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A Criticism Too Far – J v J [2014] EWHC 3654

This is my fiftieth Flyer since I sent my first back in 2006 and I am proud to think it has been throughout that period universally welcomed by my colleagues throughout the Northern Circuit and indeed even further afield.

Introduction:

The recent Judgment of Mostyn J in the North West case of **J v J [2014]** raises some very important issues for the Profession. There are again many matters dealt within the judgement which are reminders and, in this instance, stern reminders of those areas where practice lags behind recent or not so recent procedural rule changes. There are others opined upon by His Lordship which practitioners will find hard to accept as valid or an acceptable appraisal of the current approach of practitioners to the court process and their legal costs relationship with their clients. There are other views expressed by Mostyn J which most will regard as simply wrong.

The Facts:

The facts of the case are really secondary, but to set the scene, the parties were 54 (H) and 44 (W). There were two children aged 17 and 16 still living with the wife at the FMH. The parties had separated in 2011 and their marriage had been 15 years long. The husband was an established market gardener and at the time of the hearing there was a real prospect of his companies being merged with another to his financial advantage. Other than her notional income in the businesses the wife had no independent employment. At the conclusion of the hearing, the judgment approached division of the parties' resource value equally subject however to the costs issues.

In consequence of the parties having expended costs between them of a staggering £920,000 (H - £551,000 and W - £369,000), which included £154,000 on forensic accountants who appeared for each party – their resources for division after costs were significantly reduced from a pre-application position of £2,885,000 down to £1,965,000. Indeed, post the FDR in March 2014, when the costs had been 'just' £226,000, the parties were to go on to spend a further £700,000 on their legal wrangling to the judgment seat.

Mostyn J's Approach and Observations:

His Lordship adopted a number of approaches and made a number of highly critical observations:-

i) the costs expended of almost one third of the capital resources were totally disproportionate– an 8% average in his experience being more common – and even this he considered also disproportionate;

ii) one reason for the 'burgeoning of costs' was the wrong decision by the deputy district judge at the first appointment to permit a forensic expert on each side instead of the single jointly instructed expert to be provided almost invariably under Part 25 FPR;

iii) another was then the permission to allow the husband to change his first instructed accountant for a second forensic accountant;

iv) yet another was at the second FDR for the court not, as it had canvassed itself, to impose on the parties a single jointly instructed forensic accountant at that stage and also to permit the parties to waive the provision in PD 27A as to the Trial Bundle not to exceed 350 pages – resulting in, eventually, a Trial Bundle comprising of an essential reading bundle, 4 further 'court' bundles, 4 'additional' bundles, a 'husband's' bundle ie 10 volumes in all with another 2 added during the course of the 7 day hearing itself (the time estimate at the FDR having originally been 5 days).

v) 'the result had been to make a case that was surely so easily settleable almost impossible to compromise…'.

vi) the state of affairs revealed by the case was the same as referred to by Booth J in **Evans v Evans [1990]** 1 FLR 319 and more recently by Munby J , as he then was in **KSO v MJO & Others [2008]** EWHC 3031 in his 'Bleak House' reference when parties spent 71% of their resources on litigation costs and was the subject of Lord Neuberger's lecture to the Association of Costs Lawyers in 2012. The cry that 'something must be done' had gone unheeded.

vii) whilst the costs in the civil sphere limit the costs recoverable only from the losing party – the argument that to limit the costs charged by the lawyer of his own client was an impermissible interference with commercial transactions did not wash when those very costs come out of a finite pot over which the other party has a valid claim.

viii) something now needed to be done and first that including fixing lawyers' costs whether in ancillary relief cases or anything else. Hourly billing incentivises and rewarded the inefficient and punishes those with greater skill and knowledge who tend to work at a more efficient rate – the concentration should be on the value of the work and not the cost of time spent.

ix) a litigant should be able to demand a fixed price for each of the three (FA, FDR and trial) phases of ancillary relief.

x) further the court in ancillary relief proceedings should be able to impose at the beginning of an ancillary relief hearing a costs cap on lawyers charges in each of these three phases – this process could be variable but on strictly limited grounds.

xi) such capping of legal fees could encourage the erstwhile litigant in person back into representation with the potential costs engaged of a more manageable amount.

xii) the 'no order as to costs' approach introduced in 2006 has done nothing to curb the disfiguring impact of excessive costs. Whilst some have called for the re-introduction of the 'Calderbank' approach, His Lordship would see the same as a completely retrograde step.

xiii) this was now a matter of urgency which His Lordship would refer to the President for consideration by the Rules Committee.

xiv) in the present case there had been appended to the husband's Form E without the Court's permission a full accountant's report. To do so was wrong – the Form E permits of appendage of an accountant's letter supporting the spouse's valuation but not a reasoned report of this nature without permission so that it can be argued, as in this case, that the report should be that relied upon in the case.

xv) where there is a gross disparity on the spending on litigation costs by one party when contrasted with the other (as here by a margin of £182,000) it would be appropriate to add back to the other side's recovery the disparity in question in the fair division adopted: see **RH v RH [2008]** 2 FLR 2142 and **JS (Appeal: Costs) [2012]** EWHC 2690.

xvi) in a case such as this, the lawyers' payment within the wife's recovery was to be deferred. The wife should in the distribution of the resources held receive by lump sum, initially, sufficient to pay her litigation loan off first at £250,000, but the £119,000 balance then still due to her lawyers should wait until the sale of the husband's shares (12 mns limit).

xvii) in relation to the husband not having before the hearing approached his bank to see if he could raise a loan to meet his liabilities, it is for the spouse claiming that he or she cannot raise credit to establish the same by evidence as opposed to there being a burden on the other spouse to show that such credit can be raised: see **Newton v Newton [1990]** 1 FLR 33

xviii) the demands of a busy practice are no excuse for a contemptuous disregard of PD 27A in the preparation of the court bundle.

xix) it is not 'unfair' to the spouse who intends to rely on any forensically 'killer' document to reveal the same by inclusion in the single court bundle as opposed to burying it in one of many volumes. On the contrary, its highlight at an earlier stage will lead to an earlier opportunity of settlement – any suggestion to the contrary is absurd and reflects a 'playing of games' approach which is to be deprecated.

xx) also to be deprecated is where there is a core bundle prepared and other volumes of documents also brought to court as back up references – this is no better than the pre PD 27 A regime. The single bundle is not meant to be a 'core bundle' only.

xxi) in **Re X and Y (Bundles) [2008]** EWHC 2058 Munby J threatened dire consequences for similar failings – but despite this and the new Rules – the Profession routinely pays no attention to it – hence again His Lordship intended to refer the matter back to the President for the Rules Committee to consider the issue.

xxii) His Lordship considered that 'a special court' may need to be established for delinquent practitioners to explain themselves as happened in the Administrative Court; see **R (on the approach of Hamid) v Secretary of State for the Home Department [2012]** EWHC.

xxiii) both parties lawyers here were responsible for ' an unbridled exercise where the only commodity being charged for was time rather than product' resulting in their costs, inclusive of the experts, amounting to 31.9% of the parties net resources.

Commentary:

Unfortunately, space does not allow the luxury in this Flyer of the fullest of commentary. There are many aspects of the judgment which we can all resonate with as lawyers. However, the comments of the cause of the malaise in this case do appear to be in some instances quite wide of the mark:-

i) This case went wrong at the outset because of the case management decisions taken by the court. The criticism of the lawyers indirectly for arguing their cases within the principles of the existing law for single and joint experts and so obtaining an order for individual experts is not justified. The Family Procedure Rules are as plain to the court as they are to the advocates and solicitors engaged. The court has the task and duty to have the last word at each of the case management hearings before the matter ever reaches the trial and this includes as to the presentation of the court bundle if it is to be other than in PD 27A.

ii) The parties in this case were mature individuals represented by reputable firms of solicitors and counsel. The comments made by His Lordship suggest that in some way they spent their money on legal costs ignorant to the net effect thereof upon their eventual resource distribution. This is plainly not so as any one who has any experience of the current

highly cost sensitive approach of clients will vouch for. Clients are highly aware at all stages of their spending on legal costs and are given regular updates thereon as a case progresses.

iii) The costs cap and fixed fees limit suggested is likely to be wholly unacceptable as a mandatory sanction upon practitioners. His Lordship suggests that this reflects more appropriate award to those able to work quicker and more efficiently. In fact, it does not. If fees caps are placed on the three phases of the progress of an ancillary relief case then those amounts are to be recovered both by the diligent and the indolent – they are no reflection of the ability engaged. Ancillary relief is not an art of speed alone but of due care of the client's interests. The profession is not made up of burning 'intellectuals' moving from case to case, but in most instances very hard working professionals who invariably do not bill their clients for every hour spent. Indeed, the problem with many professionals is that they actually spend far longer on their cases than they are prepared to admit to each other or their clients.

iv) The suggestion that the effect of this approach as canvassed by His Lordship could be that the burden of litigants in person may be reduced if costs were contained in this way sounds somewhat desperate of a judicial system struggling under the consequences of the costs cuts imposed upon the whole legal system. All lawyers are aware of the need in cases to offer now different packages of funding and are doing so for their clients, including the fixed price alternatives – this is matter for the client and lawyer – not for the court in some 'paternalistic' approach to get involved in – especially as most judicial knowledge of the current costs and problems of day to day practice will be historical and somewhat 'rose hued' by definition.

v) The suggestion of the setting up of some 'Star Chamber' to punish the lawyer who 'fails' to meet the standards set is a stance which the Profession needs to stand up to as wholly unacceptable. The Profession is just that and not some bunch of unruly children to be lectured in this way. The judiciary and the court system depend upon the industry and in many instances the goodwill of practitioners to function at all levels. If this productive and professional relationship is to continue, this form of commentary has to stop – where problems exist they should be dealt with not by hectoring and courts of punishment but by expecting, through due dialogue, the problem to be properly addressed by the professional bodies concerned. Are the Professions to expect the courts to establish similar sanctions against individual judges, who do not adhere properly to the Family Rules procedures or, indeed, have their salaries 'docked' for wrong decisions – the suggestion is as equally absurd.

vi) The 'elephant in the room' is, undoubtedly, the need for reform of the law itself. The client is informed that the outcome depends upon the wide discretion of the individual judge as to what is fair. Therein lies the great uncertainty of outcome within which the variables are legion and the potential to run arguments on any number of issues at any one of the stages referred to by His Lordship are present. Pre-fixing the width of the potential variation of outcome of distribution is likely to be a more effective curtailment upon the multitude of issues now capable of presentation before the court with a case precedent in support.

vii) It is surely unacceptable that the litigant can have no real idea of the outcome of a divorce settlement before the court by looking at the statutory provision upon which it is based without consulting a lawyer to find ‘the secret’ as to how it may (as opposed to must) be applied by the judge eventually. The fact that the divorce experience is one to which more than one in three married partners will be exposed to is even more reason why the present position must be addressed either by a presumption of equality within the statute or some other limiting provision.

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