

## **FINANCIAL DISPUTE RESOLUTION**

**By Joanna Cross**

### **Family Proceedings Rules 1991 as amended by the Family Proceedings (Amendment No.2) Rules 1999**

#### **Rule 2.61E The FDR appointment**

- (1) The FDR appointment must be treated as a meeting held for the purpose of discussion and negotiation and paragraphs (2) to (9) apply.
- (2) The District Judge or Judge hearing the FDR appointment must have no further involvement with the application other than to conduct any further FDR appointment or to make a consent order or a further directions' order.
- (3) Not later than 7 days before the FDR appointment, the applicant must file with the court details of all offers and proposals and responses to them.
- (4) Paragraph (3) includes any offers, proposals or responses made wholly or partly without prejudice but paragraph (3) does not make any material admissible as evidence if but for that paragraph it would not be admissible.
- (5) At the conclusion of the FDR appointment, any documents filed under paragraph (3) and any filed documents referring to them must at the request of the party who filed them be returned to him and not retained on the court file.
- (6) Parties attending the FDR appointment must use their best endeavours to reach agreement on the matters in issue between them.
- (7) The FDR appointment may be adjourned from time to time.

- (8) At the conclusion of the FDR appointment the court may make an appropriate consent order but otherwise must give directions for the future course of proceedings, including, where appropriate, the filing of evidence and fixing a final hearing date.
- (9) Both parties must personally attend the FDR appointment unless the court orders otherwise.

### **Matrimonial Property and Finance by Peter Duckworth**

#### FINANCIAL DISPUTE RESOLUTION (FDR)

B1[22] The FDR appointment is a meeting for the purpose of discussion and negotiation. The parties must use their “best endeavours” not merely to settle but also to narrow the issues. This implies first that the court should penalise in costs any party who comes to the appointment with the intention of sabotaging it and, secondly, that if meaningful discussions ensue but no settlement is reached, the court should reduce into writing and place on record what, if anything, the parties have been able to agree.

#### **1. Xydhias v Xydhias [1999] 1 FLR 683.**

CA. 21 December 1998.

Pre-Protocol case.

Facts: Draft order agreed by Counsel. Hearing vacated. H withdrew consent as W did not agree a variation of the timetable for payment of a lump sum.

DJ found agreement reached (bar minor issues) and made order in terms of the draft.

H appealed.:

- no agreement
- invalid agreement - failing to comply with Law of Property (Miscellaneous Provisions) Act 1989 Section 2.
- negotiations privileged and evidence of negotiations should not have been admitted.

CA - Stuart Smith, Thorpe, Mummery LJJ.

An agreement to compromise an ancillary relief application was not a contract enforceable in law but an agreement as to the terms which the parties considered fair with the aim of avoiding the expense and stress of a contested hearing. Such an agreement did not therefore need to comply with the Law of Property (Miscellaneous Provisions) Act 1989 section 2. The Court always had a discretion on whether to make the order in the terms agreed.

The purpose of negotiation was therefore not to determine liability but to reduce the length and expense of the legal process.

If there were a dispute on whether accord had been reached as to such an abbreviation then the court had a discretion in determining whether such an accord had been reached. Heads of agreement signed by the parties or a clear exchange of solicitors' letters would establish consensus and in any such dispute the "without prejudice" record had to be admitted to determine the issue.

Per curiam: Specialist practitioners should distinguish between the two stages of negotiation; the first being the heads of agreement signed by counsel and clients, and the second being the draft court order.

2. **Rose v Rose [2002] 1 FLR 978** CA: Lord Phillips, Thorpe and Buxton LJ

FDR before Bennett J. Leading and junior Counsel for each party. Written material and oral submissions before the judge. He withdrew for 20 minutes and, on returning, valued the assets of the parties and suggested a settlement figure of £3.6m. He then adjourned the matter for one hour for negotiations to take place.

H accepted W's proposed figure of £3.5m as a result of this negotiation.

There was no agreement in writing, but the judge was informed and he approved the agreement.

See judgment of Thorpe LJ at page 982:

*[11] The judge was summoned and the court resumed at 3.40 pm. Miss Baron said:*

*"I have to tell your Lordship that we have come to terms. The terms are that my client will receive a clean clear package which is £3.5m and it will be monies that are paid to her and there will be no trust. She will receive as well as her costs paid in full in an agreed sum of £149,396.*

*[12] There followed the explanation that the precise sum to be paid by the husband in order to bring the wife's assets up to £3.5m net depended upon ascertaining the value of the portfolio as at that date, together with the amount to be allowed for Capital Gains Tax. In conclusion, Miss Baron said that she would draw up an order and agree it with Mr. Singleton. The judge then turned to Mr. Singleton, who effectively offered brief assent without correction. day's proceedings concluded with this exchange:*

*"Mr. Singleton: Unless there is anything I can add?"*

*Bennett J: I am very happy to record it.*

*Miss Baron: My Lord, we are very grateful for the time and trouble.*

*Bennett J: Congratulations to you all.*

*Miss Baron: Thank you very much indeed my Lord. Is your Lordship available in the next week for the order to be approved?*

*Bennett J: Yes certainly.*

*Miss Baron: Thank you very much.*

*Bennett J: Not at all.”*

*[13] By that time it was approximately 4 pm on a Friday in vacation. It is hardly surprising that the detailed drafting or indeed any written reduction of the relatively simple terms explained to the judge was not attempted.*

Counsel subsequently prepared a draft order.

H then withdrew from the agreement, claiming duress at the time of the FDR

W applied for H to show cause why the agreement made at FDR should not be made into an order.

The matter came before Coleridge J. His interpretation of events is set out in Thorpe LJ’s Judgment at page 984. At paras. 19,25 and 27:

*“The position, as I see the law, is set out in my remarks made on that day. It is, I believe, quite clear. What took place partly in front of the judge at the FDR was a familiar type of conventional negotiation which led to there being broad terms agreed between the parties. But no more than that. In my judgment, it is quite wrong to suggest that the oral announcement of terms to the judge at the conclusion of this hybrid-type of hearing (about which I shall say a little more in a moment) amounted to other than what it was, namely a broad agreement on the terms at which the parties would settle. To say that the judge gave his “approval” to those terms, whatever that means and*

*whatever may or may not appear in junior counsel's skeleton, I think is investing the exercise that Bennett J. undertook on this particular occasion with a great deal more status than it deserves. The judge had read the papers and had expressed a view. He was told what the terms were and he, as it were, gave his blessing. No doubt, if he had thought the terms were wholly inappropriate, he would have also said so. It was obvious that he would broadly speaking, bless the terms because they were very close to the terms which he suggested himself. Therefore, it would have been an extraordinary state of affairs if he had then not done other than congratulate the parties for having come to within less than a percentage point or two of what he had himself suggested. But he was certainly not approving the order in the technical sense because there was no order for him to approve."*

*"That is all that was achieved between the parties on this particular date. Thereafter the matter had to be reduced to an order. The order then had to be lodged, and the court, at that stage, whether it was then in front of Bennett J, or in front of another judge, I know not, would probably have made the order if he then approved it. But it is, in my judgment, a long step between what was achieved on 3 August and a final order. Therefore, any reference to decided cases where final orders have been made and later changed seems to me to be not in point so far as this application is concerned."*

*"It is called a hearing. That is a complete misnomer. It is not really a hearing at all. The reality is that it is merely a meeting of the parties on a totally without prejudice basis at which the judge, using his experience and no doubt his authority, facilitates the negotiation and expresses, more often than not, a preliminary but inevitably superficial view about the possible outcome to the case."*

*"It is totally understandable that litigants should feel under enormous pressure at these FDRs, first, to settle, and, secondly, to take very great note of what the judge says. To some extent that is the purpose. I have no doubt at all*

*that this was such a case. I have read the transcript. Bennett J, doing the best he could, expressed himself on the various contentious issues in clear terms and, no doubt, the husband felt that he had little option but to take a great deal of notice of what the judge said on that occasion.”*

*“But occasionally and inevitably there will be times when, I believe, parties will say that they have been unfairly overborne by a combination of the occasion, the judicial indication and the heavy legal advice. That is not, in any sense, a criticism of this very useful system and certainly not a criticism of this experienced judge. But I think a little care does need to be taken that parties, when they reach agreements at these FDRs, are doing so on a totally voluntary basis. A breathing space or a period to reflect might sometimes be a wise precaution before final conclusions.”*

Thorpe LJ expresses his views at page 987:

*[28] Now in my opinion whether the FDR appointment is designated a hearing or a meeting is of purely semantic significance. Certainly it is a hearing in the sense that the attendance of the parties is obligatory (r 2.61E(9)) and they are obliged in attending to use their best endeavours to reach agreement on the matters in issue between them (r.2.61E(6)). The appointment is presided over and controlled by the judge. At its conclusion an order results. Only three categories of order are possible:*

- (i) an order adjourning the appointment;*
- (ii) a consent order disposing of the case; or,*
- (iii) directions to progress the case to its final hearing.*

*[29] I am in entire agreement with Coleridge J. that the FDR hearing may take many forms dependent on the style and practice of the individual judge. The vast majority of FDR appointments will be conducted by district judges sitting in the Principal Registry of the Family Division (PRFD) or at any one*

*of the many courts throughout the jurisdiction where contested ancillary relief cases are listed. The duration of the FDR will depend to a large measure upon the scale of the case and the complexity of the issues. Generally a comparatively brief time estimate will be adopted and a centre such as the PRFD will dispose of many FDR hearings in an average working day. Only a tiny proportion of ancillary relief applications will be listed before a judge of the Family Division at the FDR stage. Of the 17 judges of the Family Division some will undertake a disproportionate share. Accordingly anecdotal evidence of variations of style noted by Coleridge J is inevitable. But in my opinion it would be unhelpful to impose any restrictions on the exercise of the judicial discretion in this innovative and elastic field. However I would strenuously reject any criticism of the manner in which Bennett J conducted this FDR on 3 August 2001. Indeed I would say that his conduct of the hearing might stand as illustrative of one classic method. The art of mediation depends upon qualification and training. Years of experience in a specialist litigation field are no substitute for that training and qualification. Very few of the judges whose duty it is to conduct FDR hearings will have had any training and qualification as mediators. However, those who have long experience in a specialist field of litigation are supremely well qualified to offer what is widely known as early neutral evaluation. That is precisely what Bennett J offered, having prepared himself by extensive pre-reading and by drawing on the expert submissions of leading counsel both written and oral. In many cases the neutral evaluation will be supplemented by an objective risk analysis of the costs incurred, and the costs to be incurred by proceeding to full trial, against the value of what is truly in issue, drawn from a comparison of the applicant's lowest target and the respondent's highest offer. Beyond those methods there may be dangers in judges over-estimating their ability to bring about a compromise by the use of other forms of mediation for which they have received no training.*

Thorpe LJ rejects Coleridge J's assessment at page 988 of his Judgment, paras 33-37:

*[33] Against that background I approach the crucial question: what was the product of the hearing before Bennett J? Was it merely a concluded contractual agreement between the parties or was it an unperfected order of the court? In my opinion the product was clearly an unperfected order of the court. I cannot agree with the reasoning of Coleridge J in the passage that I have already cited. In particular within that passage I conclude that the judge was wrong to say:*

*“What took place partly in front of the judge at the FDR was a familiar type of concluded negotiation which lead to there being broad terms agreed between the parties. But no more than that.”*

*[34] Equally I reject the sentence:*

*“To say that the judge gave his ‘approval’ to those terms, whatever that means and whatever may or may not appear in junior counsel’s skeleton, I think it is investing the exercise that Bennett J undertook on this occasion with a great deal more status than it deserves.”*

*[35] I reject two sentences to like effect on the following page:*

*“But he was certainly not approving the order in the technical sense because there was no order for him to approve.”*

*And*

*But it is, in my judgment, a long step between what was achieved on 3 August and a final order.”*

*[36] It would be hard to conceive of a more elaborate or more profound exercise than that which the parties prepared and which Bennett J then*

*conducted. I am not sure if that point of fact was sufficiently appreciated by Coleridge J for early in his judgment he said:*

*“The FDR took a very conventional route: that is to say, the matter having been explained to the judge, he took the opportunity to rise and read, I would say, probably skim read the papers, and he then came back to court and expressed a view about the sort of level at which this case might compromise.”*

*[37] At the end of a full day the advocates and the judge approached the point at which the hearing was to conclude in its appropriate order. Plainly there was no need to adjourn the FDR. Plainly there was no need to give directions as to the November fixture (indeed early in the following week the parties vacated the fixture). Surely the only order to be made was an order in the terms agreed, provided that the judge, in the exercise of his statutory duty in s25(1) and (2), concluded that they were fair. Manifestly in this case that conclusion was a formality since the figure agreed was so close to the figure that the judge had commended. When Bennett J said on the concluding page of the transcript ‘I am very happy to record it’, he was in effect saying; ‘I make an order in the agreed terms.’*

Thorpe LJ left the question of whether Edgar principles or those applicable to setting aside a perfected order apply and suggested that the provisions set out in Stewart v Engel 2001 WLR 2268 should be applied – J retains power to vary between the making and perfection of an order in certain circumstances which include mistake.

**3. X v X (Y & Z intervening) [2002] 1 FLR 508.**

This case was decided before Rose v. Rose.

DJ refused to approve an agreement which was based on a payment of £500,000 to the husband in return for his obtaining a Jewish Get, which would allow W to re-marry, and he requested further information. During the adjournment, W withdrew consent.

Mumby J upheld the agreement.

At page 531 he referred to Edgar v Edgar [1980] 1 WLR 1410.

*‘To decide what weight should be given, in order to reach a just result, to a prior agreement not to claim a lump sum, regard must be had to the conduct of both parties, leading up to the prior agreement, and to their subsequent conduct, in consequence of it. It is not necessary in this connection to think in formal legal terms, such as misrepresentation or estoppel; all the circumstances as they affect each of two human beings must be considered in the complex relationship of marriage. So, the circumstances surrounding the making of the agreement are relevant. Undue pressure by one side, exploitation of a dominant position to secure an unreasonable advantage, inadequate knowledge, possibly bad legal advice, an important change of circumstances, unforeseen or overlooked at the time of making the agreement, are all relevant to the question of justice between the parties. Important too is the general proposition that formal agreements, properly and fairly arrived at with competent legal advice, should not be displaced unless there are good and substantial grounds for concluding that an injustice will be done by holding the parties to the terms of their agreement. There may well be other considerations which affect the justice of this case; the above list is not intended to be an exclusive catalogue.’*

4. **W v W (Divorce Proceedings: Withdrawal of Consent after Perfection of Order) [2002] 2 FLR 1225.**

A decision post-Rose v. Rose.

Agreement at FDR (with DJ assistance). Order approved by DJ but not perfected by court as it should have been. W sought new legal advice and applied for an order preventing perfection.

DJ made order as draft without word “consent”.

W appealed order. H appealed removal of word “consent”.

Bodey J. dismissed W’s appeal and allowed H’s appeal.

Parties agreed that when DJ said “yes I agree that”, this amounted to his actually making the consent order pursuant to the case of Pounds v Pounds 1994 1 WLR 1535.

The word “consent” should have been left in the order with a note for the record that W had purported to withdraw her agreement.

Bodey J. avoided the issue of the test to be applied other than referring to Stewart v Engel 2001 WLR 2268 and to circumstances of mistake on the part of the court or where the parties have failed to draw the court’s attention to a fact or point of law which was plainly relevant.

5. **Rose v Rose [2003] EWHC 505 (Fam).**

Before Bennett J. 20.March 2003.

The court was entitled to strike out an application to set aside a consent order under the court’s inherent jurisdiction if it was right to do so. It was absolutely essential in ancillary relief cases that the court should be able to put

a stop to applications seeking to re-open matters already decided by a court whether by consent or after a contested hearing, if the court was satisfied that no useful purpose would be served by re-opening the matter.

**COMMENT**

On any view, you will certainly be bound by any agreement approved however obliquely by the judge, and almost certainly by any agreement as a result of negotiation.

If you have any doubt as to the client's state of mind, then you should protect their position and clearly state that matters are not finally agreed.

This is against the FDR ethos.

**NB Smith v. Smith [2000] 3 FCR 374**

CA – Dame Butler Sloss, Thorpe LJ and Burton J

Pre-protocol

Prior agreement without full disclosure or legal advice.

W suffering from depression at the time of the agreement.

Thorpe LJ: Test set out in Edgar v. Edgar

Validity of prior agreement not a preliminary issue. Just one of the factors in Ancillary Relief proceedings to which the judge must give weight in his application of s.25 MCA 1973. The agreement is brought in under s.25(2)(f) – conduct.

Very unlikely to be applied where an agreement has been made at FDR.

JOANNA CROSS

12 June 2003.