Neutral Citation Number [2024] EWFC 113

Case No: 1715-6885-9130-1003

IN THE FAMILY COURT
SITTING AT THE ROYAL COURTS OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24th May 2024

Before :

MR. NICHOLAS ALLEN KC

(Sitting as a Deputy High Court Judge)

Between:

NA

Applicant

- and -

LA

Respondent

Miss Deborah Bangay KC (instructed by Rayden Solicitors) for the Applicant

Miss Sarah Phipps KC (instructed by Osborne Clarke) for the Respondent

Hearing date:

23rd May 2024

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Approved Judgment

This judgment was handed down remotely at 10.30 am on 24th May 2024 by circulation to the parties or their representatives by email and by release to The National Archives.

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Nicholas Allen KC:

1) FPR 2010 Part 3 has historically been underused. This is strange given that (i) r1.4(1) provides that the court *"must further the overriding objective by actively managing cases"*; and (ii) r1.4(2)(f) states that active case management includes *"encouraging the parties to use a non-court dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure."*

2) Important revisions to FPR Part 3 and Part 28 came into effect on 29th April 2024.

3) Prior to their revision (and as Mostyn J observed in *Mann v Mann* [2014] 2 FLR 928 in relation to an earlier iteration of the rule), r3.4(1)(b) permitted the court to adjourn for non-court dispute resolution ('NCDR') only *"where the parties agree"*.

4) That proviso has now been deleted. r3.4(1A)(b) provides that where *"the timetabling of proceedings allows sufficient time for these steps to be taken"*, the court should *"encourage parties"* to *"undertake non-court dispute resolution"*. The agreement of the parties to an adjournment for that purpose is no longer required.

5) The court may give directions about the matters specified in r3.4(1A) on the application of a party or of its own initiative.

6) The accompanying PD3A has also been amended with effect from 29th April 2024. It now states *inter alia*:

    a. at 10A, that while the FPR 2010 does not give the court the power to require parties to attend NCDR, *"the court does have a duty to consider, at every stage in the proceedings, whether non-court dispute resolution is appropriate"*;
    b. at 10B, that the court *"will want to know the parties' views on using non-court dispute resolution as a way of resolving matters"*; and
    c. at 10D, that the court also has general powers to adjourn proceedings (r4.1) which could be exercised to encourage the parties to attend NCDR.

7) In financial remedies cases, the power to *"encourage"* at r3.4(1A) is now backed by an amendment to the costs rules. FPR r28.3 has been amended by the addition of a new sub-rule (7)(aa)(ii) which expressly makes any failure by a party, without good reason, to attend NCDR a reason to depart from the general starting point that there should be no order as to costs. This point is emphasised by para 10E of PD3A which states that *"the court may take the parties' conduct in relation to attending non-court dispute resolution into account when considering whether to make an order for costs in relation to the proceedings"*.

8) In *Churchill v Merthyr Tydfil CBC* [2023] EWCA Civ 1416 the Court of Appeal sidestepped its decision in *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 and determined that it is permissible in some circumstances for the court to order that the parties attempt to resolve their dispute via NCDR prior to seeking a judicial determination and/or stay proceedings to allow for NCDR to take place, although such a power must be exercised in a way which does not impinge on the Article 6 right to a fair hearing within a reasonable time by an independent tribunal and must be proportionate to achieving the legitimate aim of settling the dispute fairly,

quickly and at reasonable cost. The Court of Appeal did not set out any guidance as to how or at what stage in the litigation the court should decide to make such an order, with Sir Geoffrey Vos MR commenting that *"it would be undesirable to provide a checklist or a score sheet for judges to operate"* although some potentially relevant considerations were highlighted at [61] to [63].

9) In *X v Y (Financial Remedy: Non-Court Dispute Resolution)* [2024] EWHC 538, Gwynneth Knowles J gave and published a ruling so as to ensure that those involved in family proceedings (at [4]) *"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",* and to signal that *"at all stages of the proceedings, the court will be active in considering whether non-court dispute resolution is suitable"* and the changes to FPR Part 3 "*will give an added impetus to the court's duty in this regard"*.

10) Gwynneth Knowles J further stated that to assume that the decision in *Churchill v Merthyr Tydfil CBC* was of limited relevance to family proceedings (at [15]) *"is unwise"* as *"[t]he active case management powers of the CPR mirror the active case management powers in the FPR almost word for word and both the civil and the family court have a long-established right to control their own processes. The settling of cases quickly supports the accessibility, fairness and efficiency of the civil, and I emphasise, the family justice system."* At [16] she rightly stated that litigation *"is so often corrosive of trust and scars those who may need to collaborate and co-operate in future to parent children"* and that *"family resources should not be expended to the betterment of lawyers, however able they are, when, with a proper appreciation of its benefits, the parties' disputes can and should be resolved via non-court dispute resolution."*

11) On 23rd May 2024 I heard the return date of two orders made on 14th May 2024 namely:

    a. *ex parte* non-molestation and occupation orders under the FLA 1996 made by Hannah Markham KC (sitting as a Deputy High Court Judge) which *inter alia* required H to leave the family home within six hours of the order being personally served on him or of him being made aware of the terms of the order (and H left that evening albeit W permitted him to return to the property three days later on 17th May 2024 after a without prejudice meeting had taken place between H and W's solicitors that afternoon). The order also prevented H from having any contact with the parties' three children except as may be agreed or ordered. It was also agreed on 17th May 2024 that this be discharged in its entirety and there would be no restrictions in place in relation to contact; and

    b. an order under r20.2(1)(c) which permits the court to make an interim order for *"the detention, custody or preservation of relevant property"* made by Peel J in respect of the parties' two London properties and which were made after the giving of short and informal notice (of about 28 minutes as H was telephoned at 2.02 pm before a hearing expected to commence at 2.30 pm but which in fact started at 3 pm). This was heard by Peel J as Ms. Markham KC took the view that this application should be heard by a Judge of the Family Division rather than a Deputy. It was explained by Miss Bangay to Peel J that W had not sought a freezing order under MCA 1973 s37 or SCA 1981 s37 as *"I can't show any*

intention to dissipate any assets at the moment" (I take this from the attendance note of the hearing to which I refer further below).

12) On the same date (in fact I believe whilst at court) W's solicitors filed her divorce petition and Form A via the CCD Portal. There had been no previous correspondence with H. On 22nd May 2024 W filed an application for MPS/IPPs and for a LSPO. This application is yet to be listed for hearing.

13) In her Position Statement filed on H's behalf Miss Phipps stated that not only had H been given no notice that W intended to proceed with a divorce, but he also did not even know that the marriage was over and thus W's actions last Tuesday "*blindsided him"* and *"[h]e was floored by W's actions and, understandably, very distressed."*

14) I have read what I believe may be an approved note of the judgment of Ms. Markham KC and I have read the solicitors' unapproved attendance note of the hearing before Peel J. During the course of the latter hearing (and quoting from the attendance note) Peel J raised the possibility of NCDR. He stated "*dispute resolution are the buzz words at the moment"* to which Miss Bangay replied "*disclosure is the buzz word for this case. My client is in near ignorance, other than the London properties, as to the extent of her husband's wealth and resources."* Peel J responded *"I know it is a culture shift, but all lawyers and judges must get into our heads that it is not simply a case of disclosure before we contemplate anything. Non court dispute resolution must be considered which can embrace disclosure ..."*. In reply Miss Bangay said "*I agree with the sentiment. There are steps for the court to take in this particular case before we can enter into that"* to which Peel J responded "*[s]ee where you go but please don't lose sight of the new dispute resolution requirements"*.

15) I agree with all of Peel J's observations. There is no need for financial disclosure to be given prior to parties engaging in NCDR. NCDR will almost invariably provide for such disclosure to be given as part of the process. Many forms of NCDR also have 'teeth' if there is (say) a reluctant discloser. For example if parties enter the IFLA financial arbitration and a party disobeys the arbitrator's order then pursuant to the Arbitration Act 1996 s42(1) (headed *"Enforcement of peremptory orders of tribunal"*), unless otherwise agreed by the parties, the court may make an order requiring a party to comply with a peremptory order made by the tribunal. Additional court powers exercisable in support of arbitral proceedings are set out in s44 of the same Act.

16) The return date was listed before me at 10.30 am with a time-estimate of two hours. The parties and their advisors spent (at their request) almost the entire day outside of court. At 4.30 pm I was advised by Miss Bangay that there were three moving parts all of which had to be agreed and that although the first two had been agreed the third was still *"under discussion"*. Miss Phipps' response was that she thought the remaining issues were drafting issues that I could determine and I should therefore see the draft orders. She anticipated, however, that Miss Bangay would disagree with this approach which she did.

17) At 4.50 pm I was provided with two agreed draft orders:

    a. an order under FLA 1996 Part IV which confirmed (as had been earlier advertised) that W did not seek the continuation of the occupation order and

where the non-molestation orders were replaced by undertakings in like terms to remain in force until the determination of W's financial claims or further order; and

b. an order compromising W's as yet unissued MPS/IPP and LSPO applications by H agreeing to make (i) monthly payments to W at a rate of £29,500 pm (and with the financial *status quo* otherwise largely maintained); and (ii) payment to W's solicitors of £185,000 (including VAT) in respect of W's costs to date and those estimated to the conclusion of the First Appointment (with a recital to the order stating that W's costs to date are £125,000 and to First Appointment are estimated to be a further £60,000).

18) At 5 pm I was provided with a third agreed draft order which provided for the transfer of the family home into W's sole name with the present security (i.e. the preservation orders and the Land Registry restrictions) thereafter to be discharged/removed.

19) Having approved the three orders I asked counsel for their views on NCDR given what Peel J had said on 14th May 2024. Miss Bangay said that she considered that a First Appointment would be required and thereafter there was the possibility of a private FDR appointment. Miss Phipps stated that H was open to NCDR.

20) I then raised with counsel that I was considering staying the proceedings on my own initiative. As r3.4(6) states that *"[w]here the court proposes to exercise its powers of its own initiative, the procedure set out in rule 4.3(2) to (6) applies"* and as r4.3(2) states *"... where the court proposes to make an order of its own initiative (a) it may give any person likely to be affected by the order an opportunity to make representations ..."* I was required to give both parties such an opportunity before I did so.

21) In response Miss Bangay repeated the need for disclosure as she had done to Peel J on 14th May 2024. She described my suggestion of a stay as being premature as W was *"semi-blind"* in relation to the parties' assets and that until transfer of the family home to her she had no assets in her own name. She submitted that sworn disclosure from H was required so that she could advise W as to the shape of the likely outcome to the case and such an order would be seen by H as an *"open goal"* to frustrate settlement.

22) Miss Phipps endorsed my suggestion of a stay to enable the parties to attempt settlement.

23) When I said to Miss Bangay that I did not agree with her view she asked (as of course she was entitled to do) that I deliver a brief judgment and the terms of the stay. I outlined the directions that I intended to make (see paragraph 32 below) and said that my reasons would follow in writing.

24) At least at this stage of the case the facts do not appear to be unusual. Further notwithstanding that it is seemingly a so-called 'big money' case nor does it appear that it may be unduly legally complex. On W's behalf it was averred by Miss Bangay in her position statement that (i) the family home in London is worth £8m (and is mortgage-free); (ii) there is a second London property purchased for £6.5m and which is currently undergoing extensive renovations with a budgeted costs of a further £6.5m (and which is mortgage-free); (iii) there are other properties in this jurisdiction which OCEs state

are held in the names of H's family (albeit it is said may be beneficially owned by H); (iv) H is due to complete the purchase of a new build waterside apartment in Athens at a cost of €3m; (v) H has extensive non-UK based business interests; and (vi) H's father is reputed to be a billionaire with extensive interests and H is understood to have interests in the family businesses and holds significant funds. By contrast W is said to have been a *"conventional housewife"*.

25) It may be that some or all of this presentation will be disputed on H's behalf. However, there is nothing in this description that suggests the case will be unsuitable for NCDR.

26) The court has a duty to consider NCDR. Under r3.3(1) the court must consider, at every stage in proceedings, whether NCDR is appropriate. Under r3.3(2) in considering whether NCDR is appropriate the court must take into account (i) whether a family mediation information and assessment meeting ('MIAM') took place; (ii) whether a valid MIAM exemption was claimed; and (iii) whether the parties attempted mediation or another form of NCDR and the outcome of that process. The court is also under the obligations in respect of active case management I have set out above.

27) Further as Gwynneth Knowles J observed in *X v Y (Financial Remedy: Non-Court Dispute Resolution)* those involved in family proceedings (at [4]) must *"understand the court's expectation that a serious effort must be made to resolve their differences before they issue court proceedings"* and *"at all stages of the proceedings, the court will be active in considering whether non-court dispute resolution is suitable"*. As she further observed the recent changes to Part 3 "*will give an added impetus to the court's duty in this regard"*.

28) No MIAM has taken place in this case. No prior notice was given H of the issue by W both of her divorce order application or Form A. The Form A claimed that "*the application must be made urgently because … Any delay caused by attending a MIAM would cause irretrievable problems in dealing with the dispute (including the irretrievable loss of significant evidence)".* This reflects the MIAM exemption at r3.8(1)(c)(ii) (ae). The logic behind this was (I assume) that after the non-molestation and occupation orders had been made on the morning of 14th May 2024 the further application for a preservation order was being made to the court on the afternoon of the same day and it was urgent that such orders be made in respect of the two London properties.

29) From 29th April 2024 amended wording to r3.10(1) provides that if a MIAM exemption has been claimed, the court will inquire into whether the exemption (a) was not validly claimed; or (b) was validly claimed but is no longer applicable. I do not inquire whether the exception was validly claimed in this case. I do not need to do so as even if it *was* validly claimed at the time (and of course only an applicant is required to attend a MIAM with a respondent expected to do so), given the terms of the preservation order that I have made today this MIAM exemption is no longer appliable.

30) I further observe that in *Re K* [2022] 2 FLR 1064 Sir Geoffrey Vos MR who delivered the judgment of the court stated (in the context of an application for a child arrangements order under CA 1989) at [35] that *"[i]t is a matter of concern that a party can avoid the statutory MIAM requirement by simply asserting that a case is urgent and they need a without notice hearing."* He also observed in the same paragraph that

"[f]or the statutory MIAM requirement to be effective, it must be enforced".

31) In mv view and in compliance with my duties as set out above, 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.

32) Pursuant to r3.4(2) I therefore make the following directions:

    a. the financial proceedings in Form A dated 14th May 2024 shall be stayed with immediate effect;
    b. the Form C is not to be processed and no First Appointment is to be listed at the present time;
    c. pursuant to r3.4(3) the parties must tell the court (by way of a joint letter sent by email to my ejudiciary address) by 4 pm on 4th July 2024 (i) what engagement (if any) there has been with NCDR; (ii) whether any of the issues in the proceedings have been resolved; and (iii) in light of the foregoing their respective proposals for the way forward; and
    d. upon receipt of this letter I shall decide the appropriate way forward.

33) The parties are reminded that pursuant to r3.4(4) if they do not tell the court if any of the issues have been resolved as directed, the court will give such further directions as to the management of the case as it considers appropriate.

34) I observe that there must be a question mark over whether it was appropriate for this case to have been the subject of applications made to the urgent applications judge at the High Court rather than (say) to a judge sitting at the Central Family Court. The mere fact that parties may live in (and/or own) valuable London properties does not of itself begin to justify an application in relation to the occupation thereof being made in the High Court.

35) I also record that the costs in this case are already considerable (at least on W's side as H did not instruct solicitors until two days ago). I have already noted that W's costs to date are £125,000 and her estimated costs upto and including the First Appointment are £60,000. Both parties must keep the issue of costs and the proportionality of incurring the same very much at the forefront of their minds. I shall certainly do so when considering the appropriate way forward for this case.

36) That is my judgment.

NICHOLAS ALLEN KC

24th May 2024