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How an acrimonious divorce can take a financial toll

- Describe some of the consequences of destructive behaviour in divorce proceedings
- Identify what happens with spurious litigation
- Describe the courts' views on divorce proceedings

By Rosanne Godfrey-Lockwood

On September 18 2020 the Court of Appeal handed down its judgment on the matter of Rothschild and De Sousa (referred to for ease as the Rothschild case).

This was the outcome of Richard Rothschild's appeal against an earlier judgement of the High Court delivered in December 2019. Mr Rothschild was the Appellant Husband, Charmaine De Souza the Respondent Wife.

The case highlights why it is crucial that parties litigate in a reasonable and proportionate manner within the financial remedy proceedings, which all too frequently follow on from the breakdown of their marriage.

A decision to embark upon frivolous and or malicious litigation is likely to be met with severe judicial criticism - and can have significant consequences for the overall division of the assets.

This was the case for Mr Rothschild, whose award at the end of the proceedings was heavily reduced because of his use of litigation tactics which had substantially reduced the assets available for distribution.

The Rothschild case has been reported widely across the media, albeit in some cases with a gloss which does not quite accurately reflect the judgement.

The full decision can be found under case name RR v CDS [2020] EWCA Civ 1215. The Court of Appeal, affirming the first instance decision of Mr Justice Cohen, was highly critical of the husband and his approach towards the litigation.

Husband's conduct

The husband's conduct (or rather, misconduct) of the proceedings was heavily reflected in the outcome of the case, and the assets which each party was entitled to receive.

The costs incurred by the parties in respect of the proceedings in England at the time of the appeal were estimated to be more than £1m.

Marital assets had been sold during the court proceedings to meet a proportion of the legal fees, but it remained the case that both parties had considerable outstanding fees to be paid from any award received at the end of the proceedings.

A total of 13 costs orders were made against the husband during the litigation. The Court of Appeal agreed the costs paid and outstanding would have been a fraction of what they were but for husband's litigation conduct. Dismissing the husband's application, the Court of Appeal affirmed the view of Mr Justice Cohen: "We must be able to go forward in life without being excessively trammelled by debt.

"In so far as the resources are not there to enable [Mr Rothschild] to have the same freedom, that is the inevitable result of statute requiring me to give first consideration to the children and because of the way that [Mr Rothschild] has acted since the breakdown of the marriage which has been vindictive and irrational, and which has caused a huge and unnecessary haemorrhage of money to pay for this litigation.

"It is obvious that this has been the most destructive litigation. There is no avoiding the fact that [Mr Rothschild] is very largely responsible for the situation that has arisen. Since the breakdown of the marriage he has acted destructively and throughout the litigation without any regard to the normal rules."

It remains the case that difficult and malicious behaviour exhibited by one party during financial remedy proceedings can be punished with adverse costs orders, an adjustment of the asset division, or both.

This type of behaviour, referred to as "conduct" is not just limited to litigation conduct, but any conduct which the court considers it would be inequitable to disregard.

With that in mind, what type of conduct might a court consider relevant, or "inequitable to disregard"? In the Rothschild case, Ms De Souza alleged the following conduct perpetrated by Mr Rothschild had impacted adversely on the "financial circumstances of the family":

- Deliberate and wanton overspending and dissipation of assets, for the husband's sole benefit, and at a level wholly unsustainable as against the assets that were available and the family's needs moving forwards;
- Destructive behaviour which has impacted negatively on the value of the assets;
- The husband's refusal to allow the rental (or rental at a commercial rate) of the property portfolio since the separation, resulting in repossession proceedings and other enforcement proceedings, together with increased costs, as well as depletion of other capital and income to save them;
- The husband's refusal to obtain any form of paid work in the three years since separation to assist in meeting the increased costs of a separated household and litigation;

- The husband's behaviour which had impacted on the children, increasing the expenses associated with meeting their needs;
- The husband's refusal to participate appropriately within the proceedings, bringing unmeritorious applications and consistently failing to comply with orders and deadlines, needlessly increasing costs by a vast amount; and
- The husband's refusal to agree to the release of assets on an interim basis to allow each party to meet legal fees, forcing the wife resort to expensive specialist litigation funding at significant costs that could have been avoided.

Each of the above examples may well give good grounds for an argument that there should be a re-attribution of the assets in favour of the reasonable party. Of course, each case turns on its own facts.

A culmination of one or more will strengthen any such argument. The broadest, and most frequently argued, is the penultimate submission – namely that in respect of litigation conduct. Court orders are to be complied with and, understandably, judges are becoming increasingly less sympathetic to those who flagrantly disregard them.

Judicial system under pressure

With the Covid-19 pandemic, the judicial system has found itself under unprecedented pressure to keep cases moving towards a just resolution. There is simply no compassion for those who place obstacles in the court's way by failing to comply with clear directions.

As a practitioner, one party's failure to comply with their ongoing duty of full and frank disclosure of the assets within their financial proceedings is an all too familiar issue.

Not only does this hinder any early settlement (and accordingly, increases legal costs on all fronts) because the other party is not likely to agree to a settlement which has no regard to assets which they suspect are in existence but which have not been disclosed, but it also enables the court to make such assumptions as to the available assets as it deems appropriate.

If a court draws an adverse inference in respect of one party's means and their ability to meet their needs, whether in relation to their income, assets or liabilities, because that party has failed to provide adequate disclosure, then that party can hardly complain that the inference has led to an unfavourable award.

It is highly frustrating for an innocent party to find themselves at the receiving end of such behaviour. It is essential to ensure that any failings by the vexatious party are bought to the court's attention, without delay.

Asking the right questions at an early stage, pinpointing the areas of default and placing the failings on "record" are all likely to be helpful steps both in the short and longer term, should the matter proceed to trial.

Adverse costs orders can begin to cumulate and will often send a clear message to any final hearing judge in respect of the non-compliant party's character and credibility, as well as having a bearing on the sums ultimately awarded to one party over the other.

Orders can be sought which prevent a party putting or advancing certain aspects of their case unless and until they comply with a court order and, in more extreme circumstances, a party can be prevented from making applications until they comply with that ordered of them.

At a contested hearing, adverse inferences can be sought from the court which will likely infiltrate the court's assessment of the assets and resources. In such circumstances, the court should be asked to make specific findings in respect of a party' alleged conduct.

Where there are children of the marriage, or of the family, it is important to remember that they will be the court's first consideration in the financial proceedings.

Far too often, one party acts in such a way towards the other during the financial proceedings that it has a negative impact on the wellbeing of the children, whose needs will take priority within the financial award.

What can thereafter also ensue are costly and damaging parallel Children Act proceedings. If matters can be dealt with in an amicable, or at least civil, fashion, it may well obviate this further round of litigation and the consequent cost.

The courts are wholly supportive of mediation, and/or out of court based negotiations.

This can be even more beneficial if it engaged with before litigation is even initiated, saving each the financial and emotional cost of adversarial proceeding.

If the parties commence proceedings with the courts but express a desire to put a hold on it to enter into meaningful discussions, the courts are almost always willing to grant the parties the time they require to do so.

Parties should give serious consideration not just to mediation, but to private financial dispute resolution hearings (often referred to as PFDRs) where they are afforded a genuine opportunity to resolve their financial claims against one another in a calm and professional setting.

Another option, where the parties have reached the point of no agreement, is for them to engage in arbitration. This will provide them with a binding and enforceable decision without delay.

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