"FINANCIAL REMEDIES, CONTROLLING AND COERCIVE BEHAVIOUR"

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It is a truth universally acknowledged that, save for the most egregious cases, the courts do not take misconduct into account in financial remedy claims.

The s.25(2) checklist of relevant factors includes "…(g) conduct… if that conduct is such that it would… be inequitable to disregard it", but for fifty years this has been interpreted as applying only to exceptional cases: "gross and obvious" to adopt the formulation of Ormrod J in Wachtel v Wachtel [1973] EWCA Civ 10, which the Lords upheld in Miller; McFarlane [2006] UKHL 24, per Baroness Hale at [145]

"…This approach ['gross and obvious'] is not only just, it is also the only practicable one. It is simply not possible for any outsider to pick over the events of a marriage and decide who was the more to blame for what went wrong, save in the most obvious and gross cases."

But does this reluctance to hear allegations of conduct in a financial claim need to be reviewed in light of changing attitudes towards domestic abuse, which the Domestic Abuse Act 2021 now defines to include "controlling[1] or coercive[2] behaviour" and "economic abuse [3]" (s.1(3)). Might a finding of controlling or coercive control amount to conduct which is either 'inequitable to disregard' (per the statute) or 'gross and obvious'. Is the Financial Remedy Court heading towards the sort of fact-finding hearings that take place in private law children proceedings, pursuant to PD 12J and Re H-N [2021] EWCA Civ 448.

The recent case of Traharne v Limb [2022] EWFC 27 is not directly on point: the wife relied on allegations of domestic abuse as a defence to the husband's case that she should be held to a pre-nuptial agreement (PNA), rather than as a freestanding conduct argument. Nevertheless, the judgment of Sir Jonathan Cohen is instructive in terms of the approach a judge in the FRC is likely to take to allegations of controlling and coercive control.

Traharne v Limb

The essential facts were as follows: the parties were aged 59 (W) and 68 (H). This was a second marriage for both parties, which lasted 8 years. The assets were worth £4m. H sought to hold W to a pre-nuptial agreement (PNA). W raised as an (Edgar) defence to the PNA that H had subjected her to controlling and coercive behaviour, including financial control, 'gaslighting', isolating her from her support network and 'love bombing' her. H's open proposal was to offer £465k less amounts already paid by way of interim maintenance and a costs allowance (net £305k); W sought £1.05m and a modest pension share.

The matter came before Sir Jonathan Cohen for a 4 day hearing. The headline points from Mr Justice Cohen's characteristically clear and concise judgment are as follows:

01 Both sides were criticised for the 'misconceived steps' which had led to the incursion of £650,000 of costs in a 'not big money' case;

1 Defined in the Explanatory Notes to the 2021 Act at § 76 as follows: "a continuing act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish or frighten their victim

2 Defined in the Explanatory Notes at § 75 as "…a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour"

3 Defined in the Explanatory Notes at § 77

02 In relation to the PNA, the court applied Radmacher v Granatino [2010] UKSC 42 and Edgar v Edgar [1980] EWCA Civ 2, finding that Ormrod LJ's formulation of the vitiating factors is "…as relevant now as they were when uttered over 40 years ago". Notably, allegations of coercive and controlling behaviour "… would plainly be an example of undue pressure, exploitation of a dominant position or of relevant conduct";

03 On the facts, the court found that W was vulnerable at the time when the PNA was negotiated, and that it did not meet her financial needs;

04 However, the court rejected W's allegations of controlling and coercive behaviour, and found no causal link between those allegations and W entering into the PNA;

05 Cohen J criticised W's side heavily for concentrating on issues of domestic abuse: "[54] I very much regret that so much energy has been devoted to exploring this subject. The emotional and financial consequences on the parties has been considerable. It has also been entirely unnecessary"; and

06 W's needs were assessed at £378k, comprising an income fund of £192k, capital of £21k and £165k pension. In terms of costs both sides were criticised and "[95]… W has set her sights far too high. She has increased her claim rather than sought to mitigate it". H was ordered to contribute a further £80k, which meant that W exited the marriage owing between £70k to £80k to her solicitors.

Commentary

Firstly, had W been successful in (i) achieving findings of coercive and controlling behaviour, and (ii) a better outcome based upon those allegations, it might have been argued that Traharne was a breakthrough case, comparable to Hayden J's judgment in the private law case of F v M [2021] EWFC 4. However, W plainly was not successful, although (i) query if W will appeal and (ii) bear in mind that the facts of Traharne were unusual, in that W relied on allegations of abuse as a shield to H's PNA argument.

Secondly, there was a modest development of law, in relation to Cohen J's view that coercive and controlling behaviour came within the Edgar factors including undue influence. That conclusion is perhaps unsurprising given that the court has always approached Edgar arguments holistically, and (per Ormrod LJ in Edgar) "…it is not necessary in this connection to think in formal legal terms";

Thirdly, Cohen J's judgment identifies the problems with raising allegations of domestic abuse:

(i) legal costs will inevitably rise, particularly where a pattern of behaviour is alleged. Anyone who has argued for an 'add back' will know that there is a world of difference between raising one allegation (e.g. sale of a house at an undervalue) as opposed to establishing a pattern, e.g. from dozens of individual transactions or allegations. The latter (pattern) can require a significant amount of documentary evidence and in due course, longer hearings, and delay, if the individual allegations are disputed.

(ii) the allegations may not be necessary to resolve a case. On the facts of Traharne, Cohen J found W's allegations "entirely unnecessary". Financial practitioners would do well to study the recent judgment of the Court of Appeal in K v K [2022] EWCA Civ 468, which discourages court inquiry into domestic abuse in the context of private law children cases, save where 'strictly necessary',

"A fact-finding hearing is not free-standing litigation...It is not to be allowed to become an opportunity for the parties to air their grievances. Nor is it a chance for parents to seek the court's validation of their perception of what went wrong in their relationship".

Fourthly, how would a finding of controlling and coercive behaviour fit into the distribution of assets? A judge may conclude (i) that controlling and coercive behaviour amounts to relevant conduct, and (ii) may be sympathetic to the argument that (to cite Lord Nichols in White), "…there is much to be said for returning to the language of the statute", but how does that fit within the general principles of the law (see helpful recent summary by Peel J in WC v HC [2022] EWFC 22)? Presumably not by enhancing a sharing claim. In which case, it would seem that the argument is only worth pursuing if it means that a party's needs have increased (e.g. because of the impact of the abuse). Unless the court is also going to be asked to review another issue where most courts have show great reluctance to act: compensation. And then things would really get interesting.