PRIVATE FINANCIAL DISPUTE RESOLUTIONS

A SHORT GUIDE

Editors
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Duncan Brooks

Consulting Editor
Mr Justice Mostyn

With a Foreword by the President of the Family Division

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A SHORT GUIDE

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First Edition

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Foreword

Rt Hon Sir Andrew McFarlane, President of the Family Division

Sir Hugh Bennett and Duncan Brooks are to be congratulated for spotting the need for, and then producing, a short, clear guide to the developing world of private Financial Dispute Resolution hearings. I stand as one with my predecessor, Sir James Munby, in hoping that all family judges will take the opportunity to develop and encourage the use of private FDRs; this very accessible booklet should greatly help in that task.

As the authors make plain, there are both pros and cons attached to the option of a private FDR, but, in my view, the pros will normally outweigh the cons by some measure.

Sir Hugh, who can properly be regarded as the major force in developing the practice of this form of dispute resolution, and to whom we should all be immensely grateful, has combined his great experience and wisdom with that of Duncan Brooks, who brings knowledge of the nitty-gritty practice from the other side of the FDR table, to produce a booklet which is as accessible and useful to lay clients, as it is to lawyers. It should be read by all those for whom resolution by private FDR may be an option.

27th September 2018

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Introduction

On 27 July 2018, in one of his last acts as President of the Family Division, Sir James Munby wrote the following (*President's Circular: Financial Remedies Court Pilot Phase 2*):

> *7. I hope that the lead and other judges will take the opportunity to develop and encourage the use of 'private' FDRs locally. A private FDR is a simple concept. The parties pay for a financial remedy specialist to act as a private FDR judge. That person may be a solicitor, barrister or retired judge. No additional qualification is required. The private FDR takes place at a time convenient to the parties, usually in solicitors' offices or barristers' chambers, and a full day is normally set aside to maximise the prospects of settlement. It takes the place of the in-court FDR.*
>
> *8. At present, demand on court resources has led to instances of over-listing of FDRs. A high settlement success rate is not likely to be achieved if the district judge's list for the day has more than five FDRs in it. This has the inevitable knock-on of far more cases being listed for a final hearing than should be so – a classic example of the law of diminishing returns.*
>
> *9. Although a private FDR does require some (often quite modest) investment by the parties, this expense can be greatly outweighed by the advantages gained. The very fact of investment by the parties will signify a voluntary seat at the negotiating table rather than a sense of being dragged there. The 'hearing' can take place at a time convenient to the parties, even in the evening or at a week-end, and for as long as the parties want. The private FDR judge will, by*

> *definition, have been given all the time needed to prepare fully for the hearing.*
>
> *10. Anecdotal evidence suggests that private FDRs have a very high settlement rate. Of course, each settlement frees up court resources to deal, sooner and more fully, with those interim and final hearings that demand a judicial determination.*
>
> *11. Usually, where the parties have agreed to a private FDR the order made at the first appointment will record such an agreement in a recital, and will provide for a short directions hearing shortly after the date of the private FDR. That directions hearing can be vacated if agreed minutes of order are submitted following a successful FDR. If it has been unsuccessful then directions for the final hearing can be given. An alternative is for the case to be adjourned generally while the private FDR process takes place. In that event an order in the terms of para 81 of standard order No. 1.1 would normally be made.*

This guide explains how the private Financial Dispute Resolution process works, and provides tips and traps for the private FDR evaluator as well as for the parties.

Financial Dispute Resolutions: Procedure, Case Law and Best Practice Guidance

A private Financial Dispute Resolution ('FDR') is similar to a court-based FDR, but with the added advantage that the parties will know that the 'judge' (or evaluator) will be a specialist in financial provision following separation, will have pre-read all of the documents sent to them, and will have the entire day available to assist them to reach a settlement.

FDRs emanated in the late 1990s, because the judiciary and practitioners were frustrated by the large number of lengthy final hearings that were settling at the door of court. This wasted court time and was also a very expensive process for the divorcing parties.

Procedural rules

There are very few guidelines for FDRs set out in the procedural rules.

FPR 2010 r.9.17 states at (1) and (6):

> *The FDR appointment must be treated as a meeting held for the purposes of discussion and negotiation ... Parties attending the FDR appointment must use their best endeavours to reach agreement on matters in issue between them.*

FPR PD 9A provides:

> *6.1 A key element in the procedure is the Financial Dispute Resolution (FDR) appointment. Rule 9.17 provides that the FDR appointment is to be treated as a meeting held for the purposes of discussion and negotiation. Such meetings have been developed as a means of reducing the tension which inevitably arises in family disputes and facilitating settlement of those disputes.*
>
> *6.2 In order for the FDR to be effective, parties must approach the occasion openly and without reserve. Non-disclosure of the content of such meetings is vital and is an essential prerequisite for fruitful discussion directed to the settlement of the dispute between the parties. The FDR appointment is an important part of the settlement process. As a consequence of* ***Re D (Minors) (Conciliation: Disclosure of Information)*** *[1993] Fam 231, evidence of anything said or of any admission made in the course of an FDR appointment will not be admissible in evidence, except at the trial of a person for an offence committed at the appointment or in the very exceptional circumstances indicated in Re D.*
>
> *6.3 Courts will therefore expect –*
>
> *(a) parties to make offers and proposals;*
>
> *(b) recipients of offers and proposals to give them proper consideration; and*
>
> *(c) (subject to paragraph 6.4), that parties, whether separately or together, will not seek to exclude from consideration at the appointment any such offer or proposal.*
>
> *6.4 Paragraph 6.3(c) does not apply to an offer or proposal made during non-court dispute resolution.*
>
> *6.5 In order to make the most effective use of the first appointment and the FDR appointment, the legal*

> *representatives attending those appointments will be expected to have full knowledge of the case.*

It is clear that the inadmissibility rule in para 6.2 applies equally to a private FDR.

Case law

There is also little case law about private FDRs. The leading authority is *Rose v. Rose* [2002] 1 FLR 978. At para 29, Thorpe LJ stated:

> *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 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 Division at the FDR stage. Of the seventeen judges of the 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. 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.

30. Equally early neutral evaluation at the FDR hearing remains a tool to be used with due circumspection. Successful use depends both upon thorough preparation and also upon the nature of the case. The present appeal well illustrates the need for, and the virtues of thorough preparation. As Miss Baron put it this was a Rolls Royce FDR hearing. The scale of the average case does not begin to justify such treatment. A district judge in a busy hearing centre may have several FDRs in his list each with a one-hour time estimate. The papers submitted in advance may be inadequate or incomplete. The court may not have had adequate time to pre-read. Furthermore it is not easy to retain a clear separation of the relevant facts of the several cases so listed.

Best practice guidance

Thorpe LJ was also a member of the Family Justice Committee,

which produced a booklet: *Financial Dispute Resolution Appointments - Best Practice Guidance* (December 2012). The committee summarised FDRs as follows:

> *i. the purpose of the FDR is to enable the parties to attempt to reach a reasonable settlement by agreement and the benefits of reaching such agreement (specifically, avoidance of the costs, stress, and delay of a final hearing);*
>
> *ii. the court will likewise expect the parties actively to apply their minds to the possibility of settling. This means that, notwithstanding e.g. offers made in advance of the hearing or the content of a position statement, for the FDR to fulfil its proper objective parties should be told that they may inevitably have to compromise on their 'opening' position in order to achieve this;*
>
> *iii. As the parties will be expected actively to engage in negotiation, clients should be made aware that they need to be prepared to be at court for considerably longer than the court's time estimate for the length of the hearing. It may be advisable to suggest to clients that they rearrange (if possible) any commitments they may have during the day of the FDR and/or arrange alternative childcare so that constructive negotiations are not prematurely curtailed;*
>
> *iv. The privileged and 'without prejudice' nature of an FDR appointment and its associated negotiations should be fully explained. The most obvious associated feature of this is that the judge conducting the FDR will give an indication to the parties as to the likely outcome were the case to progress to a final hearing but thereafter will not be permitted to have any further involvement in the case: see r 9.17(2) and PD9A, para 6.2;*
>
> *v. Practitioners should discuss with clients the weight to be given to any judicial indication and the fact that such an indication is not binding (and is no guarantee that the judge at final hearing will reach the same conclusion);*

vi. The status of any offers made at an FDR; specifically the fact that they cannot be relied on subsequently (for example, in relation to making or resisting an application for costs) unless re-stated in open correspondence after the hearing. So too, it should be made clear that evidence of anything said at an FDR is not admissible in evidence at the final hearing, save at the trial of a person for an offence allegedly committed at the appointment or in very exceptional circumstances - Re D (minors) (conciliation: privilege) [1993] 1 FLR 932.

vii. The fact that the role of the FDR judge is not to determine issues of fact between the parties and that, therefore, lengthy submissions on disputed factual issues are to be avoided (this should also be remembered when preparing any documentation for use at the FDR - see below).

viii. ... notwithstanding the significant benefits to the parties of reaching agreement, there is no pressure (and certainly no compulsion whatsoever) to settle at the hearing, and so if the client wishes to give further consideration to any offer outside of the court environment, subsequently withdraw any offers made but not accepted at the hearing and/or go to trial then they must be made aware that they are fully entitled to do so;

ix. ...even if the parties do not reach agreement at the FDR Appointment, this does not mean that no further attempt to settle can (or should) be made until the final hearing. Rather, negotiations can (and should) continue after the hearing by way of inter-solicitor correspondence commencing the day after the hearing if necessary. If appropriate, practitioners should consider whether to suggest holding 'round-table' discussions shortly after an unsuccessful FDR in order to capitalise on each client's newly re-defined expectations;

x. While the benefits of reaching agreement at FDR are

often obvious, it is equally important that any risks involved in settling at court are also highlighted. This is particularly relevant where there are issues upon which the parties (or their representatives) remain uncertain on the day of the hearing and/or which require further investigation (e.g. the tax implications of a particular settlement). In the event that clients wish to proceed in the absence of relevant information and/or other specialist advice, then this should be recorded in writing and signed by the client. Alternatively, it should be made clear to the client at a suitable point that an alternative option is to apply to adjourn to a second FDR (and in such circumstances, the likely costs implications of doing so should be raised);

xi. It is also good practice to ensure that clients are aware of the probable court timetable in the event that the FDR does not produce a settlement so that the parties are aware that they may not have finality in respect of their finances for several (or even many) months, and that interim financial arrangements may have to continue over that period (e.g. one party might remain living in the former matrimonial home to the exclusion of the other).'

The advantages and perceived disadvantages of private FDRs

A private FDR is very similar to a court-based FDR, except that the parties will have chosen and paid privately for an evaluator to take the role of the judge in a court-based FDR. The evaluator will be a barrister or solicitor or retired judge who is instructed by both parties.

The evaluator will read the documents that have been sent to them, will listen to submissions from both sides, and will give an indication about the likely outcome of the case.

This is invaluable to the parties, because they benefit from the neutral evaluation of an expert without the financial and emotional cost of proceeding to a trial or arbitration.

The private FDR is held on an entirely without prejudice basis and thus what occurs at the hearing cannot be referred to in any further court proceedings.

Advantages

1. The main benefit is that (anecdotally) settlement rates are far higher, because the evaluator is an expert, will have considered all of the relevant arguments, and the parties can have confidence that the process has been conducted thoroughly.
2. The parties will have selected the evaluator and will know that she or he is a specialist in the field. At court, the case will be

allocated to a judge who may or may not have background expertise in financial provision following separation.

3. The evaluator will be at the parties' service for the entire day. It is exceedingly rare for a court FDR to last for an entire day. Current demands on the court system are unbearably high, and many courts list more than four FDRs in a court day (see Sir James Munby's statement above).
   However skilled and experienced the judge at court, it is difficult to assimilate the necessary information in four or more cases and to give an accurate and helpful indication.
   The evaluator at a private FDR will be available whenever the parties need them. A judge at court will have to deal with other cases, so it is frequently necessary to wait for lengthy periods before seeing the judge.
   Over-listed courts sometimes adjourn FDR hearings to another date, either before hearing from the parties or part-way through the hearing. That should not occur with a private FDR.

4. The evaluator will have pre-read the relevant documents that have been sent to him or her. It is simply not possible for a judge at a court-based FDR to read more than the bare essentials for each FDR that they hear.

5. The evaluator is also available to help with disputes that may crop up later, for example by assisting to draft the order. This is seldom possible at court.

6. The evaluator is providing a service to both parties, and will be polite, courteous, and sensitive when delivering the indication.

7. A private FDR will **not** take place in a court building. The 'hearing' can be arranged at a date and location that are convenient to the parties. There will be pleasant facilities with

rooms for each party, good IT facilities, printing on demand and refreshments.

8. As practitioners, we often overlook the imposing nature of court buildings. Members of the public will often never have been to court, and will imagine that it is where criminals go for trials. Further, even the best courts have limited rooms available, may not allow laptops/iPads to be charged onsite and many have no refreshments available.
9. The parties can hold a private FDR even before court proceedings have been issued.
10. The authors have experience of conducting private FDRs before the issue of any proceedings, resulting in an agreement which was duly sanctioned by the court. Of course, it goes without saying that both parties must be satisfied that each has made full and complete disclosure to the other of their assets and liabilities.

Perceived disadvantages - and possible remedies

1. The court service does not charge for a judge's time.
2. The parties will need to pay for a private FDR evaluator. We are aware, anecdotally, that the range of fees charged by evaluators is wide and open to negotiation.
3. In any event, the expense can be greatly outweighed by the advantages gained e.g. an early settlement and thus the saving of substantial legal fees, of more stress for the parties, and of a long wait to a final hearing by the court.
4. A private FDR evaluator is not a judge and so does not have coercive powers to direct disclosure etc.

5. If the case involves non-disclosure, or wide-ranging directions are being sought against third parties, then it may be more appropriate to hold a court-based FDR, where directions can be given if the FDR is ineffective. Do bear in mind though that private FDRs can still be very effective in those situations.

6. There can be a delay in arranging a court hearing after a private FDR if settlement has not been reached.
   This can be avoided by making sure that a court directions hearing is listed shortly after the private FDR is due to take place.

7. Is the concept of private FDRs at risk from an undercurrent that, since the parties, or sometimes just one of the parties, pay the evaluator a fee, he or she may so conduct the FDR in a way so as to promote future appointments as evaluator from the lawyers involved in any particular case?

8. We firmly believe it is not. No evaluator should ever 'pull their punches' when giving his or her views. What the parties want, indeed what they have paid for, is for the evaluator to spell out impartially his or her considered, clear, easily understood, and robust views as to the likely outcome of the case. Indeed the evaluator is likely to gain further appointments thereby and not by 'trimming the sails'.

Preparation for the private FDR

Choice of evaluator

This is a matter for the parties and their lawyers. No evaluator can be appointed unless both parties agree upon his or her appointment.

The identity of the evaluator will no doubt be in part determined by the complexity of the case including the amount of assets and liabilities of the parties.

The most complex are likely to be heard by a retired judge or senior barrister or solicitor, all of whom will have had many years of being involved with financial remedy cases.

The less complex are likely to be heard by experienced barristers or solicitors, and sometimes by a retired judge.

If the parties are experiencing difficulty in choosing an evaluator, one way to break any impasse is for one party to nominate three names and invite the other to choose one. If that does not work, then the parties could ask a third person to nominate the evaluator.

Should an evaluator, who is attached to a particular set of chambers, be appointed if the barrister representing one of the parties is a member of the same chambers?

We believe that there is nothing in principle against this. Indeed it is the authors' experience that it is frequently done in practice and has given no cause for concern. No doubt the lawyers representing the other party would not agree to the appointment of such an evaluator if they were not completely satisfied of the evaluator's

integrity and impartiality, and will have explained and advised their client accordingly. And to disqualify such an evaluator out of hand might thereby have the unfortunate consequence of ruling out of contention for appointment the best person to conduct the FDR.

Ensuring the private FDR happens

There have been anecdotal reports of one or other party deciding not to attend a private FDR, meaning that there is unnecessary delay.

In order to avoid this, if in the midst of court proceedings, we recommend that a First Appointment Order include a paragraph stating that the parties agree that they will both attend the private FDR in person and will not adjourn the private FDR without the court's prior agreement.

What papers should/should not be used at the private FDR and sent to the evaluator?

We suggest that there should be one, and certainly no more than two, bundle(s) of papers sent for pre-reading and use at the private FDR.

The documents that will probably be of most help to the evaluator will be counsels' or solicitors' written submissions and these should be sent to the evaluator as early as possible to give him or her plenty of time to read and absorb them before the hearing.

The bundle should include:

- Forms E without attachments (unless really relevant to the issues in dispute e.g. budgets).

- Replies to questionnaire with any attachments that are truly relevant.
- Any section 25 statements of the parties.
- Experts' reports.
- Without prejudice offers (so that the evaluator can see what is each of the parties' standpoints and what the issues are which divide the parties).

We suggest that general solicitors' correspondence, bank statements, and credit card statements should **not** be included.

On the day of the private FDR

Attendance

It ought to go without saying that the parties should attend in person. If one party cannot attend, then there is no reason why that party should not be able to take part by video conferencing. In any event it is essential that both parties should be engaged in the hearing and hear what the evaluator says when giving his or her evaluation.

Room layout

This is a matter for the parties guided by the evaluator. It depends on how well the parties are communicating.

As a general default suggestion, we recommend that the evaluator should sit on one side of the table and the parties and their lawyers on the other, all at the same level. This should prevent one or both of the parties 'eye balling' each other and should get away from a feeling of 'being in court'.

However, if the parties would prefer a round-table layout, then that can also work well.

Formality

Again, this depends on the parties' preferences and how well they are communicating.

As a default, we suggest that a certain formality should be retained with the evaluator being addressed as 'Sir' or 'Madam' and the parties referred to as Mr, Mrs or Ms X.

However, we have conducted private FDRs where the parties have preferred to be called by their first names, and this can work very well too.

Standard warnings

The evaluator will usually remind the parties that:

- An indication is likely to be different than the result at trial, because assets and incomes may change over time, legal costs will mount and eat into the asset base, and both parties will give oral evidence, which may change the outcome.
- Both parties should be asked to provide details of the costs that have been spent and the costs anticipated to the end of a final hearing or arbitration. If the case does not settle, those costs will be spent on lawyers and will not come back. Whatever the parties' bottom lines, they may as well spend that money by improving their offer and resolving the proceedings rather than spending it on lawyers.
- There is an emotional cost to extending litigation and the uncertainties of a trial. It is difficult to put a monetary value on this, but it ought to be borne in mind. The stress on both of them will increase and they may have a long wait before the court can hear their case, and at the end of it all the parties may wish that they had settled at the FDR!

Timings

The evaluator should endeavour to ensure a prompt start to the hearing so that the submissions and his or her evaluation of the issues can be given at a time during the day which leaves the parties adequate time to negotiate thereafter.

It is always best to be giving an evaluation at around lunchtime. It is generally unhelpful if the evaluation is only given by the mid-to-late afternoon, because the parties will need time to digest and evaluate the indication and then to negotiate.

The hearing itself

The way the hearing proceeds is again a matter for the parties guided by the evaluator.

Normally the applicant's lawyer will make oral submissions to the evaluator, then the respondent's lawyer has his or her turn, with the applicant's lawyer having the opportunity of a brief reply.

We believe it is important that the evaluator should not sit 'sphinx like' and silent but probe the points in the oral submissions, if necessary robustly but fairly.

To that end we believe that before oral submissions are made, the evaluator should explain to the parties that he or she will intervene during submissions for two reasons, namely to clear up any points he or she does not understand and also to challenge points being made by the lawyers to test their strength or weakness. It should be pointed out to the parties that this is entirely normal and that if they go to a final hearing this is what is very likely to happen.

There are different schools of thought about whether the parties should speak themselves. We would suggest as a default that they do not speak directly to the evaluator - but in certain circumstances

it can be helpful to hear an explanation about an issue directly from the party themselves.

After hearing submissions, it is usually appropriate for the evaluator to take time to consider the arguments that were put and to write notes about the likely indication. Some evaluators will produce a summary of the indication with a schedule, others will give an oral indication. The appropriate course will depend on the complexity of the issues, the time that is available, and the evaluator's own preference.

Precision of indication

The parties and their representatives should consider what they would like the evaluator to do.

There are two schools of thought.

One is that it is helpful to give a 'bracket' of likely opinions and to allow the parties to negotiate within that bracket. This is realistic, because no two judges will make the same decision, even on the same facts. However, it does elevate the risk that each party negotiates from the extreme of the bracket.

The other school of thought is that the evaluator should outline the bracket but then say (as precisely as possible) what he or she would do. The advantage is that the parties will then have a neutral specific indication that they may simply agree to adopt in full or, if not, explain why any particular element should be different. The disadvantage is that the evaluator's precise outcome will almost certainly be different to the actual outcome if the case were to proceed to trial.

In some cases the evaluator can most help the parties by asking them to identify issues upon which an evaluation is needed (e.g. an issue whether a court is likely or not to uphold a prenuptial

agreement, an issue what, if at all, premarital assets are likely to be ring fenced, and an issue what accommodation should the applicant or respondent need for the future) which can then lead the parties to negotiate and settle without the need for any further evaluation of precisely what financial provision the court is likely to make.

Evidential disputes

There are some cases in which the outcome will depend on a finding of fact, for example where one party's parents provided funds to enable the parties to buy a family home, and there is a dispute about whether those funds were a gift or a loan.

Our view is that FDRs can be very effective in these situations.

The best evidence about intentions are usually (a) contemporaneous documentary evidence; and (b) how the parties have acted following events. It is possible for an evaluator to give an indication about the strengths and weaknesses of each party's case based on the evidence that has been provided. This will enable them to negotiate a settlement without the need for a preliminary issue or final hearing.

In *Shield v. Shield* [2014] EWHC 23 (Fam), Nicholas Francis QC (as he then was) stated:

> *I note that there was no FDR in relation to the preliminary issue. Whilst, as has been made clear in a number of cases, an FDR will not necessarily be appropriate to the resolution of a preliminary issue, I express the view that consideration should at least be given to the possibility of an FDR prior to the hearing of a preliminary issue. It may well have been the case here that the input of an experienced FDR judge might have helped to save this family from the course which it has taken.*

Communication by the evaluator

The evaluator should recognise that the parties will have invested much faith in the private FDR and that the manner in which it is conducted may have a profound influence on the parties and whether or not they accept his or her views and reasons.

Moderation in language, attention to detail, and a profound knowledge of each party's case are likely to impress the parties and thus make the views and reasons, perhaps unpalatable at first to one or both parties, all the more acceptable in the end.

The parties often appreciate meeting the evaluator briefly at the start of the day, and saying goodbye to the evaluator at the end of the day.

After negotiations

How can the evaluator, having given his or her views and reasons, best resolve points of disagreement that may arise thereafter?

We suggest that the parties and their lawyers should return to the evaluator's room and make further submissions in the presence of each other, upon which the evaluator can then and there pronounce.

However, the evaluator should be alert to recognise if one, or sometimes both, parties are seeking to change his or her views in whole or in part, and, unless there really is good reason, be firm in refusing to change his or her mind. Otherwise there is a risk of a degree of chaos and thus of the proceedings breaking down.

Caucusing

There are different views and practices about whether or not the

evaluator should 'caucus' in order to break a deadlock (i.e. go into one or both of the parties' rooms in the absence of the other party and seek to persuade one or both that their positions on disputed issues are unlikely to succeed at the final hearing).

This ought not to occur unless the parties agree in advance and the evaluator is happy doing so. It may be that an evaluator who is also a trained mediator would be more comfortable with this.

In our view, whilst this procedure may be superficially attractive particularly if the evaluator perceives that one party is being utterly unreasonable on one or more issues, it is fraught with danger.

First, it may be perceived that the evaluator's neutrality is being compromised and that he or she is seen as an advocate for the other side.

Second, on what basis is the evaluator entering one party's room - i.e. is the discussion between the evaluator and the party privileged? Surely it must be. In which case the evaluator cannot communicate what he or she is told to the other side and cannot use what information he or she is told.

Third, what if the evaluator is told something by one party that directly or indirectly points to non-disclosure of an asset by that party? In that event we think the only course open to an evaluator is to terminate the FDR forthwith and without being able to tell the other side why!

So, in the second and third scenarios above, we believe that the evaluator's integrity may be seriously at risk.

After the private FDR

Interaction with the court

If a case has not settled at a private FDR, judges can be reluctant to list a lengthy trial without knowing what negotiations have taken place.

We suggest that the court ought to trust that the private FDR evaluator gave a sensible indication and that the parties would not have resolved the case if it had been a court-based FDR.

If the court insists on knowing more, it is open for the parties to present a without prejudice summary of the FDR indication and offers made by each party to the judge at the directions hearing.

The consequence of this will be to debar that judge from hearing the final hearing, and it may also prejudice that judge's ability to make any contested directions (see *Myerson v. Myerson* [2008] EWCA Civ 1376).

Conclusion

We hope that evaluators of private FDRs, the lawyers for the parties and the parties themselves will find this short guide of practical help.

We believe that private FDRs, as opposed to court based FDRs, are the way forward for the reasons which we have set out above.

We repeat, with the kind permission of the authors, para 3.15 of *Financial Remedies Practice 2018* (Class Legal):

> *In **Al-Khatib v Masry** [2004] EWCA Civ 1353, [2005] 1 FLR 381 Thorpe LJ stated, when approving a mediated compromise of an appeal, that there is no case, however conflicted, which is not potentially open to successful mediation, even if mediation has not been attempted or has failed during the trial process. Thus the court (and practitioners) should not assume that if (for instance) the parties have previously failed to agree to mediate, or have mediated without reaching an agreement, or have been unable up to that point in the proceedings to agree to any other form of N-CDR, a point may not have been reached where changing attitudes, the narrowing of issues, the impact of litigation costs and the prospect of more to come, the delay before final court resolution is likely – or a combination of those and other attritional factors – may make the parties more disposed to consider alternatives to in-court litigation.*

Albeit that what Thorpe LJ was expressing was in the context of mediation, his words can equally be applied, mutatis mutandis, to private FDRs at first instance.

PRIVATE FINANCIAL DISPUTE RESOLUTIONS

A SHORT GUIDE

Editors
Sir Hugh Bennett
Duncan Brooks

Consulting Editor
Mr Justice Mostyn

With a Foreword by the President of the Family Division

Private Financial Dispute Resolutions are increasingly being seen by practitioners as the way forward, as the long wait times for court listings, and lack of time when there, makes the court process less and less appealing.

As the President of the Family Division says in his Foreword:

> 'I stand as one with my predecessor, Sir James Munby, in hoping that all family judges will take the opportunity to develop and encourage the use of private FDRs; this very accessible booklet should greatly help in that task.'

This guide explains how the private FDR process works, lists its advantages and perceived disadvantages, and gives expert advice on how best to prepare for and manage the hearings for all those involved (representatives, evaluators and parties).

About the Editors

Sir Hugh Bennett was called to the Bar in 1966 and took silk in 1988. He was appointed a High Court Judge in 1995 and assigned to the Family Division where he conducted many financial cases. After his retirement from the Bench in 2010 he was a member of the Courts of Appeal of Jersey and Guernsey until 2015. He also returned to his former chambers at Queen Elizabeth Building in London from where he conducted many private FDRs over a period of 8 years. He has now retired from any further private work.

Duncan Brooks is a barrister specialising in the financial aspects of family law, practising from Queen Elizabeth Building. He is recommended as a leading junior barrister by Chambers UK and the Legal 500. He was appointed as a Deputy District Judge in 2010 and has been a Family Arbitrator (MCIArb) since 2013 (in which capacity he has delivered 14 awards). He regularly appears at private FDRs, both as a barrister and as the neutral evaluator.

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