



Conduct - To Plead or not to Plead?

When is conduct relevant?

Section 25(2)(g) of the Matrimonial Causes Act 1973 states that for conduct to be taken into account in financial remedy proceedings it needs to be conduct that would, in the opinion of the Court, be inequitable to disregard. What does this mean? Section 4.4 of the Form E (financial statement for a financial order) states, *“bad behaviour or conduct by the other party will only be taken into account in very exceptional circumstances when deciding how assets should be shared after divorce/dissolution”* What are very exceptional circumstances?

[OG v AG \[2020\] EWFC 52](#)

In this case Mostyn J identified four situations in which conduct will be relevant:

- Gross and obvious **personal misconduct** by one party against the other, normally, but not necessarily, during the marriage.

This conduct will only be taken into account in very rare circumstances and there must be a financial consequence to the conduct.

- Where one party has **wantonly and recklessly dissipated assets** which would otherwise have formed part of the divisible matrimonial property.

It will only be in clear and obvious, and therefore rare, cases that this principle is applied.



● **Litigation misconduct.**

Where proved, this conduct should be severely penalised in costs.

● Where one party **fails to give full and frank disclosure** which results in inferences being drawn as to the existence of assets.

The taking of account of such conduct is part of the process of computation rather than distribution.

What procedure should be followed when alleging conduct?

Tsvetkov v Khayrova [2023] EWFC 130 and *Tsvetkov v Khayrova* [2023] EWFC 131

In this case, Peel J referred to Mostyn J's guidance as set out in *iOG v AG*. Peel J went on to add that, in his judgment, a party asserting conduct must prove:

Stage One

- The facts relied upon;
- If established, that those facts meet the conduct threshold, which has consistently been set at a high or exceptional level; and
- That there is an identifiable (even if not always easily measurable) negative financial impact upon the parties which has been generated by the alleged wrongdoing – a causative link is required.

Stage Two

If stage one is established, then the Court will consider how the misconduct and its financial



consequences should impact upon the outcome of the financial remedy proceedings with the Court undertaking the section 25 exercise which requires a balancing of all relevant factors.

At paragraph 45 of his judgment, Peel J picked up on the tendency for parties to either reserve their position on conduct or include incidents of bad behaviour which do not meet the requisite threshold for properly pleading conduct at section 4.4 of their Form E. Peel J strongly deprecated this practice.

Peel J set out that, in his view, the following procedure should normally be followed when there are, or may be, conduct issues (however, he noted that this will not be necessary or appropriate where one party alleges litigation misconduct, as the Court will be able to deal swiftly with costs at the hearing):

- Conduct is a specific section 25 factor and must always be pleaded as such (not just at the 11th hour of the Final Hearing).
- A party who alleges conduct must:
 - a) specify the allegations,
 - b) state how the allegations meet the threshold criteria for a conduct claim, and
 - c) identify the financial impact caused by the alleged conduct.
- The conduct allegations should be clearly set out at section 4.4 of the alleging party's Form E.
- The Court is duty bound by FPR 2010 r1.1 to have regard to the overriding objective, i.e. deal with cases justly having regard to any welfare issues involved.
- The Court is required to identify the issues and is empowered to determine which issues should be investigated, as per FDP 2010 r1.4.
- The Court should determine at the First Appointment how to case manage the alleged



conduct.

- If alleged conduct arises after Forms E, this must be brought before the Court as soon as possible so that it can be managed properly.
- Whenever conduct is relied upon and the Court permits it to be advanced, it should be properly pleaded.

In this case the threshold for the husband pleading conduct was met. The wife had removed (unbeknown to the husband) jewellery from a Harrods safety deposit box and only some of it could be accounted for. She also told the Court that she had 20 high-end handbags in her possession but she in fact had 150. Peel J described the wife as having *“uttered barefaced lies to the H and the Court”*. Peel J made an award against the wife of 50% of the husband’s costs on an indemnity basis. He conducted a summary assessment and ordered £374,316 to be paid forthwith and the balance to be set off against the lump sum payable to the wife by the husband.

How does the Court deal with domestic abuse as personal misconduct?

N v J [2024] EWFC 184

This is a very recent judgment by Peel J in which he refers to his earlier judgment in *Tsvetkov v Khayrova*. In Peel J’s view, personal misconduct, including domestic abuse, must be exceptional to be relevant in financial remedy proceedings; the increasing awareness of domestic abuse (and its harmful and pernicious effects) does not lower the threshold. Peel J accepted that whilst statute does not specifically require there to be a financial consequence to the conduct, cases where such consequence is absent will be vanishingly rare (as the authorities suggest). He also considered that the alleged conduct must be material to the outcome and to inquire into conduct must be proportionate to the case as a whole.

In this case N (who had a history of mental health issues prior to the relationship) alleged that during their relationship J lied about infidelity which resulted in N increasingly requiring medical treatment (hospitalisation, rehabilitation, medication and Electroconvulsive Therapy). Peel J decided that the conduct claim would be excluded from consideration at trial. He decided this on the basis that the financial distribution could be fairly achieved by reference to all the other section



25 factors without any need to take account of the conduct allegations and even if conduct were found in this case it would make no material difference to the outcome.

What other points should lawyers consider when there are allegations of conduct?

In summary, allegations of bad behaviour will not be relevant in every case and will not always amount to conduct. Clients should be advised of the very high threshold to plead conduct in financial remedy proceedings and the correct procedure (as set out above) that should follow. It is also worth bearing in mind the helpful messages in the below two cases.

Ultimately, don't run an untenable case [AO v TL \(Costs\) \[2023\] EWFC 216](#)

Peel J had made an award of Â£7.75m net to the wife on a needs basis. The parties each sought a costs order against the other. The wife in this case made personal criticisms against the husband throughout her documents without formally pleading conduct. Peel J made a costs order against the wife for the sum of Â£100,000 to be deducted from her award.

In his judgment, Peel J stated *“the practice of making pejorative comments about the other party which have absolutely no relevance to the outcome of the financial remedy proceedings and are probably hurtful, must cease; the court's function is not to pick over the bones of the marriage and attribute moral blame”*.

It is fair to acknowledge that Peel J doubted whether this added significantly to the costs but highlighted it is not appropriate to make unnecessary allegations and, ordinarily, this might justify a costs order. He also considered that the husband was *“somewhat evasive and legalistic about his trust interests”* (which was a central issue in the case) and that the wife did not negotiate reasonably until late in the day. Peel J stressed that lawyers must advise their clients of the costs risk associated with running an untenable case and although the starting point is no order as to costs, the Courts are increasingly willing to depart from that so as to do justice.

Plead conduct and add-back (correctly) and early on [O v O \[2023\] EWFC 161](#)

In this case before Recorder Laura Moys, the wife alleged that the husband had incurred net losses of Â£406,820.68 (she later reduced this figure by Â£60,000) via a spread betting account. She invited the Court to add-back these losses to the husband's side of the balance sheet on the basis that the husband's actions were reckless, significantly reduced the pot available and it would be



inequitable to disregard.

However, in her section 25 statement, the wife said that *“this is not a conduct case”* then went on to make various allegations against the husband about him being unpleasant or abusive since their separation in a total of 13 paragraphs under a section headed *“s.25(2)(g) conduct”*. None of the allegations were formally pleaded. In Recorder Moysa’s view, had the wife properly pleaded her conduct allegations at the earliest available opportunity the tension in the wife’s add-back strategy would have emerged much sooner than the final hearing and the difficulty with the wife’s approach would have been apparent.

It seems that the law on when and how to properly plead conduct in financial remedy cases is now firmly settled. There is ongoing research by Resolution, the Fair Shares Project and The Law Commission in relation to the issue of domestic abuse in financial remedy proceedings. The Law Commission’s scoping report (due in November 2024) will specifically deal with conduct as a factor to which the Court must have regard when deciding financial remedy awards. The judgment of Peel J in *N v J* may provide even more momentum to the ongoing research.

Annie Boxer

annie.boxer@iflg.uk.com

The International Family Law Group LLP

www.iflg.uk.com

Â© August 2024