In Practice

Conducting Conduct Cases, Financial Remedies and FPR 2010

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Raising, or responding to, allegations of conduct, managing their use and assessing their financial worth is a tricky business: a truism in financial remedy proceedings, whether as part of the substantive claim or within an application for costs. This article looks critically at the pressure on clients not to pursue conduct allegations and, if conduct is a live issue, suggests good practice in accordance with the Family Procedure Rules 2010 ('FPR 2010').

Conduct: Don't Raise it!

It is fair to say that the bias in divorce and financial remedy proceedings is against pursuing allegations of bad conduct. We know as practitioners that the guidance is clear: allegations must possess that inherent 'gulp factor': subjectively, for the client, that may be a given: objectively, for the court, the allegations may not even force a hiccough! Nevertheless, it is easy to understand the client's frustrations at being advised that the outrageous behaviour of the other party may not assist them in their claim and may even cost them dearly. This is particularly so given that the broad legal process on divorce, dissolution and financial remedy proceedings is infected with 'pro-conduct' terminology and numerous opportunities for the wronged party to express their opinion on the behaviour of the other.

Separation itself is predicated on an omission or an act of commission by one against the other. Divorce is most commonly pursued based on one party's unreasonable behaviour. In 2009 of all decrees awarded to one partner, 67 % were awarded to the wife. In over half of those cases, the husband's behaviour was the fact proven. Of the divorces granted to the husband, the most common fact proven was the wife's behaviour (Divorces in England and Wales 2009 (Office for National Statistics, 17 February 2011)). The petition requires description as to fault, particularisation of the conduct relied upon and identification of causality. The acknowledgment of service is drafted in fighting terms: 'do you intend to defend the case' or, in the alternative, 'do you admit the adultery'? If the dispute escalates and injunction proceedings are instituted, significant harm under s 33(7) of the Family Law Act 1996 must be attributable to the conduct of the respondent. The discretionary exercise also requires consideration of the parties' conduct 'in relation to each other and otherwise' (s 33(6) of the 1996 Act).

The client who is handed Form E to complete is offered an inviting box in which to identify the nature of the behaviour or conduct relied upon. If he is also handed a sheet of the s 25(2) MCA 1973 factors to study, he will see that conduct is one of only eight factors for the court's consideration. Where one party is alleged to have wasted or frittered away assets by extravagant living or reckless speculation, the claim may require that the 'waster' does not receive as great a share of what is left 'as he would have been entitled to if he had behaved reasonably' (*Martin v Martin* [1976] Fam 335). If an application is made pursuant to s 37 of the MCA 1973, an intention to defeat the claim must be demonstrated on the evidence. Finally, on the battlefield of costs, the only basis for making a costs order is 'the conduct of a party in relation to the proceedings (whether before or during them)' (Partt 28.3 FPR 2010). Therefore, however forcefully lawyers and judges seek to dissuade conduct-litigation, the documents, forms, statutes and rules are littered with references to its utility. It is an unfortunate quandary.

Pursuing or Responding to Allegations of Conduct

Early Identification

Faced with a conduct case, what is good practice in light of the FPR 2010? Early identification of the issue of conduct and the specifics of the allegations is critical in furthering the overriding objective (Part 1.4(b) and (c) FPR 2010). The pre-action protocol may provide little assistance given that allegations of conduct, if disputed in nature or as to the effect on financial division, are often a bar to settlement (Practice Direction 9A ('PD'). Nevertheless, the focus on proportionality and the need to identify disputed and potentially costly issues as early as possible, remains good guidance.

However, do not be fooled into thinking that significant factual disputes between parties renders forms of Alternative Dispute Resolution (including the FDR process) impossible and impractical. Recall the words of Carnwath LJ in the cohabitee case of *Hannan v Maxton* [2009] EWCA Civ 773, [2010] 1 FLR 27, at para [18]:

> 'I would not like it to be thought that ADR is only suitable for cases where the facts are not substantially in dispute. Indeed, experience shows that it is often in those cases where the facts are most hotly disputed that ADR can be useful, because it focuses attention of the parties on the commercial reality of the litigation and the costs involved, rather than on the very uncertain question of which of them will ultimately be believed by the judge on the bare factual dispute.'

The Financial Statement

The FPR 2010 provides an advanced opportunity to attach to Form E evidence in support of a (conduct) case before the first court appointment: 'The financial statement must be accompanied by the following documents only – (ii) any other documents necessary to explain or clarify any of the information contained in the statement' (Part 9.14(2)(b)(ii) FPR 2010). PD 22A [9.1] provides guidance on the manner of exhibiting documentary evidence (in support of the Form E). Given that the court will consider how to case-manage any conduct allegations at the FDA, early identification highlights the issue, provides direction to the judge and may generate concessions from the other side. The essence of the factual dispute will also indicate whether an FDR is a sensible use of the client's money.

Schedules and Statements

The statement of issues can further highlight the conduct dispute and should be used to summarise the conduct arguments and their potential impact on financial division (r 9.14(5)(a) FPR 2010). In any Children Act 1989 case in which allegations of violent or abusive conduct are made the *Scott* schedule offers particulars of each allegation, dates and references to any evidence in support. This exercise is critical if handled with care and proportionality and the opportunity to undertake this is provided for within the new procedural rules. Part 9.15(3)(c) and (d) FPR 2010 state that at the FDA the court must give directions where appropriate about the evidence to be adduced by each party and any further chronologies or schedules to be filed. These provisions arguably include the *Scott* schedule, which can attach to any narrative statements, if required. Beware the over-pleaded *Scott* schedule. The tendency to plead each and every allegation raised by the client is a dangerous trap. Consider carefully which allegations are the more potent, which have the best evidential basis and which have had a financial effect on the client, such that the conduct, if proved, may impact on the ultimate financial order.

If responding to conduct allegations, use the court's case management powers positively in your favour. The court's duty to actively manage cases includes considering whether the likely benefits of taking a particular step justify the cost of taking it (Part 1.4(2)(h) FPR 2010). General powers of case management (Part 4.1(3) FPR 2010) permit the court to: (a) exclude an issue from consideration; and (b) take any other step or make any other order for the purpose of managing the case and furthering the overriding objective. An application can be made, therefore, at an early stage to prevent a party relying on conduct allegations if there is a good argument on the papers that the conduct

pleaded is not of sufficient gravity, without evidential basis or if it would not be given expression in any final award. Arguably, conduct should have a direct financial effect on the wronged party or the financial position at trial (*H v H (Financial Relief: Attempted Murder as Conduct)* [2005] EWHC 2911 (Fam), [2006] 1 FLR 990, at para [45] per Coleridge J). For those raising allegations of conduct, remember the two lessons of Mostyn J from *FZ v SZ and Others (Ancillary Relief: Conduct: Valuations)* [2010] EWHC 1630, [2011] 1 FLR 64: the first is that the initial move in a divorce can colour the whole of the rest of the case; the second is that every action tends to give rise to an equal and opposite reaction.

Directions

As can be seen, whether raising or responding to conduct allegations, preparation of the case at an early stage is underlined by the FPR 2010. PD 22A (4.1(c)) also provides that parties prior to the FDA should, if possible, exchange and file with the court details of any directions that they seek. This provision is useful in indicating the extent of any further witness, affidavit or other evidence required in support of, or in response to, allegations of conduct. The normal course is likely to remain that the parties will be directed to file sequential narrative statements. *The Practice Direction: Residence and Contact Orders: Domestic Violence and Harm* [2009] 2 FLR 1400 (14 January 2009, albeit limited to Children Act 1989 cases, provides good guidance as to general principles and potential directions in cases involving significant factual disputes.

Trial

Assuming that an FDR is deemed inappropriate (Part 9.15(5) FPR 2010), the matter will proceed to a final hearing. Consideration should be given at the appropriate stage in the directions process as to how the allegations should be dealt with by the court. The court can direct a separate hearing on any issue in dispute, effectively setting up a stand-alone fact-finding hearing. Conversely, the final hearing time estimate will need to be carefully considered in order to provide sufficient time for the allegations to be assessed on the evidence. The applicable standard or proof is of course the balance of probabilities and it is a binary decision of the court on each allegation raised: either it is proved or it is not. In cases involving allegations of conduct it is critical for the court to retain control over the provision of evidence. The FPR 2010 highlights that:

> Part 22.1(1) The court may control the evidence by giving directions as to –
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> (a) the issues on which it requires evidence;
> (b) the nature of the evidence which it requires to decide those issues; and
> (c) the way in which the evidence is to be placed before the court.

Using these powers positively, the court can limit the evidence at the final hearing and further the overriding objective of saving expense and allotting to the case an appropriate share of the court's resources (Pt 1.1 (d) and (e) FPR 2010).

A witness must attend the final hearing for cross-examination if a party wishes to rely on the witness statement filed unless the statement is submitted as hearsay evidence. The extent of examination in chief is now expressly limited to amplifying a witness statement or giving evidence in relation to new matters arising and permission is required from the court to ask further questions (Part 22.6 (3) FPR 2010). In an attempt to reduce the disputed facts in a case, a notice to admit facts can be served (Part 22.15 FPR 2010). The intention to rely on hearsay evidence at a final hearing must be indicated with reasons in support and principally at the time of service of the witness statement relied upon (Part 23.2 and 23.3 FPR 2010).

Costs

Finally, conduct allegations can provide fertile ground for applications for costs. The fact or manner in which a particular issue is raised or pursued is relevant conduct under Part 28.3 FPR 2010 and may justify the making of an issue-based costs order (M v M (Costs) [2006] EWCA Civ 917, [2010] 1 FLR 256). If it can be shown that a party unsuccessfully pursued allegations of conduct or pursued those allegations in a disproportionate or unreasonable manner, good grounds exist for applying for an order for costs 'relating . . . to a distinct part of [the]

proceedings' (Civil Procedure Rules Part 44.3(6)–(9), which are incorporated into the FPR 2010 by Part 28.3(3) as to the issue of the quantum of any costs order).

In *K L v K (Jud)* (on appeal *K v L* [2010] EWCA Civ 125), the husband's conduct in sexually abusing members of the wife's family represented 'undoubtedly the grossest breach of trust' (Moylan J at para [62]). On the issue of costs, the husband's approach to the financial remedy litigation also warranted an order for costs against him. Despite his convictions for 15 counts of sexually assaulting the wife's grandchildren within the criminal case, he resisted further allegations of conduct raised by the wife within the financial remedy proceedings. Moylan J made considered findings against the husband at trial, which extended over some seven days. In the final analysis on the issue of costs, which was unsuccessfully appealed, the husband was deemed to bear 'a far greater responsibility for the continuation of the proceedings to their ultimate determination . . . than the wife. He contested a number of the allegations raised by the wife when, in my view, it was not reasonable for him to do so' (see Moylan J, *L v K (Jud Re: Costs)* [2009] EWHC 2213, at para [6]).

Conclusion

Conducting conduct cases can be a risky business. The client's determination to pursue allegations must be weighed against the court's powers to control the case before it. Ultimately, although a day in court may be achieved even with limited results, it can cost the client dearly, emotionally and financially.