clients to swallow, yet now they are under more pressure to come to the table and negotiate reasonably.***

In the context of the decision in *OG v AG* [2020], this article considers the extent to which bad behaviour, or conduct, is relevant to the parties' financial settlement and the extent to which divorcing spouses are required to put behind them the wrongs they might have suffered and engage in constructive negotiations rather than running up excessive legal costs.

Family lawyers are used to hearing about bad behaviour by one or both spouses and it is helpful to understand the dynamics of the relationship and how these affect the process and settlement negotiations.

Section 25(2)(g), Matrimonial Causes Act 1973 (MCA 1973) provides that the conduct of each of the parties to the marriage is one of the factors to which the court has to have particular regard when determining the parties' financial settlement, but only if that conduct is such that it would be inequitable to disregard it. It is a high bar. Clients who feel that they have suffered during the relationship are often upset to hear that, other than in extremely rare circumstances, the court is interested in neither their spouse's behaviour nor the reason for the divorce, that it does not matter which spouse petitions for divorce and that their spouse will not be penalised in the financial settlement for their behaviour.

This message is reinforced by the Divorce, Dissolution and Separation Act 2020 (DDSA 2020) which, inter alia, removes the requirement for one spouse to provide examples of the other's unreasonable behaviour in support of their statement that the marriage has broken down irretrievably. It is anticipated that DDSA 2020 will come into force during 2021.

Background

In *OG v AG*, during the course of a remote hearing, Mostyn J reviewed the circumstances in which the court will take conduct into account. The parties had been married for some 25 years and had two children, aged 25 and 10. They had a family business, referred to as X, which manufactured ducting. They also had a portfolio of properties. At the final hearing the total assets were found to be £16,371,669, made up of the X business (£10,707,643), pensions (£1,983,578) and other assets (£3,680,499).

The husband filed his Form A on 21 August 2018. On 27 February 2019, a company referred to as AB was incorporated in another country. Its business was to manufacture and distribute ducting. AB's shareholders were two of the husband's close friends and the husband's father. The husband denied being involved apart from acting as an agent of his father and having a power of attorney for him. The wife's case was that the husband was fully involved in AB, which he had set up as a rival business to compete unfairly and unlawfully against X.

The X business was valued by the single joint expert at a median figure of £13,865,000, of which its surplus assets were £9,920,000 and the trading element £3,945,000. After hearing arguments about the economic downturn caused by the Covid-19 pandemic and the anticipated disruption due to Brexit, Mostyn J applied a 10% discount on the trading element only. Counsel for the wife argued that a competitor discount of 40% of the entire value of X should be applied as a result of the husband setting up AB in direct competition with X. Mostyn J applied a discount of 30% for the competitor business on the trading element only of X (£1,183,500). Less costs of sale and taxes, the company was valued at £10,707,643.

The wife specifically pleaded a case of conduct against the husband under s25(2)(g), MCA 1973 in respect of his non-disclosure of some property transactions in Dubai and his setting up AB to compete against X. To reflect his conduct, she sought a departure from equality against him of one-sixth of the assets, some £2,728,612.

Four scenarios in which conduct can arise

At paras 34-39 of his judgment, Mostyn J set out the 'four distinct scenarios' in which conduct 'rears its head in financial remedy cases', namely:

- **'Gross and obvious personal misconduct' by one spouse against the other**, usually during the marriage, and only where there is a financial consequence to such behaviour. Mostyn J referred to the case in which the husband had stabbed his wife and caused such injury that she was unable to work, and the financial impact of the husband's behaviour was taken into account in the financial award (*Jones v Jones* [1975]). Mostyn J referred to the conjoined appeals of *Miller v Miller; McFarlane v McFarlane* [2006], in which it was confirmed that such conduct will only be taken into account in very rare circumstances. The wife in *Miller* had argued that the husband should not be permitted to rely on the fact that their marriage was short, his conduct being that he had left her for another woman, ostensibly without good reason. The House of Lords rejected this argument, holding that the husband's actions should not be taken into account in the financial award. In the words of Baroness Hale in *Miller; McFarlane* (para 145):

> *… it is simply not possible for any outsider to pick over the events of a marriage and decide who was the more to blame for what went wrong, save in the most obvious and gross cases.*

- **Add-back cases**, in which one spouse has 'wantonly and recklessly dissipated assets which would otherwise have formed part of the divisible matrimonial property' (para

36 of *OG v AG*). The dissipation must be clear and obvious and again these cases are rare.

- **Litigation misconduct**, which may result in a severe costs penalty, although will rarely affect the substantive award. The Court of Appeal decision in *Rothschild v De Souza* [2020] is one such case, in which Moylan LJ found (at para 65) that:

> *The general approach is that litigation conduct within the financial remedy proceedings will be reflected, if appropriate, in a costs order. However, there are cases in which the court has determined that one party's litigation conduct has been such that it should be taken into account when the court is determining its award.*

His concern was that a costs order (para 63):

> *… simply reallocates the remaining assets between the parties. It does not necessarily remedy the effect of there being less wealth to be distributed between the parties.*

He acknowledged that in some circumstances an order could be made that does not meet the badly behaved spouse's needs because otherwise that would be giving a licence to litigate unreasonably.

- **A party's conduct in failing to give full and frank disclosure**, which the court can take into account to draw inferences to assess the amount of the non-visible assets, rather than in how such assets should be distributed (see for example *NG v SG (appeal: non-disclosure)* [2011], also a decision of Mostyn J).

In *OG v AG*, Mostyn J found that the husband was the true beneficial owner of AB and in respect of the husband's conduct, he asked himself the following question (at para 70):

> *Beyond allowing for the competitor discount, which will fall solely on the husband in my distribution, and a heavy penalty in costs, which I will come to explain, should the court form a moral judgment and additionally sanction the husband?*

Emphasising that the financial remedy court is no longer a court of morals and conduct should only be taken into account where it is both inequitable to disregard and has a measurable financial impact, Mostyn J declined to grant the wife's request for an additional departure from equality to reflect the court's indignation at the way the husband had conducted himself during the litigation. It is, he explained, 'unprincipled for the court to stick a finger in the air and arbitrarily to fine a party for what it regards as immoral conduct' (para 72).

Running a conduct case

The decision in *RM v TM* [2020] is a helpful reminder of how to put forward a conduct argument. Robert Peel QC, sitting as a deputy High Court judge, referred to an earlier appeal hearing in that case when Moor J confirmed that conduct must not be pleaded merely as one of the general circumstances of the case in the narrative statement and must be specifically pleaded under s25(2)(g), MCA 1973, with each party having the opportunity to deal with the allegations in narrative evidence in reply.

Costs rules

Against the background of increasing pressure on the courts' resources, and the dearth of open negotiations despite the abolition of the *Calderbank* rules in financial remedy proceedings, are two significant developments in the costs rules set out in the Family Procedure Rules 2010 (FPR 2010).

With effect from 27 May 2019, para 4.4, FPR 2010, PD 28A, provides that when considering the conduct of the parties under r28.3(6)-(7), FPR 2010, in the context of whether to make an order for costs:

> *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.*

In addition, from 6 July 2020, r9.27(A), FPR 2010 imposes a duty on each party to serve and file an open proposal for settlement within 21 days of the financial dispute resolution appointment (FDR). Where there has been no FDR, the proposals must be served and filed either by such date as the court directs or not less than 42 days before the date of the final hearing. This obviously gives the parties much more time to negotiate than if proposals were only put forward seven or 14 days before the final hearing in accordance with r9.28, FPR 2010. If it is not going to be possible to comply with r9.27(A), then it would seem advisable to seek an extension to this period of time or draft directions for disclosure that take account of this rule change.

For practitioners and clients alike, these significant changes are entirely in keeping with the overriding objective at r1.1, FPR 2010. The fact that a spouse's bad behaviour will be disregarded in the financial settlement is already a bitter pill for some clients to swallow, yet now they are under more pressure to come to the table and negotiate reasonably or risk a costs order against them.

It can be difficult for a client to get into the frame of mind to negotiate in the run-up to a final hearing if they have been denied the opportunity for sensible discussions earlier on in the proceedings or an effective FDR. However, as *OG v AG* makes clear, this is no excuse. Hence the revised costs rules and the obligation to put forward a reasonable open offer at

the correct time should be borne in mind from the beginning of a case. Generally, the ideal is for the parties to consider alternative methods of dispute resolution but this of course needs both parties' cooperation.

The new provisions are helpful to those who wish to reach a settlement outside court and whose spouse might otherwise have refused to set out their position until just before the final hearing or to negotiate at all.

The new costs rules are also consistent with the Covid-19 case management checklist released by the president of the Family Division, Sir Andrew McFarlane, in June 2020 as an annex to his guidance titled *The Family Court and COVID-19: The Road Ahead* (see: www.legalease.co.uk/the-road-ahead). The president has issued subsequent guidance, *The Family Court and COVID 19: The Road Ahead 2021* (see: www.legalease.co.uk/the-road-ahead-2021), in which he confirmed that the 2020 guidance continues to apply and specifically referred again to the checklist attached to his previous guidance.

Costs in *OG v AG*

In *OG v AG*, the legal costs exceeded £1m. Mostyn J found that a large amount of that sum was caused by the husband's conduct, observing (at para 27):

> *I asked the husband to explain himself, and he did not really have an answer as to why he had behaved in the way that he did. I inferred that it was pure bloody-mindedness engendered by the toxic aftermath of the breakdown of the marriage and the confrontational personalities of each of the husband and wife.*

However, this did not obviate the wife's responsibility to negotiate reasonably. Mostyn J found that from 12 June 2020 she was able and expected to negotiate reasonably. He reduced the costs order against her husband by £50,000 to reflect her 'unreasonable and untenable open negotiation stance' in her open offer (para 93).

Mostyn J emphasised the importance of para 4.4, FPR 2010, PD 28A, saying (at para 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.*

Other recent cases that have dealt with the FPR 2010 cost rules are:

- ***RM v TM***, in which the parties spent just under £600,000 in legal costs, leaving them with about £5,000 of liquid assets each. Considering rr28.2, 28.3(6) and 28.3(7), FPR 2010, the judge made an order for costs against the husband that negated the effect of an earlier costs order against the wife, so that both parties ended up in the same position.

- ***JB v DB* [2020]**, in which Mostyn J made an order for costs against the husband of £15,000 for cancelling a meeting aimed at resolving the issues between the parties.
- ***MB v EB* [2019]**, which involved a struggling artist husband and a very wealthy wife. The husband's legal costs were around £650,000 and completely disproportionate. Considering r28.3, FPR 2010 and para 4.4, FPR 2010, PD 28A, Cohen J found that the wife's offer was 'light', but was very critical of the husband's failure to respond to it for 18 months, believing that had he responded earlier there would have been a quick resolution of the case. The judge declined to order that the wife should meet the husband's costs, instead capping her liability at £150,000 (an almost identical figure to the husband's costs at the time the wife had made her offer).

Conclusion

Although the court will ignore bad behaviour during the marriage in all but the most extreme cases, the new costs rules mean that it will not ignore bad behaviour during the court process, including a refusal to negotiate reasonably, and will not hesitate to impose penalties. More than ever, clients have to put aside their emotions when trying to sort out their financial settlement, and understandably many will need support in doing so.

Cases Referenced

Cases in **bold** have further reading - click to view related articles.

- JB v DB [2020] EWHC 2301 (Fam)
- Jones v Jones [1975] 2 All ER 12
- MB v EB [2019] EWHC 3676 (Fam)
- Miller v Miller; McFarlane v McFarlane [2006] UKHL 24
- NG v SG (Appeal: Non-Disclosure) [2011] EWHC 3270 (Fam)
- OG v AG [2020] EWFC 52
- RM v TM [2020] EWFC 41
- Rothschild v De Souza [2020] EWCA Civ 1215

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