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The issue of delay in financial remedy cases: why not engage in arbitration instead or arrange a private FDR?

There is no disputing the fact that the Family Courts continue to face considerable workload pressures, undoubtedly exacerbated during the Covid-19 pandemic. Judges and Court staff are under considerable pressure to ensure that there is continued access to timely justice. However, with increased pressure, demand, and workload, delay to financial remedy cases is now unfortunately the norm. For a client, delay can mean increased stress, costs, and uncertainty all of which are of course not welcomed. Nonetheless, there are various options that can be pursued to minimise delays in financial remedy cases including engaging in mediation, arbitration, or arranging a private FDR.

Engaging in mediation

There has recently been significant encouragement for parties to a Family Law dispute to engage in mediation. The mediation process involves an independent, professionally trained, mediator assisting the parties to come to an agreement between them. One of the many advantages to mediation is that the parties remain in control; the role of the mediator is to facilitate discussion, not to decide the dispute. The mediator can work flexibly with the parties in a way that suits their circumstances. The mediation process is usually less costly than pursuing litigation and can often bring about a resolution more quickly. However, despite the many advantages, mediation will not always be suitable for each case; this is especially so where there has been domestic abuse.

The recent article from my colleague Sarah Corners, Partner and Mediator at the firm, explores the mediation process in more detail https://iflg.uk.com/blog/alternative-dispute-resolution-mediation

Engaging in arbitration

In summary, arbitration is an alternative process to court proceedings by which a dispute is resolved by an impartial adjudicator whose decision the parties agree will be final and binding upon them. In the family law context, once the process is complete, the parties then apply to the court for the arbitrator's written arbitral award to be formalised into a court order.

There are many advantages to entering into arbitration. For example:

- The parties can agree the scope of the arbitration in advance – the arbitrator can be instructed to resolve a whole matter, or just certain aspects of the matter that the parties are unable to agree on.
- The parties can decide on the mode of the arbitration, i.e., by hearings, on paper, or both, and generally have more control in terms of the way the matter progresses compared to litigation.
- Arbitral awards can be arrived at relatively quickly without incurring the considerable costs of attending numerous hearings.
- The same arbitrator can be involved in the matter from start to finish, unlike when a matter is litigated, and the parties may find themselves before a different judge at each hearing.
- The process itself can feel less daunting for the parties as it is much more flexible than engaging in litigation and having to attend formal courts.

- The parties can choose an arbitrator who would be well suited to determine the issues which are in dispute.

Some clients may be wary of entering into arbitration because they are concerned about ending up in a situation where they are dissatisfied with the arbitrator's award. This is because arbitration awards in the commercial sphere (and in many other countries) are very difficult to challenge. They are often limited to situations where there was a lack of jurisdiction, serious irregularities, or a question of law. However, in the landmark judgement of *Haley v Haley* [2020] EWCA Civ 1369 the Court of Appeal clarified the approach to be taken by the Family Court in such a situation.

The husband in this case considered the arbitral award to be unfair. He therefore applied to the High Court seeking to appeal the arbitral award or for an order to be made by which the court would decline to make an order under the Matrimonial Causes Act 1973 ("MCA 1973") as per the terms of the arbitral award and alternatively the court would exercise its discretion anew. Deputy High Court Judge Ambrose dismissed the husband's appeal and made an order in accordance with the terms of the arbitral award. The husband appealed the decision of Deputy High Court Judge Ambrose and permission was given.

The husband's appeal was limited to consideration as to the test to be applied where one party declines to consent to or challenges the making of an order under the MCA 1973 in the terms of the arbitral award following family arbitration under the Institute of Family Law Arbitrators Scheme. The Court of Appeal by unanimous view ruled that the court can decide not to make an order in accordance with the terms of the arbitral award if the order is *'wrong'* and if there are considerable grounds for concluding that an injustice would be done if an such an order was made.

The following comment from Lady Justice King which can be found at paragraph 6 of the judgment is particularly noteworthy:

"It goes without saying that it is of the utmost importance that potential users of the arbitration process are not deterred from using this valuable service; either, on the one hand, because the outcome is not seen as sufficiently certain or, on the other, because arbitration is regarded as providing no adequate remedy in circumstances where one of the parties believes there to have been an unjust outcome."

The test for challenging an arbitral award is therefore lower than originally thought; earlier

reported decisions suggested that the arbitral award had to be seriously or obviously wrong. This new test brings arbitration much more in line with the approach of the Family Court. Those that are hesitant about entering into arbitration because they are concerned there is no recourse if the order is wrong or unfair should be reassured by the judgment of Lady Justice King.

Arranging a private FDR (also known as early neutral evaluation)

A fundamental stage in financial remedy proceedings is the FDR appointment. It stands for Financial Dispute Resolution appointment and, in summary, is a hearing at which the court gives a non-binding indication as to the likely outcome and encourages settlement.

Notwithstanding the excellent work done by so many in the family justice system, the court system is currently severely under-resourced and over-worked. The problem already existed before the Covid-19 pandemic but has since got worse. The issue is more acute in some areas of the country than others. As a result, judges conducting FDR appointments will routinely find that they have perhaps five or six other cases to deal with that day. With the best will in the world it is not possible to devote the same amount of attention to a case if there are a handful of other matters which also need to be heard the same day.

A private FDR follows a very similar format to a court-based FDR, save that rather than the indication being given by an over-stretched judge provided by the court, the parties agree to pay a practising solicitor or barrister of their choice to give the non-binding indication instead. There are many advantages to arranging a private FDR in place of a court-based FDR. For example:

- The private FDR can be arranged for a date suitable to both parties.
- The arrangement of a private FDR is voluntary, unlike the compulsory court-based FDR; therefore, the parties are likely to begin the process of negotiation with sincere desires to settle.
- The private FDR judge will only have one case to deal with that day as opposed to the court-based FDR judge who will usually have a number of cases within their list.
- The private FDR judge will have had sufficient time to read in on the case and given the

current pressures on the Family Court judges, this is not always an option with court-based FDR's.

- A whole day can be set aside for the private FDR in order to encourage the parties to actively engage in negotiations and work towards settlement.
- There is more flexibility as to the remote means by which a private FDR takes place (e.g., Zoom, Teams and other platforms).
- The parties can agree to the identity of the early neutral evaluator at a private FDR and pick someone well suited to the issues in the case.

Does the Court have the power to compel non-Court based dispute resolution?

The answer to this question was provided by the Court of Appeal in the recent case of *Churchill v Merthyr Tydfil CBC* [2023] EWCA Civ 1416. The defendant local authority made an application to stay the claim on the basis that the claimant should have used the available Corporate Complaints Procedure. The application was dismissed by Deputy District Judge Kempton Rees citing the earlier decision in *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576 that the Court could not compel parties to mediate. The local authority appealed to the Court of Appeal, and it was concluded that the power does exist to stay proceedings for the parties to attend/for the Court to order non-Court-based dispute resolution. Sir Geoffrey Vos, Master of the Rolls, concluded:

"Even with initially unwilling parties, mediation can often be successful. Mediation, early neutral evaluation and other means of non-court-based dispute resolution are, in general terms, cheaper and quicker than court-based solutions. Whether the court should order or facilitate any particular method of non-court-based dispute resolution in a particular case is a matter of the court's discretion, to which many factors will be relevant."

Conclusion

Despite the many attractive advantages, mediations, arbitrations and private FDRs are sometimes perceived as not being suited to all cases, particularly because of the hesitation some clients may have in relation to the additional cost. However, for many clients, the chance of settling their case timeously and reducing the risk of having to proceed to a Final Hearing by engaging in focused negotiations outweighs any hesitations. As King LJ said in '*Haley* '(in relation to arbitration although the same could be said to apply to private FDRs):

"*There is a common misconception that the use of arbitration, as an alternative to the court process in financial remedy cases, is the purview only of the rich who seek privacy away from the courts and the eyes of the media. If that was ever the position, it is no more. The court was told during the course of argument, that it is widely anticipated that parties in modest asset cases (including litigants in person) will increasingly use the arbitration process in the aftermath of the Covid-19 crisis as the courts cope with the backlog of cases, which is the inevitable consequence of 'lockdown'*."

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