Financial Remedies Focus

The private FDR – achieving settlement

David Burles, *Barrister and Arbitrator, 1GC Family Law*

David Burles MCIArb (1GC Family Law) specialises in family-related financial disputes as well as private law issues in respect of children. David was appointed as a DDJ in 2007, is a ticketed financial remedy judge and for many years has sat in the CFC undertaking specialist financial work in the 'complexity' stream.

Every financial remedy dispute should settle at, or shortly after, an FDR. Certainly, without the need for a final hearing. There are those that suggest that certain types of case are incapable of compromise or are somehow 'un-FDR-able' – but that defies all logic. Think about it – if a case does not settle at FDR, it will proceed inexorably to a final hearing where an outcome will be imposed by a Judge or by an arbitrator. Nobody acting logically would expose themselves to the huge cost, delay and strain of a final hearing in many months' time when they can achieve that same result today and thereby have more money and less stress.

'Ah!' I hear you say, 'But the problem with this theory is that no one can predict the outcome of a final hearing with any certainty in every case.' This is sometimes true but that does mean a case is incapable of settlement long before a final hearing. If there is a 90% chance of party X securing a lump sum of £100,000 but a 10% chance of them securing a lump sum of £200,000 then that 10% risk should be factored into the outcome – perhaps by an agreed lump sum of £110,000, or perhaps in another way. 'Pricing' the risk of different possible outcomes *tomorrow* into an award calculated *today* happens every day in other industries, the stock market being the most obvious example. We need to do it better.

A critical factor is that the 'financial landscape'[1] needs to be clear for an FDR to work and so any settlement hearing must be timed correctly. 'But what about the non-disclosure cases?' you ask, 'you can't FDR those!'. Donald Rumsfeld famously explained 'there are "known knowns" and there are "known unknowns" but crucially there are also "unknown unknowns" – the ones we didn't know we don't know [and] it is the latter category that tends to be the difficult ones'. But that shouldn't be fatal to settlement. After all the Judge at final hearing will have to wrestle with the same issue of non-disclosure and an outcome will be imposed. In fact, I would suggest that for financial remedy practitioners the 'unknown unknowns' can be easy to address at FDR – as there is no evidence to support them. they should be disregarded. It is the 'known unknowns' that are more difficult – but again the only constructive approach at FDR is to seek to anticipate the eventual outcome and settle on it before the final hearing. If, as may well be the case, a clear prediction is not possible for the private FDR judge, he/she should seek to 'price' into an early settlement the *level of* risk of a final hearing judge drawing inferences as to (i) the *existence* of undisclosed resources and (ii) the likely *quantum* of that undisclosed wealth.

So, the success rate of FDRs should really be very high. And yet it seems they are not. HHJ Farquhar's September 2021 report on the future of the Financial Remedies Court, underpinned by work from the MOJ's Family Court satistics team and their

1 The words used by of Mostyn J in *OG v AG (Financial Remedies: Conduct)* [2020] EWFC 52, [2021] 1 FLR 1105

assessment of the FamilyMan software, suggested that a little less than 50% of cases that haven't settled prior to reaching a *court-based* FDR actually settle at or after FDR and the other 50% run on to final hearing.[2] That surely isn't good enough.

As to the success rate of *private* FDR's ('PFDRs') there is no statistical material, but one would hope it is significantly better than the somewhat lacklustre results of its court-based cousin.

One reason for the failure to reach agreement at an FDR, even where the financial landscape is clear is that settlement requires the parties and their advisers to make logical and sensible decisions at the FDR about the likely outcomes at a final hearing and many don't. Emotions can cloud decision making, especially if the settlement hearing comes when marital wounds are still too new. Likewise, the background whisperings of friends and family can sometimes undermine sound advice. Still others are reluctant to commit, hoping (against hope) 'something will come up' to improve their outcome. We have all seen these happen.

But even where the parties are operating sensibly FDRs and PFDRs can fail for reasons that are avoidable and unnecessary. Some of those reasons are contributed to by the parties and others lie with the FDR judge. During my professional career, I estimate that I have been an advocate at hundreds of court-based FDR appointments as well as at numerous PFDR's. As a DDJ over 15 years I estimate that I have conducted over 200 court-based FDR appointments – both remotely and 'in-person' and that does not include the increasing volume of PFDRs that I now preside over.

This article seeks to draw on that experience to help parties, their advisers and fellow FDR and PFDR judges, to get the best chance of getting to settlement at FDR.

How best can the parties and their advisers help themselves and the PFDR judge?

(i) Make proposals well in advance of the PFDR

Both parties should make settlement proposals at least 48 hours before any PFDR and preferably earlier. By doing so this allows (i) a cooling off period for a client outraged at the other party's meanness/greed (delete as applicable) (ii) counsel to address those proposals in their Notes and 'net effect' documents and (iii) allow the Judge to analyse the proposals to establish the key points of difference in the parties' positions. Where proposals are made for the first time at court, or late the day before, the prospects of settlement are instantly reduced as both the client, and the client's advisers, will feel under avoidable pressure to understand and evaluate that offer.

(ii) The bundle

Get the FDR bundle agreed early and out to the Judge, ideally with the settlement proposals included. I like my bundles to be sent a week before a PFDR hearing so that I can have (i) a first read and reaction to the evidence *prior* to seeing counsel's notes, (ii) a period of reflecting, a chance to review relevant authorities and a general internal 'processing' followed by (iii) a re-read focused typically on the key 'magnetic' issues as thrown up by the documents and the parties' rival proposals.

(iii) An agreed table of the rival proposals – point by point

The parties should look to agree a Table that sets out all the points in dispute in the rival proposals, no matter how minor. The focus here is not on the disputed *reasons* for those differences but is simply a mechanical analysis of the actual level of dispute. A PFDR Judge will almost certainly prepare such a Table if one hasn't already been

2 The Report itself does express reservations about the quality of the underlying material and so the figures come with a health warning. In fact the 'success' level at FDR may be lower still as cases that settled in the run up to a final hearing appear to be categorized as settling at or after an FDR, even though the costs of the final hearing were probably not avoided.

compiled and many, myself included, will prepare their own even if one has been agreed by the parties, as this helps the judge prepare and also ensures that nothing is missed. As a Judge (and as counsel) I arrange my 'Issues' Table into separate columns for (i) the issue ie 'lump sum, s 28(1A) bar, term of child maintenance etc (ii) Wife's position as to that issue, (iii) Husband's position as to that issue (iv) the quantum of the difference between the two positions eg £200,000 as to lump sum, £1,800 pcm on spousal maintenance etc (v) a column for me to enter my indication on the issue and (vi) a final column for me to include bullet points as to why I have arrived that indication on that issue, including points made in oral submissions that have 'landed' strongly. This becomes a crucial document in support of the eventual indication and, although I usually aim to agree my basic Issues Table with counsel in advance of the PFDR, I do not share my final Issues Table.

Why should the parties do this if the FDR judge is going to do one anyway? In my experience focusing on the *quantum* of disputes can often help the parties appreciate where the maximum effort needs to be made towards settlement and occasionally can show that some 'hot' topics that have dominated in correspondence are, in fact, of limited *financial* importance in the overall scheme of things.

(iv) Counsel's notes

These should come in the day before the PFDR, ideally in the morning but really no later than mid-afternoon. I am well aware from my own years of preparing such documents that much of the detail is sometimes included to satisfy the client's need to have a point ventilated rather than to persuade the tribunal. So be it. However, the core issues will be set out in the note, and it is vital for the judge to understand the points a party is making in order to address them effectively in the indication. It is not enough for the judge to *tell* the parties that they have read the documents, they need to show the parties that they have done so, by reference to the bundle and the notes. Any sign that the Judge has not pre-read relevant documents can significantly undermine a party's confidence in the ensuing indication and, even if that indication is still sound, a discernible failure to pre-read can provide an excuse for a hesitant litigant to avoid settling. What a waste!

How best can the PFDR judge help the parties?

(i) Do the correct job – let the parties know what the final hearing outcome is likely to be.

It sounds obvious but I have known PFDR indications to be more focused on what the PFDR judge felt ought to be the outcome rather than anticipating the actual likely outcome, desirable or not. Navigating the s 25 exercise can feel unstructured and leave parties feeling rudderless but, in truth, there are many areas that are highly predictable and where a judicial 'culture' operates. Examples are numerous, a conservative approach to the quantum of earning capacities for parties who are late returners – eg to the employment market, a resistance to permitting high spending to qualify for an 'add-back', reluctance to allow one party's housing needs to be elevated above the other, and so on. These all allow the final hearing to be reasonably predictable and should be the foundation of the indication given, regardless of whether the PFDR judge personally thinks that fair or not.

(ii) 'Price in' the risk on key disputed evidential issues.

In my view the PFDR judge should be extremely slow to decline to give an indication on important but disputed evidential issues. Of course, no findings of fact are possible at FDR, let alone permissible, but it is usually possible to give a considered view as to the likelihood of a court making such findings. In one FDR I conducted both counsel suggested it was 'un-FDR-able' because the husband was asserting that £200,000 of monies in a bank account belonged to a third party and that this issue 'would turn on the evidence'. However, after analysing the basic evidential components surrounding the bank account

issue, it was not difficult to give an indication of the likelihood of the husband establishing his case on the bank account at any final hearing and to 'price in' the risk of him being able to do so in a broad way. The husband listened and the 'un-FDR-able' case settled that day. And it wasn't very difficult.

Indeed, this approach can (and I suggest should) be applied to issues such as (i) disputed beneficial interests in properties (ii) add-backs (iii) disputed debts to third parties (often family members) (iv) transactions intended to defeat divorce claims and even (v) non-disclosure issues. There are inevitably judicial risks in giving views about evidential disputes and the Judge needs to be careful. Non-disclosure disputes can be difficult as the inference of undisclosed resources made at final hearing frequently requires a multi-stranded forensic assessment of the available evidence and that takes time. But it can be done at a PFDR if the necessary time is made available. In the great majority of cases it is possible to assess risk and to price in that risk, and this should always be done..

(iii) The FDR indication – get it out early.

There is a 'golden' time window within which the parties have the best chance of settling at FDR and that is when they are fresh and still have energy. The nervous energy felt by both the parties and their advisers (yes – the advisers get nervous too!) means that energy quickly gets consumed and tiredness can become a factor and undermine negotiations. By 6 pm, unless the parties are very close to agreement, it is frequently getting too late to settle. As we know from experience the client's advisers start becoming worried about their client settling and making important decisions when they are clearly tired and worn down.

However where the PFDR is a one-day hearing the Judge can help the parties by (i) starting as early as possible and usually by 10.00 am at the latest (ii) limiting counsel's advocacy to the matters that are central to the issues (iii) and delivering the indication orally well before the parties break for lunch.

(iv) The 'written' indication?

There is a growing tendency for PFDR judges to provide written indications, frequently coupled with the PFDR judge's own asset schedule of the indicated outcome. Sometimes these are surprisingly detailed. But in my view, this carries risks.

Perhaps the greatest danger is that the time taken to craft the written indication can reduce the time available within the crucial negotiating window so that the negotiations begin too late, and the precious (and finite) negotiating energy runs out too soon.

A further risk is that a detailed written indication can oftens give the impression that a Judge has made up his/her mind before the advocates made their oral submissions. How else did they have the time to put together the document? For the 'losing' party – the one most disappointed by the indication – this can create irritation and that party's 'sticky energy' can then seriously impede the settlement process. In a one-day PFDR it is ideal for counsel's submissions to be concluded by 11.30/12 and the indication delivered orally by 12.30 and 13.00 at the latest. The parties should be considering it as they eat lunch and then, suitably refueled, there are still four or five hours to make real progress before tiredness sets in.

It is frequently helpful to provide a brief written document as well, typically a short document setting out clearly the core indications on the 'magnetic' factors. It gives the parties an important guide to take away if the negotiations do not conclude on the day, and discussions are to continue on the days following the PFDR. But, that written document can and should be supplied during the afternoon or even the PFDR has concluded, and time should not be lost in advance of the oral indication preparing it. The same frequently applies to a judicial asset schedule showing the 'net effect' of the indication, even where these are required to illustrate the oral indication.

Conclusions

There are of course many other considerations in achieving the most

effective use of PFDR's, whether for the parties, their advisers or for the judge selected. Everyone has their own style. But it is frustrating that there is no real protection against the client who makes irrational decisions that disregard clear judicial indications to the contrary. The main shield to that approach is a well-judged open offer designed to raise costs risks and thereby concentrate minds. One linked idea floated at the Bar has been to require every FDR (and PFDR) judge to commit their indication to writing and then seal that indication in an envelope marked 'to be opened only after the final hearing judgment has been delivered' and thenallow that to strongly influence costs orders at that final hearing. But as far as the writer is aware this has only ever been canvassed informally. To be fair, for the court-based judge at least, setting down the indication in writing, would be a lot of extra work in an already busy list.

It remains to be seen whether the PFDR is here to stay in its current numbers in what is hopefully fast becoming a post-pandemic world. Given the current backlog of delays in the court system it seems likely that they will be. If the recommendations of HHJ Farquhar's committee are not followed and the courts return to the pre-pandemic bad habits where FDRs could be listed at 10.00 am but not heard until 2 pm (or even later), or where the time for proper judicial reading and preparation is so limited as to cripple the power of any indication, then it is difficult to see PFDR's losing their current popularity.

Whatever lies ahead it is surely realistic to expect that the current 50% success rate of the court-based FDR process should be improved upon and that, where the parties are able to have a PFDR, the cases that do *not* settle become a tiny minority.

For further reading see 'The private FDR – a continuing evolution' by Tom Carter and Robert Williams in March *Family Law* ([2022] Fam Law 352]).