FORENSIC CHEATING

ENSURING A LEVEL LITIGATION PLAYING FIELD

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A new era dawned on 11 January 2022, when Mr Justice Mostyn and His Honour Judge Hess issued a Statement on the Efficient Conduct of Financial Remedy Proceedings in the Financial Remedies Court Below High Court Judge Level with the approval of the President[1]. For many this was the long-awaited main course following the "entrée" of a similar statement in respect of Financial Proceedings in the High Court which had already been released on 1 February 2016. The Statement covers the entire financial remedy process from the point of issue to final resolution. It applies to every financial remedy case and every hearing below High Court level, the bread and butter for most family law practitioners. The Statement changes the way in which financial remedy practitioners (solicitors and barristers) must run their cases and a great deal more preparation and collaboration must now be undertaken in advance of any hearing.

Knowing the rules is critical of course, as is ensuring practitioners have sufficient time to comply. The box below sets out a summary of the rules. Preparing composite documents clearly requires the compliance of the other party (over which a practitioner of course has no control) and the run up to a hearing is a notoriously busy time. Enough time must be allowed not only to prepare the documents but to share them with the other party before the hearing. The statement makes clear that parties "must" collaborate to produce the documents and that it is unacceptable for the court to be presented at the FDR or final hearing with competing asset schedules and chronologies. For many cases this may be straightforward, but for complex situations agreeing these documents can be rife with difficulties.

What has become clear over the past year is that the judiciary are taking procedural breaches and non-compliance with court Orders, Practice Directions and Statements of Efficient Conduct very seriously.

If it is clear that it will not be possible to comply then practitioners should make an application to the court in good time seeking an extension of time or whatever relief is required. If they fail to do so and find themselves in breach of the rules or a court order, there is a risk of being reported to the professional body and also of a law report in the public domain for ever more reprimanding them.

In the recent case of Xanthopoulos v Rakshina [2022] EWFC 30 Mostyn J made preliminary comments criticizing the parties' "shocking' preparation for the hearing. He warned that: "the deliberate flouting of orders, guidance and procedure is a form of forensic cheating […] Advisers should clearly understand that such non-compliance may well be regarded by the court as professional misconduct leading to a report to their regulatory body" [3].

1 The Statement (and the accompanying template composite schedule of assets) was amended on 12 January 2022.

Admittedly that case was extreme in every sense with Mostyn J describing the costs as "apocalyptic" and "beyond nihilistic" (they were £5.4million at the time of that hearing and estimated to be between £7.2m and £8m by the conclusion of the proceedings). The procedural breaches in that case were numerous: -

- The husband's skeleton argument ran to 24 pages and the wife's skeleton argument ran to 14 pages (rather than 10 pages).
- Skeleton arguments were due by 11:00 on the working day before the hearing, but the husband's skeleton argument was filed only on the morning of the hearing, while the wife's skeleton argument was filed at around 17:30 the day before.
- the husband's statement was to be filed and served by 12:00 on 21 March 2022. However, the husband's statement was dated 22 March 2022 and the wife claimed that it had only been served on her on 24 March 2022.
- The same order also provided that the parties' statements for the hearing would be limited to 6 pages each, with any exhibit accompanying the same limited to 10 pages (a total of 16 pages). The husband's produced an 11 page statement with a 15 page exhibit, and the wife produced an 11 page statement and 28 page exhibit.
- There was to be one bundle limited to 350 pages of text, but the judge was provided with four bundles respectively containing 579 pages, 279 pages, 666 pages and 354 pages (some 1,878 pages).

In the case of WC v HC [2022] Peel J reprimanded both sides for a number of breaches and emphasised that "Court Orders, Practice Directions and Statements of Efficient Conduct are there to be complied with, not ignored." Referring to an order that he had made at the Pre-Trial Review which limited the parties' s25 statements to 20 pages of narrative to which the husband had complied but the wife had not[2], Peel J noted that "This is completely unacceptable, and W's legal team should not have permitted it to happen. The purpose of the restriction on statement length is partly to focus the parties' minds on relevant evidence, and partly to ensure a level playing field. Why is it fair for one party to follow the rules, but the other party to ignore them? Why is it fair for the complying party to be left with the feeling that the non-complying party has been able to adduce more evidence to his/her apparent advantage?

What does this mean for 2023? At its simplest, the additional planning and work required will surely at an even earlier stage throw into sharp relief the benefits of settlement for even the most recalcitrant of parties. Most importantly, no longer can parties screech up to the door of court with disregarded deadlines and flouted rules trailing in their wake and expect a blind eye to be turned.

A Headline Summary of the Statement on the Efficient Conduct of Financial Remedy Proceedings in the Financial Remedies Court Below High Court Judge Level

- **Allocation** – the applicant must file the allocation questionnaire at the same time as issuing their application unless wholly impractical. The applicant should also seek to consult the respondent for the purposes of completing the questionnaire.
- **Judicial continuity** – subject to available judicial resources, every case will then be allocated to an individual Judge at the earliest opportunity.
- **Obligations on practitioners before each hearing:**

First appointment

- The parties are to file a joint (or if impossible separate) market appraisal of each property currently used as family home 14 days before the First Appointment.
- The parties use their best endeavours to file no more than 3 sets of property particulars and joint (or if impossible separate) details as to mortgage capacity 14 days before the First Appointment.
- Questionnaires should not exceed four pages and longer questionnaires are only likely to be approved where justified by complexity, i.e. alleged non-disclosure.
- The applicant must file a composite case summary and composite schedule of assets and income based on Forms E using the approved templates (which are provided with the Statement)[3] 1 day before the First Appointment.

FDR

- The applicant must file an updated composite case summary and composite schedule of assets and income 7 days before the FDR
- The applicant must file a composite and neutral (in terms of the key dates and litigation) chronology 7 days before the FDR.

Final Hearing

- A final hearing template (i.e. timetable) must be prepared either at the PTR (which will be listed in every case where the final hearing has a time estimate of 3 days or more) or at the directions phase of an unsuccessful FDR (or at the subsequent mention hearing in those cases where the FDR was private).
- The applicant must file an updated composite case summary and composite schedule of assets and income 7 days before the Final Hearing.
- The applicant must file an updated chronology 7 days before the Final Hearing.
- A s25 statement should be limited to 15 pages (excluding exhibits) where possible and the 25 page limit in PD 27A 5.2A.1 should be regarded as a maximum.
- Court bundles are limited to 350 pages (absent a specific prior direction from the court). This does not include the position statements and the composite documents but it must contain the parties' Forms H or H1 (where applicable).The bundle must be filed not less than two working days before the hearing.
- Position statements are to be no longer than 6 pages at First Appointment, 8 pages for an interim hearing, 12 pages for an FDR Appointment and 15 pages for a final hearing (all page limits include any attached schedules).
- Position statements should be emailed to the hearing judge by 11am on the working day before the hearing.

Orders

- The order should be agreed and lodged before leaving court if at least one of the parties is legally represented at a particular hearing.

2 The Wife's statement purported to comply in that it consisted of 20 pages, but because it used smaller font and spacing it was, in fact, about 27 pages compressed within the 20 page limit provided for. The consequence is that her statement was about 33% longer than the Husband's.

3 These documents do not need to be agreed, but only one is to be filed and any differences between the parties should be noted easily.