

## Arbitration - The route to consider when an ex-partner plans to play dirty in divorce

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Divorce can be a messy business at the best of times. In the post pandemic days of judicial backlog and huge waits for court time more and more people are turning to other forms of resolution including Arbitration.

But what do you do if faced with this choice and you are battling an ex who you feel is determined to play dirty and hide their finances? For many, Arbitration offers unique advantages. It allows them to dictate their own timetable, choose their arbitrator and to a significant extent set their own rules.

Whilst that may be great if your relationship with your ex is not at rock bottom it isn't so good if you are up against someone prepared to play dirty and even use the process of arbitration itself as a means of control.

Bear in mind that there are a number of sanctions a court can be asked to impose that are simply not available to an arbitrator:

1. A penal notice may be attached to an order to file financial disclosure. This means that in cases where that order is not complied with the non - discloser may be fined or in an extreme case may be committed to prison.
2. A judge can make an order for third party disclosure, for example against new partners or spouses, employers, accountants, company directors and banks. They can be ordered by the judge to come to court with relevant information and documentation.
3. In extreme cases where there is clear evidence of unjustified dealing with assets and a risk of dissipation or removal from the jurisdiction, an interim injunction called a 'freezing order' can be made. This restrains a spouse from disposing with or dealing with the assets. These sorts of orders can extend to assets held overseas.
4. A 'search and seizure order' can potentially be made allowing entry to the suspected non-disclosing spouse's premises in order to remove all items covered by the order. Such powers are far ranging and are all backed up by the threat of imprisonment for contempt.

In cases of suspected serious non-disclosure it may therefore be best to go down the court route from the outset.

Nonetheless, it should be kept in mind that within the scope of arbitration proceedings, there are still ways in which potential non-disclosure can be dealt with:

1. In the same way as a judge, the arbitrator is entitled to make adverse inferences against a spouse if they are uncommunicative or obstructive. In other words, it is possible to argue that because a person is being evasive that they have something to hide, and that the arbitrator should assume the true value of their wealth is higher than it is stated to be.
2. It may be that one party seeks to instruct specialist third parties such as a forensic accountant in order to look at the other spouse's disclosure, and adduce evidence which may support a submission of non-disclosure. As long as the arbitration agreement does not limit the arbitrator's powers of case management, the party who seeks to instruct such an expert is entitled to ask for such a direction.

**3.** As long as it is agreed that costs should be determined by the arbitrator as opposed to the court, under the rules which govern financial arbitrations the arbitrator has the discretion to order that one party bear a larger than equal share (up to the full amount) of the arbitrator's fees and expenses, and the legal costs of the other party. As part of this decision they can take into account a failure to comply with the rules, or any order or directions made by the arbitrator; the manner in which a party pursued or responded to a claim, and any other aspect of a party's conduct that is deemed relevant.

Ultimately an arbitral award has to be approved and endorsed by a Judge. Recently the Court of Appeal has confirmed that this is not just a "rubber stamp" exercise but the prospect of going through the arbitration process only to have it re-visited by a judge at huge expense is obviously to be avoided.

Arbitration has attracted much judicial endorsement and remains a quicker, flexible and often more cost effective alternative to going to court. However, it is a consensual process entered into by agreement. A view should be taken on the appropriateness of arbitration in light of how serious the non-disclosure is and whether court-based sanctions may be necessary.