



JUDICIAL TIPS ON PRESENTING CLAIMS IN THE FINANCIAL REMEDIES COURTS

Prof David Hodson OBE MCI Arb
DDJ at the Central Family Court, Financial Remedies Court





Understand your judge

- 🌍 What are their powers? Can they make the order you want?
- 🌍 What limitation on their powers? In law and/or in practice
- 🌍 Does the client know how to address the judge, where to sit and what to do, and what not to do? Do they know how to behave? When and how to bow? Clients worry about these sorts of things
- 🌍 What will the client wear? The tactics of couture
- 🌍 Remember the judge can see the client at all times whereas the advocate is looking at the judge and the solicitor is sitting next to the client. A client can often give a lot away in their mannerisms and attitude. Warn the client
- 🌍 Might gender of judge be relevant on the issues?

Understand your judge

- 🌍 When in practice will they read the papers? Full timers and deputies
- 🌍 Send to them by email in addition to formal filing?
- 🌍 Always provide a draft order
- 🌍 The use of skeletons; when not to and why do so. The huge benefit to the judge and to your case
- 🌍 Keep them short: they are called skeletons deliberately!
- 🌍 Who will draft? Counsel or solicitor? Interrelationship with statement of issues
- 🌍 Sitting behind counsel. The huge benefit to the judge, to counsel as well as for the client yet curious judicial well-being guidance

Understand your judge

- Expectation of judicial continuity in FRC
- Listing before nominated judge
- Listing without reference to the convenience of counsel if likely to be a long delay; adverse impact on case and client
- Realistic time estimates including oral judgement delivery; increasingly frequent criticism of too short estimates
- Remember judgement writing takes a long time if not oral/immediate
- Start on time!
- Understand your digital judge; the new digital way of judicial working now and over coming years

Using a balance sheet

- 🌍 Prepare one at the beginning of the case, perhaps even before the first meeting, for discussion purposes and then keep updated
- 🌍 Update after exchange of Forms E; will assist preparation of questionnaires
- 🌍 Distinguish marital and nonmarital assets
- 🌍 Give to the judge at first appointment; at a glance the judge can see the primary assets
- 🌍 Try to agree with the other party; was to be part of the Rules
- 🌍 Counsel may include in their skeleton or borrow from it
- 🌍 Ct of A in *Moher* (2019) EWCA 1482: include in a final judgement

Using a net effect schedule

- 🌍 Based on a balance sheet, preferably already prepared
- 🌍 Shows the effect and impact of offers of settlement of both parties of their respective offers; can highlight ridiculous offers of other side!
- 🌍 Hugely valuable for the judge at all hearings
- 🌍 Equally valuable for clients to understand the impact of offers made and received, especially in complex negotiations at an FDR
- 🌍 Also valuable to give to the court when lodging a consent order; D81 is a hopeless document which gives the judge no idea on the effect of the intended settlement on the finances of each

Third-party interests

- 🌍 An increasing feature in finance cases of any complexity
- 🌍 More frequent in some communities where cultural norm
- 🌍 Is an asset held by one of the parties in reality beneficially owned by a third party, alternatively does a third party hold an asset for one of the spouses?
- 🌍 Might be in trusts, companies or similar and therefore consider joining trustees, directors, agents et cetera
- 🌍 But might simply be family members, including male family members for a female spouse
- 🌍 Do you join the third-party? Why? Why not join?

Third-party interests

- Leading authority is *TL v ML* (2005) EWHC 2860
- Join as early in the case as the issue arises or becomes obvious
- Preliminary trial and adjudication before an FDR?
- Beware of significantly increased costs as more lawyers involved, more paperwork and pleadings and statements
- Court will want third parties joined if any likelihood of an order being made against third parties e.g. because assets are in their name. Otherwise court has no power to make an order in respect of that asset

Foreign assets

- Complex topic but why the case may be in the Financial Remedies Court
- Always consider issues of enforcement against assets abroad before finalising a settlement and when drafting the order
- Consider a freezing order although increasingly hard to obtain
- Is it a needs-based order i.e. maintenance in EU speak and therefore reliance on EU Maintenance Regulation, but for how long?
- Enforcing against foreign pensions: *Goyal* (2016) EWFC 50
- Take good legal advice abroad at an early stage in the case
- Some judges may need help on issues of foreign assets and relevant law and practice

Add backs

- 🌍 A source of huge client frustration when they see the other spouse engaging in significant expenditure and therefore reducing the level of assets available for sharing. What can be done? The add back
- 🌍 The court adds back onto the balance sheet particular expenditure of one spouse as if it was still available for distribution
- 🌍 Initially frequently used and worked well e.g. Paul McCartney case
- 🌍 Unfortunately case law has dictated that there must be wantonness or recklessness, akin to conduct. High threshold
- 🌍 Made it very difficult to argue; to great client dissatisfaction, and often judicial dissatisfaction in stark circumstances. Worth running to FDR?

Bundles

- 🌍 350 pages is still controversial. But necessary
- 🌍 Inadequate for any complicated final hearing? Prepare collaboratively (or otherwise) a side bundle?
- 🌍 Get permission at FDR for more than 350 pages? Risk that cross-examination continually has to have extra pages introduced alternatively Judge cannot properly deal with some issues
- 🌍 Some judges will refuse bundles of more than 350 pages. Don't risk it. Get permission from trial judge if not already obtained
- 🌍 Bundles for all hearings of an hour or more. But do not need 350 pages for a first appointment! Keep it short & basic. What can be read?
- 🌍 Are your ring binders strong enough to survive the trip to court?

The financial dispute resolution hearing, FDR

- Real innovation of English family law, hugely successful, very high settlement rate, mostly satisfactory process, saves costs
- What should be in the bundle? A full trial bundle is not needed.
- Good skeletons are hugely valuable for a busy judge. Get them to the judge as early as possible, and not at 9:55 AM! Remember the judge has many other cases in the list
- Should contain a commentary on the merits but also on the respective offers
- Net effect schedule is hugely valuable
- What if the other side have not put forward an offer in advance?

The financial dispute resolution hearing, FDR

- Parties must be in attendance but what if they are abroad?
- Can take place even if no DN, but unlikely if no DN appl
- Prospects of bypassing an FDR are very limited especially in FRC. Also considerable judicial opposition to listing FDR and final hearing together at the first appointment
- What costs have been incurred to date and what costs to final hearing?
- If agreement is reached but not yet full terms of consent order, put agreement in writing and signed; *Rose* order
- What then? The use of mentions
- What can an FDR judge then do in the case? Very little

The financial dispute resolution hearing, FDR

- 🌍 Remember to take back all privileged documents and not leave on the file; the role of the solicitor
- 🌍 The court will know all privileged offers. We do not yet have Calderbanks but they can be produced for an FDR
- 🌍 If the parties are close, but don't settle, many judges will refuse to list for a final hearing even if the lawyers ask them to do so. Adjourn for a second FDR or require a roundtable meeting and adjourn for a mention before the same judge?
- 🌍 Remember that statistics show that many FDRs which don't settle on the day then settle within a fortnight or so; delay going into full trial preparation mode

The financial dispute resolution hearing, FDR

- 🌍 Remember that an FDR is not easy for a judge!
- 🌍 Perhaps relatively short time to read lots of papers and facts and issues; alongside a busy list with other similar FDR's
- 🌍 Be realistic about what is possible. A judge cannot give a precise figure for an outcome in most cases but only an indication of the likely range
- 🌍 A judge will give the best indication possible in the circumstances but will also be very keen to bring about a settlement. The huge benefit for the parties of settling in contrast to going on to a final hearing
- 🌍 This can create real professional challenges for the solicitor. Judicial pressure. Barrister pressure. Pressure from the other side. Client keen to settle. But is it a good deal? Specifically a deal worth taking today?

Private judging

- 🌍 The private FDR; a significant trend in London
- 🌍 Perhaps at least 25% of all first appointments where specialist finance lawyers are involved refer to a private FDR
- 🌍 Conducted by senior experienced lawyer, invariably barristers, invariably with arbitration training and experience but privileged and without an arbitration award
- 🌍 Benefit that the parties know the private FDR judge will have read the papers, will have only one case that day and be fully engaged and specialist
- 🌍 FDR of choice of many specialists
- 🌍 Additional cost but benefit for parties and practitioners

The financial remedies court

- 🌍 Financial remedies unit operating in London for several years and very successfully; with an ancillary specialist enforcement unit
- 🌍 Rollout around the country had been proposed but resisted-by judges
- 🌍 Now going forward in a few areas intended as a pilot but in effect as a preliminary to the rest of the country
- 🌍 Specialist judges
- 🌍 Certificates of complexity
- 🌍 Hearings conducted more efficiently, more quickly and often settled earlier through expertise of the judge
- 🌍 One of our country's best innovations



Prof David Hodson OBE MCI Arb

The International Family Law Group LLP

david.hodson@iflg.uk.com

+ 44 (0) 20 3178 5668

+44 (0) 7973 890648

www.iflg.uk.com

@DMHodson

