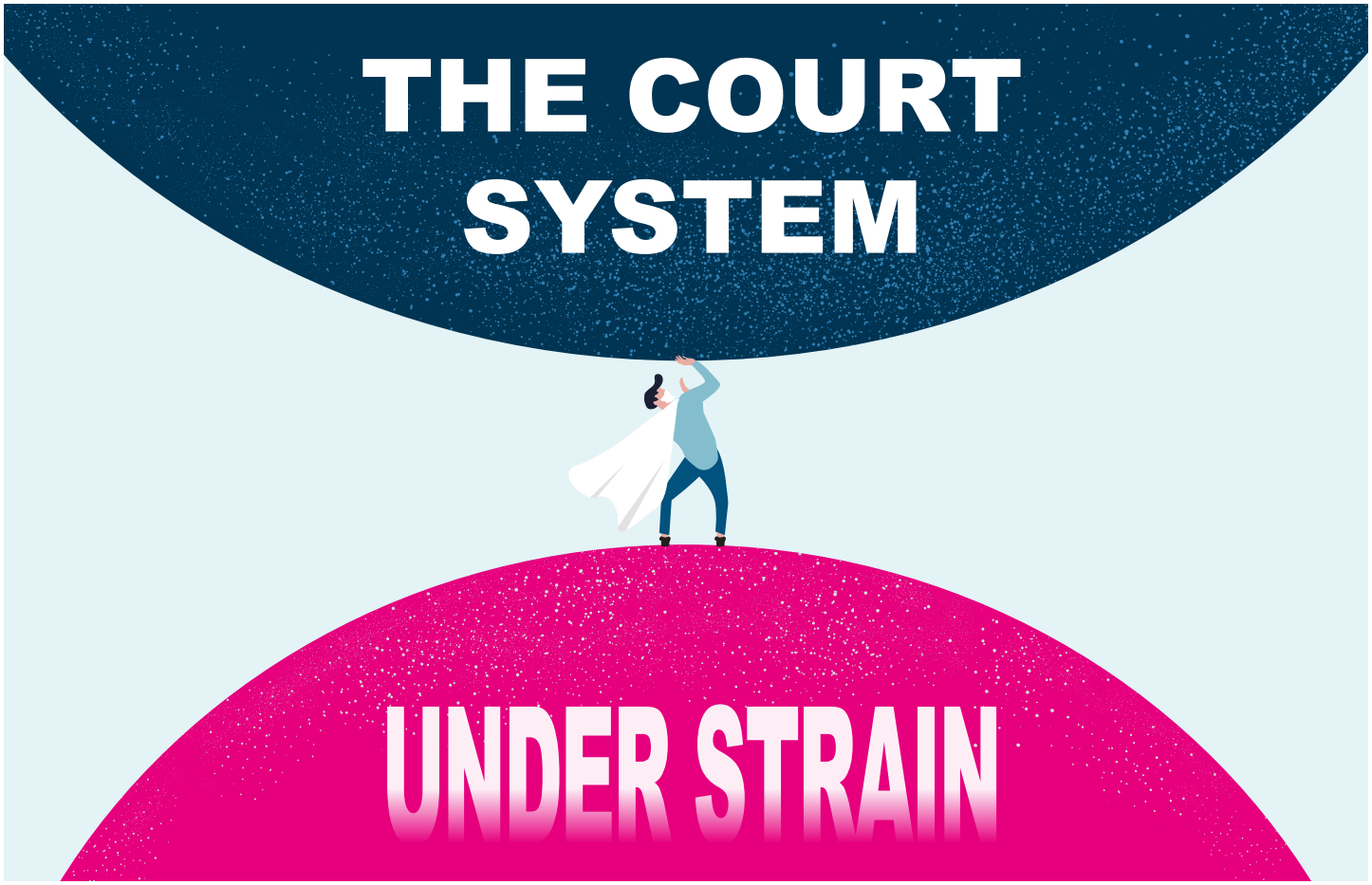


Authored by: Jack Rundall - 1GC

"Lack of judicial availability" are four words which over the last year have come to haunt every family lawyer.

This phrase is used by court offices across the country as the explanation for adjourning hearings, usually with about 24 hours' notice. Final hearings seem to be the worst affected and an analysis of my own diary over the last year suggests that (in finance at least) such hearings are more likely than not to be adjourned at least once. I have a couple of matters which have been adjourned twice and have heard of cases going through their fourth attempt to find a judge. Delays of 6 months or so between each listing are not uncommon and applications for financial remedies seem to be the worst affected, presumably because matters involving children are given priority. In each case these adjournments lead to unnecessary costs; not just wasted brief fees but inevitably extra correspondence, ongoing interim maintenance and mortgage payments and, in one of my cases, the need (following each of two adjournments so far) to update a chartered surveyor's valuation of various commercial premises and an accountant's valuation of a business. That's a total of four experts' reports placed in the shredder (or at least deleted).

Whilst there may be moves afoot to try to improve the position (for example, the increased recruitment of part-time judges and the introduction of the fast-track procedure for low-value financial remedy cases proposed in His Honour Judge Farquhar's October 2021 report), none are likely to resolve the crisis in the near future. So, if 2021 has taught us anything, it must surely be the desirability of looking outside the court arena to resolve disputes. Mediation remains a sensible option where the parties are able to work constructively but arbitration is more likely to be the solution for parties staring down the barrel of an adjourned final hearing since it provides a binding resolution. Despite this it remains something of a niche option in family law, albeit one that is becoming more common.

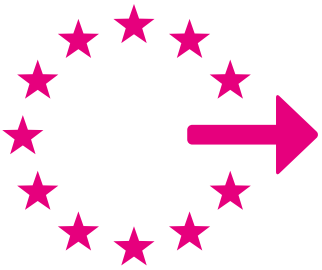
As of June 2020, 304 arbitrations had been notified to the Institute of Family Law Arbitrators (IFLA) in financial cases but, as of September 2021, this had risen to 407, not a big number but a 34% increase in one year.

The case of Haley v Haley[1] as well as the pandemic perhaps explains this trend; the judgment confirmed that the process of appealing an arbitrator's award is the same as appeals from a judge's decision, providing an extra layer of certainty to the process.

1 [2020] EWCA Civ 1369

Case law

A full review of the important cases of 2021 is beyond the scope of this short article. However, some particularly important decisions this year were *CA v DR (Schedule 1 Children Act 1989: Pension Claim)* [2] where Roberts J rejected a claim by a mother under Schedule 1 of the Children Act 1989 for maintenance to include provision to make contributions to a pension, *Oberman v Collins*[3] which confirms that, when dealing with arguments about constructive trusts in relation to a portfolio of properties, it is unnecessary for the court to analyse the intentions behind the beneficial ownership of each individual property and Roberts J's decision in *WX v HX (Treatment of Matrimonial and Non-Matrimonial Property)* [4] which contained a summary of the law concerning matrimonial property (at paragraphs 113-117) which now appears to be the 'go to' case for a distillation of the applicable principles. There has also been a body of important cases dealing with costs and the impact of paragraph 4.4 of PD28A. These include Mostyn J's decision in *LM v FM (Costs Ruling)*[5] where he considered that parties are still under a duty to negotiate openly and reasonably at interim applications (even though para 4.4 does not apply to these hearings) and the two decisions of *Azarmi-Movafagh v Bassiri-Dezfouli* [6] and *LF v DF (Financial Remedy Costs: Debts in a needs case)*[7] which both provide some much-needed clarity around the interplay between costs orders and needs.



Brexit

As of 01.01.2021, the UK became a third country for the purposes of any proceedings initiated after 31.12.2020. Thus, amongst others, Brussels IIa, the maintenance regulation, the EU Services Regulation and the Mediation Directive have all ceased to apply. Perhaps the most significant impact of this is that forum for divorces and maintenance cases is no longer determined by lis pendens but instead is now based on forum non conveniens, thanks to the Domicile & Matrimonial Proceedings Act 1973. This raises the possibility of incompatible decisions between the courts of England and Wales and those of EU member states (for example, if one party applies somewhere in the EU on the basis of lis pendens and the other applies in London on the basis of forum non conveniens). The uncertainty surrounding all this means that, now more than ever, it is important to take advice early advice, and to take local advice in each jurisdiction which may be involved in a dispute.

Remote hearings

Finally, HHJ Farquhar's May 2021 report on the future use of Remote Hearings in the Financial Remedies Courts suggests that these are here to stay, albeit in a rather more limited way than at present. In short, FDRs, final hearings, MPS and LSPO applications, appeals, and enforcement hearings where the respondent's liberty is at risk will all be heard in person by default. Other directions hearings and applications are likely to continue to be dealt with remotely. That being said, the court is likely to take a "permissive view" of applications for other hearings to be dealt with remotely if these are made in good time.

2 [2021] EWFC 21
3 [2020] EWHC 3533 (Ch)
4 [2021] EWFC 14
5 [2021] EWFC 28
6 [2021] EWCA Civ 1184
7 [2021] EWFC B50