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‘For the times they a changing’ – The Private FDR

Introduction:

1. In February this year I was invited to the offices family lawyers firm, O’Sullivan Davies in Perth, Australia. Having delivered a seminar on *‘The History of and Present Approach to Prenuptials in England and Wales’* to an invited audience of law firms there earlier, I took the opportunity to dine out with James Claringbold, a partner of the firm and who himself had had secondment experience as an overseas lawyer only a few years ago in specialist family Chambers in London.

2. In our wide ranging conversation, James informed me that the popularity in Western Australia of the Early Neutral Evaluation Hearing (‘ENE’) or what we now know as our Private FDR had never been higher. It was clear that the reasons for this in Oz were identical to those now canvassed here – namely that such hearings provided an outcome which was likely to be cost effective, avoided delay and allowed bespoke attention by the chosen neutral evaluator of the specific issues involved.

3. James could see no down side from his regular experience of such hearings, which he reported were especially welcomed by lay clients in more often than not securing far earlier resolutions to their divorce financial disputes than awaiting the State Court’s process.

4. Of course, arbitration and mediation over here have each met with stubborn resistance to referral, no doubt in part because many in the profession itself were weaned on Court based litigation alone and still harbour deeply entrenched (albeit discretely hidden) views about any alternative resolution approach. So - is the private FDR bound for the same fate?

5. If the initial reaction from within the profession itself, especially in London and the southern counties is any indicator – then probably not.



6. Set against uncertain times generally, the lay client's hardening resistance to spending his or her money on the wide discretionary outcome of matrimonial finance litigation has over the last few years become palpable. Brexit has only encouraged this trend. Whilst the Bar Standards Board is increasing its pressure upon a somewhat truculent Bar community generally to publish its fee structures – a move well overdue; the lay client progressively is seeking '*maximum value for money*' disposal routes to avoid spending ever larger proportions of the family wealth in the litigation process of achieving a fair division of resources on divorce.

7. It is against this background that the private FDR has the potential to prosper – because, instead of being a pure '*other method* alternative, it offers the self same method of evaluation as presently operated by the Court itself (which when it occurs - is a highly successful medium in securing settlement) and at the same time it short circuits the process, whilst enabling the parties to choose their own experienced neutral evaluator instead of the lottery and crowding of the Court's listing system.

8. In addition, it has received heavy weight backing from the Court system itself in the form of first the former President of the Family Division in his leaving speech last year and most recently from his successor Sir Andrew McFarlane. As Sir James Munby put it last July 2018 (see '**President's Circular: Financial Remedies Court Pilot Phase 2**' p1201) as follows:-

a 'A private FDR is a simple concept. The parties pay for a financial remedy specialist to act as private FDR judge. That person may be a solicitor, barrister or retired judge. No additional qualification is required. The private FDR takes place at a time convenient to the parties, usually in solicitors' offices or barristers' chambers, and a full day is normally set aside to maximise the prospects of settlement. It takes the place of the in-court FDR'

Further

'Usually, where the parties have agreed to a private FDR the order made at the first appointment will record such an agreement in the recital, and will provide for a short directions hearing shortly after the date of the private FDR. The directions hearing can be vacated if agreed minutes are submitted following a successful FDR. If it has been unsuccessful then directions for the final hearing can be given. An alternative is for the case to be adjourned generally while the private FDR takes place.'



What is the Process

9. In short, the Court does not have the power to order the parties to attend a private FDR. The Court has only the power to adjourn for a period to allow a private FDR to take place and according to the President’s guidance to fix a directions hearing at an appropriate future date to either give formal approval to the agreement reached as a result of the private FDR or to give directions for a final contested hearing. All of this is entirely within the existing powers contained within **FPR 2010 Part 3 (2)>(4)**.

10. i) Accordingly, the first step will be for the parties and their solicitors to agree for the Financial Dispute Resolution hearing to ‘go private’ and set out below is a tabulated format summary of steps which may be useful.

ii) If I have learned anything in setting up my own Chambers as a barrister over 5 years ago – it is whatever you offer in ability and services – the crucial question remains **are you likely to deliver best value for money** – and so with this in mind – I have added in the last column below the private FDR hearing service I provide for comparison:-

	STEPS	APPROACH	ASHLEY MURRAY
STEP 1	Private FDR judge process	<p>i) Explain to the lay client the advantages of the ‘private’ FDR process – ie avoidance of delay, bespoke choice of Judge, process enables judge without distraction of other cases to devote entire period to engaging parties in a settlement;</p> <p>ii) Explain that the private FDR is intended to be in place of the Court FDR hearing, is confidential and the costs shared equally;</p> <p>iii) Explain that where agreement is reached at the private FDR it is necessary to obtain the binding order of the Court thereafter</p>	<p><i>i) Full details of the terms and conditions of Ashley Murray acting as the private FDR Judge are set out at under ‘Private FDR hearings’ at www.ashleymurraychambers.co.uk</i></p>

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		<p>endorsing such terms at a short directions hearing. Emphahsise that the Court, whilst not a rubber stamp, is, save in exceptional circumstances, going to approve any such agreement by final order.</p>	
STEP 2	<p>Jointly agree between all parties upon the identity of the 'private' FDR Judge</p>	<p>i) There is currently no nationally approved list – and so the same will need to be an individual with recognised expertise in this area or a retired judge;</p> <p>ii) Quite a number of London Chambers offer this service – on The Northern Circuit the choice is more limited at this stage.</p> <p>iii) Most advertised services continue to require the judge's fee to be discussed – this is in fact a nonsense and there should be a fixed fee structure fully transparent in the service advertised.</p>	<p><i>i) >iii) Ashley Murray accepts joint instructions to conduct private FDR hearings subject to all parties signing an appropriate private FDR engagement contract (copy available on request) and payment of his fixed fee of £4,000 plus vat (and any agreed extra costs) in full no later than 7 days before the date agreed within the engagement contract for the private FDR hearing. The suitability of Mr Murray for such engagement is:-</i></p> <ul style="list-style-type: none"> • <i>he operates a fixed sitting fee of £4,000 plus vat for all cases where the net value of the assets engaged up to £5m *subject to undue complexity – fees above this net asset level or of undue complexity are subject to agreement after reasonable discussion;</i> • <i>he already holds authorisation uniquely as a Recorder (Judge) to sit within the Family Court process on divorce financial remedy hearings and appeals;</i> • <i>he has sat on Family cases as a Recorder (Judge) for over 24 years;</i> • <i>he was the first barrister on the Northern Circuit to practise exclusively over 24 years ago in divorce financial remedy work;</i> • <i>he has for many years been ranked grade 1# by the national legal directories for his divorce financial remedy practice;</i> • <i>he remains the most experienced barrister in such financial remedy work on Circuit;</i>



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				<ul style="list-style-type: none"> • he was the original protagonist and campaigner for the 'Money Judge' system now operated on the Northern Circuit which he helped instigate in liaison with Ryder LJ; • he is co-author of a standard legal textbook with particular responsibility for the acclaimed section on prenuptial agreements; • he has lectured within the UK and Australia upon divorce financial remedy and pre and post marital agreement subjects; • he has had numerous articles published in the Family Law Journal and elsewhere on financial remedy issues over the last 22 years;
STEP 3	Secure provisional agreement to the date and venue for the private FDR to take place	<p>i) The private FDR judge should provide the option either to conduct the private FDR at a venue chosen by the parties or to provide a neutral venue meeting facility which, at least, provides a room for each of the parties' legal teams and an appropriately sized hearing room together with refreshment facilities etc</p> <p>ii) All parties should be familiar with the private FDR agreement which will need to be entered into (see STEP 5 below)</p>	<ul style="list-style-type: none"> • Solicitors engaging Ashley Murray to sit as a private FDR Judge have the option to provide their own agreed venue for the private FDR - in which event the only additional cost, if any, will be Mr Murray's reasonable travel expenses (and if outside the Northern Circuit any required accommodation cost) in excess of 100 miles return round journey from Liverpool. • Alternatively, Ashley Murray Chambers will arrange a suitable neutral venue in agreement with the parties within the Liverpool City area as well as necessary refreshments for the private FDR hearing - details of cost for a full day will be up to £500 plus vat - dependent upon requirements. 	



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<p>STEP 4</p>	<p>Obtain by a joint application to the Court a consent order adjourning the Court process.</p>	<p>i) It is usual in the private FDR process that there has already been financial remedy proceedings commenced and the parties have either already had a FDA directions hearing or one is listed for hearing. However; an early neutral evaluation or private FDR can take place before proceedings are issued as long as the parties are satisfied that appropriate disclosure has occurred.</p> <p>ii) Although the President's guidance may suggest that the Court FDR/process could be adjourned generally – it is suggested this is probably unwise and there should be an adjournment for a set period of time only to a short directions date to ensure no unnecessary delay by either party in due compliance;</p> <p>iii) The adjournment application should provide for <i>'agreed disclosure directions'</i> if none have been made to date at a FDA and/or where further directions are deemed required in advance of a private FDR;</p>	
<p>STEP 5</p>	<p>Obtain the signature of all parties, lawyers and the chosen judge to the private FDR agreement.</p>	<p>There is currently no standard approved contract form but the existing mediation agreement could be modified for these purposes or the chosen</p>	<p><i>Ashley Murray Chambers will provide a copy of the private FDR agreement form upon registered request.</i></p>



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		private FDR judge will have a pro forma agreement for these purposes. Either way the agreement should contain a confidentiality clause	
STEP 6	Comply with the private FDR judge's directions in advance of the private FDR hearing	As part of the terms and conditions of the appointment of the private FDR judge, he/she will have required agreement by the parties to such directions compliance	<p><i>The standard directions subject to the individual requirements of the case would be:-</i></p> <p><i>A skeleton FDR bundle delivered not less than 3 working days before the Private FDR hearing comprising only of:-</i></p> <ul style="list-style-type: none"> • <i>the bare FDRs, if already filed,</i> • <i>any questionnaires and replies thereto,</i> • <i>an agreed schedule of up to date net assets and net incomes with any reason for disagreement and alternative figures arising thereby endorsed briefly thereon;</i> • <i>an agreed statement of resolved issues and outstanding issues;</i> • <i>a neutral chronology;</i> • <i>copies of any relevant valuations;</i> • <i>copies of any SJE reports</i> • <i>copies of any relevant up to date company accounts and/or trust documents</i> • <i>the written submissions of the advocates presenting the parties cases at the hearing.</i>
STEP 7	The private FDR hearing	i) If agreement is reached at the end of the hearing then reduce the Heads of such an agreement into writing and/or into a standardised Court order	



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		<p>form and obtain the signature of all parties and the private FDR judge thereon;</p> <p>ii) If overall agreement cannot be reached to all aspects - consider if any issues/ values can be agreed and reduced to writing as above;</p> <p>iii) If overall agreement cannot be reached, then attempt to agree the terms of a joint letter to the Court requesting, without the attendance of the parties, at the listed short directions hearing an agreed order listing the matter for a final contested hearing on standard terms</p>	
STEP 8	The listed short directions hearing	<p>i) Make a consent application with attached Consent Order draft for a Court Order endorsing the terms of the agreement reached at the private FDR.</p> <p>ii) In the absence of overall agreement list for final hearing</p>	