The role of conduct in financial proceedings in England and abroad

Executive summary

Conduct remains an area in which public and client perceptions vary widely from how case law has developed in the area. This article examines the historical background for conduct as a facet of the divorce process, analyses how conduct is applied by the Courts as a factor within financial proceedings and examines comparable international jurisdictions.

The historical context

Divorce as we know it – as a remedy within the gift of civil rather than religious courts – has from its outset in the late 19th century been fault-based. Conduct has played a role from the very beginning. The only basis on which a divorce could be granted in accordance with the Matrimonial Causes Act 1857 was adultery (women required a husband to have been adulterous plus an aggravating factor such as incest to have been present).

Significant reforms in the early 20th century widened the conduct on which a divorce could be based to include cruelty and wilful desertion for three years – both of which live on in slightly modified forms in the shape of behaviour and desertion petitions until no fault divorce reforms which are due to take place in April 2022.

The end of the swinging sixties saw a fundamental tipping of the balance away from conduct with the introduction of one ground for divorce – irretrievably breakdown of the marriage – albeit supported by one of five facts. Three facts were conduct based – adultery, behaviour, and desertion – and two were not – two years' separation with consent and five years' separation.

The latter part of the 20th century and the beginning of the 21st saw more divorce reforms but until April 2022 the fundamentals remained the same: a process arising from the irretrievably breakdown of a marriage, attributable to one of the five facts. As such, the starting point of the process is, in most cases, the conduct of the respondent party.

On 1 April 2022 the much-awaited no-fault divorce reforms will finally be introduced into law in England and Wales. Although these reforms are limited to divorce and do not make any change to the way in which conduct is treated within financial proceedings, it will be interesting to see whether the reforms will have an impact on how the general public believe conduct is treated within financial proceedings.

Within the process the divides financial assets

Conduct often looms large in the mind of a client instructing in relation to financial proceedings either following or as part of the divorce process. This is understandable given that the disclosure form they are required to complete (Form E) has a specific question focussing only on conduct. This arises from Section 25(2)(g) of the Matrimonial Causes Act 1973 and Schedule 5 to Part 5 of the Civil Partnership Act 2004, both of which give Judges a list of factors to consider when making financial remedy orders and both of which specifically name conduct as one of those factors.

None of the factors is given more weight than the others so conduct has, theoretically, a potentially unlimited role within the proceedings. The reality is not quite so simple.

Limits imposed by the judiciary

In our legal system, laws come from several sources. Acts of Parliament, international law, common law, and precedents set by the judiciary. While Parliament did not set any limits on the role of conduct, the judiciary has done.

As long ago as 1972, Lord Denning[1] made it clear that the role of conduct would be fundamentally circumscribed:

The court should not reduce its order for financial provision merely because of what was formerly regarded as guilt or blame. To do so would be to impose a fine for supposed misbehaviour in the course of an unhappy married life.

This represents a rather stark wake up call for the client wishing to advance a case built on conduct: the court is not there to redress marital unhappiness in pounds and pence within the divorce settlement.

In the same decision Ormrod J mentions conduct having to be 'obvious and gross'. Other cases mention a *'gasp'* factor[2] . Conduct will, therefore, only be taken into account when it represents the most serious behaviour and when it would inequitable not to take it into account, i.e., when fundamental fairness demands it[3]. Yet even were the Court to find behaviour worthy of the *'gasp'* factor, it may not be willing to quantify and apply that behaviour in the final reckoning as the case of *FRB v DCA (No. 2)*[4] makes clear.

Development of categories

Case law shows us that there are two, or arguably three, broad categories of conduct and that they are treated very differently by the law.

Litigation (mis)conduct

The first category is litigation conduct within proceedings. This relates to how the parties conduct themselves in terms of court processes. Non-compliance with court rules and practice can be met with costs orders imposed on the errant party. Requests for such orders are advanced frequently – far more frequently than the orders that are made. The conduct involved generally must have a material effect on the reaching or imposition of a settlement or run up costs for the other party. A few days late here and there will not, in reality, see a costs order made against a party.

The conduct in this category is dealt with by way of an order rather than an adjustment to the financial settlement (though in reality, payment of the costs order will reduce the amount in the hands of the offending party). Costs orders are limited in scope, and it is rare for a party to recover all of their costs.

Matrimonial conduct

The second type of conduct falls within the period of the marriage rather than within the proceedings – though of course in practice they often overlap. It can be sub-divided into twofurther categories: financial conduct and more personal conduct.

Financial conduct

Courts have been more readily willing to apply *'add back'* in the cases of financial conduct compared with personal conduct. It is arguably easier for a Judge to quantify what has been *'lost'* to the matrimonial pot where it can be summed up in pounds and pence then add that notional sum back in to meet the offending party's claim. A loss does not always equal an add back though. It can mean the making or not making of certain orders, or in some cases nothing happening at all.

The case of *K v K*[5] saw a wife avoid a maintenance order being made against her in favour of her alcoholic husband who also had a personality disorder. He had gambled away the family savings and his behaviour had allowed the family home to reduce in value and then be repossessed.

K v K is somewhat unusual in that there is quite often a feeling that the flaws of a spouse, particularly resulting from a health condition, ought not be redressed in the divorce finance courts. Contrast *K v K* with the case of *MAP v MFP*[6] which saw a husband spend £1.5m over a two-year period, much of it on drugs, prostitutes and then drug rehabilitation (with only limited success). The Court took a rather different approach to *K v K* and refused to add the sums back into the pot, making it clear that the expenditure was due to facets of MFP's personality and that MAP was to take her spouse as she found him. Essentially, the message was that the Court was not in the business of undoing a bad bargain a spouse had made for themselves.

The Court does take a varying approach where there the poor behaviour is aggravated by a *'wanton'* element (as opposed to it being something an addict or someone suffering medically has limited control over). The *'wanton'* line of authorities deals with bad behaviour aimed specifically at running down the matrimonial pot (rather than just having a good time?). *Vaughan v Vaughan*[7] , for example, saw £100,000 added back where the money had been gambled and frittered away. The Court made explicit its justification had been the clear evidence of a reckless and wanton aspect to the husband's behaviour. As any solicitor will tell their client, it can be incredibly hard to produce evidence of deliberate and *'wanton'* behaviour. The door is open to *'wanton'* conduct claims, but it requires a very firm evidence-based push.

The door seems to swing more easily open in cases where the behaviour amounts to fraud. Mrs

LeFoe, in a case involving not only her husband but also the family mortgage-provider[8], was awarded very slightly under half of what the matrimonial pot would have been, were it not for Mr LeFoe's *'long record of falsehood and deceit'* – a very significant add back. A fraudulent re-mortgage of the family home later saw both mortgages fall into arrears, all to try and defeat his wife's claims against him.

Personal conduct

On the other end of the scale, it is much harder to bring a successful claim in relation to personal conduct. The quality of behaviour is inherently subjective in everyday life and just as much in the Courtroom. What represents terrible conduct to one person (and to one Judge sitting in a finance case) is part of the ebb and flow of a somewhat unhappy marriage for another.

In light of the poor likelihood of success, conduct arguments are rarely run-in relation to personal conduct and even more rarely are they successful. The Court has made it quite plain it exists to divide matrimonial finances, not, in the ordinary run of business, to act as a personal moral arbiter nor to mete out punishment for poor behaviour.

Where the Court can act is where that conduct strays outside the ordinary run of business and into something truly exceptional. In the words of Ormrod J[9] , it is willing to deal in conduct which is *'gross and obvious'* which has *'nothing to do with the ordinary run of fighting and quarrelling in an unhappy marriage'*. Even then, the Court's role is not punitive – it does not stray into the realm of the Criminal Courts – rather, it aims to redress grossly unfair situations in which a perverse financial result might come about due to the behaviour of one of the parties.

No one case has provided a comprehensive test for conduct being given weight in determining a financial settlement: rather, a patchwork of comments and findings is required to form a guiding approach.

It is apparent that physical violence must be extreme. The types of conduct the court has been willing to address through financial adjustment include a wife inciting another to kill her husband[10], a husband brutally assaulting and raping his wife resulting in imprisonment for a number of years[11], and a mother who murdered the two children of the family despite having been found not guilty by reason of insanity[12].

Balcombe LJ acknowledged in Evans that while the case (referred to above in which the wife incited someone to attempt to murder her husband) would see financial redress for conduct, this would

not be the case in every instance where there had been violent conduct or even homicide. Each case would turn on its own facts. This can be seen in *Hall v Hall*[13] where a maintenance order for just under 1/3 the husband's income was still made in favour of his wife despite her having stabbed him in the abdomen during an argument. *H v H* was explicit in saying any financial adjustment should not be punitive: the Family Court is not standing in the shoes of the criminal court to duplicate, magnify or replace any punishment which has or might have been meted out.

Sexual conduct is rarely in itself enough to justify any rebalancing of the scales between the parties. Where there is particularly heinous conduct (an aggravating factor akin to differently Victorian divorce treated men and women?) the court may be willing to intervene. There are few cases in this area; the most prominent (in that they have been cited in further judgments) tend to involve incest with children[14] and grandchildren[15] within the family.

The recent case of *FRB v DCA (No. 2)* explored the issue of sexual conduct within the context of marriage breakdown. Mr Justice Cohen identified that learning of some seven years' deceit as to the true paternity of the parties' child had had a *'devastating effect'* on the husband and he agreed it was conduct it would be inequitable to disregard. The husband sought a 50% reduction in the wife's sharing claim on the basis the adultery leading to the child's conception had taken place halfway through the marriage. Mr Justice Cohen accepted there were some authorities from the 1980s which pointed this way, but they were *'of no value in the times in which we now live'* and that to weigh emotional damage in financial terms was akin to *'comparing apples and pears'.* A key factor for the Judge was the fact the husband's disclosure left quite a bit to be desired. On the basis he could not quantify the *'damage'* caused by this, the Judge declined to impose a specific value on the course of conduct perpetrated by the wife and alter the division of capital assets. He did, however, reduce the sum paid by way of maintenance in recognition that the true father ought to make financial contributions to the child's upbringing.

The key difficulty appears being able to confidently say what *'value'* the poor conduct needs to be attributed to put matters right. This can be difficult with financial conduct cases, harder still where the conduct is a moral matter. Australia, as discussed below, has found quite a neat way to tackle the issue (though this is limited to serious domestic violence cases only). Where the court can attribute some financial value or impact arising from the moral (mis) conduct it appears to have been easier for the Courts to *'add back'* a sum to address unfairness arising from personal behaviour. *H v H* was perhaps an easier decision than most in relation to conduct: the stabbing by the husband had the effect of reducing the wife's earning capacity to zero. Given how readily the Court accepted the wife's conduct in *FRB v DCA (No. 2)*, yet it declined to make a financial

adjustment, the case poses some interesting questions: was the husband too ambitious in seeking a 50% reduction – might the Court have been willing to countenance a smaller reduction to the capital award, and, like equity, ought the husband have come to court with *'clean hands'* – was his own lack of candour his undoing in trying to successfully run a conduct case?

The English jurisdiction remains significantly far from having a clear and unequivocal approach to personal conduct (other than taking a very light touch) while financial conduct remains a developing area vulnerable to counterarguments and evidential difficulties around the *'wanton'* nature of any particular behaviour.

An international perspective

Just as the position on conduct within the English system of family law varies, so does it vary across and within other jurisdictions. Below is a brief look at how conduct is dealt with in societies very similar to our own, with both common law and civil law systems.

Canada, which has a common law system like England and Wales, is a federal nation and there are some small variations from province to province. However, like England and Wales, conduct generally has little to no impact unless it has a financial aspect and can be described as *'wanton'* [16]. Case law has developed three specific categories in which conduct will be applicable in determining how the matrimonial pot (or net family property as it is known there) is divided. They are:

- Reckless investing: the leading case in this area[17] saw a husband's share of the pot reduced in light of his wanton and reckless investments having depleted the pot. This depletion was accompanied by fraudulent acts to hide his earlier behaviour, including forging the wife's signature to obtain more credit.
- Spending to feed addiction: a husband took pains to hide the parlous state of family finances from his wife. Years of addiction had led to job losses and debt to feed that addiction. Despite the true scale of the family's debt having been hidden from the wife,

she still made significant contributions to meeting the debt she was aware of (to the tune of tens of thousands of dollars) and made vastly unequal contributions to what did remain in the family pot[18]. Again, we see an element of fraud or deceit in hiding the true state of affairs from the other spouse.

- Spending money on an affair partner: despite the wife's continuing suspicions, the husband continued an extra-marital relationship with a woman, using family assets to travel far and wide with her. This was held to be reckless depletion of the pot and was redressed in the final financial split[19].

Australia, also a common law jurisdiction, has a no-fault system of divorce and this filters through to financial matters too. The Family Law Act 1975 is explicit in stating that the matrimonial assets will be divided along contributions lines (though like our system, those contributions may not always be financial in nature). It flows from this that if one party has made a negative contribution or has been impeded from contributing then this can be factored into the final reckoning of matrimonial finances (and, since cohabitees have rights in Australia, cohabitation finances as well). This remains the exception rather than the rule[20].

For financial conduct, the principles followed by the court are most clearly set out in the case of *Kowaliw & Kowaliw*[21]:

- Notional assets can be *'added back'* into the matrimonial (or cohabitational) pot
- Financial losses resulting from the actions of one or both are generally to be shared except where there has been *'waste'.* This can be found:
  - Where one of the parties has embarked upon a course of conduct designed to reduce or minimise the effective value or worth of matrimonial assets, and/or

- Where one of the parties has acted recklessly, negligently, or wantonly with matrimonial assets, the overall effect of which has reduced or minimised their value (which could take in excessive gambling, spending excessive sums on drugs, alcohol or the downloading of internet pornography)

So, the position on financial conduct is clear, even if used sparingly in practice. The Australian Courts have rather neatly tied the idea of certain types of moral conduct to contributions to justify adjustments in respect of non-financial behaviour. The 1997 decision of Kennon & Kennon[22] allowed for the alteration of a property settlement within the existing contributions-based framework[23] on the basis that the husband's course of violent conduct had such an impact on the victim it made it significantly more arduous for her to make contributions. A causal link had been established between the level of the wife's contributions (and what they would otherwise have been) and the husband's course of violent conduct and how that course of conduct had impacted on future needs.

Just as in our jurisdiction, the Courts have been explicit that a light touch should be taken, not every act of violence will see an adjustment.

The French civil law system in so far as it relates to division of assets during the marriage and in divorce operates very differently from our own, and at the same time in a very similar way.

At the time of marriage, couples can opt for one of the selections of marriage contracts available (or choose none at all). The contracts allow for community property or separation of property and provide an enduring framework dictating how property acquired during the marriage is dealt with. The election of the parties for separate property is subject to a compensatory allowance even where the party seeking an adjustment in their favour is at fault.

In the event an allowance is sought or where a community property regime was selected at the time of marriage, a Judge will (in a multi-stage process much like our own Financial Remedy process) make a division using criteria set out in the French Civil Code[24]. The criteria including duration of marriage, age and health, professional qualifications and occupations, non-financial contributions to family life, estimated or foreseeable assets, existing and foreseeable rights, and pension rights. A position very similar to our own other than the omission of conduct which we would find in our Section 25(2)(g).

Germany takes a very different approach to France in that conduct plays a clear role at least as far as maintenance is concerned. The Civil Code[25] allows maintenance (paid only where need demands it and very rarely on a lifetime basis) can be restricted or refused by a Court in light of the conduct of the receiving party. This conduct can be:

Financial:

- the person entitled frivolously induced his own indigence
- the person entitled frivolously disregarded serious property interests of the person obliged, and/or
- the person entitled, before the parties lived apart, for a long period grossly violated his duty to contribute to the family maintenance, and/or

Moral:

- the person entitled has committed a major criminal offence or a serious intentional minor offence against the person obliged or against a close relative of the person obliged; and/or
- the person entitled is clearly responsible for manifestly serious misconduct towards the

person obliged

Case law confirms that ‘manifestly serious misconduct’ can include adultery outside the marriage [26].

Just as there is a perception that the approach of the English Family Court to maintenance sometimes varies depending on where the court is sitting, the Courts of Southern Germany are reputed to pay more generous maintenance than compared with those in the North.

Across Germany, Courts have very limited powers to deal with division of property (as compared with awards of maintenance). Only gains on property during the marriage and pensions can be divided. The assets gaining value remain the property of the person they legally belong to so conduct has little impact.

Conclusion

Conduct remains an area with limited application in practice on claims for financial remedies on divorce, but it remains to be seen whether this could change and how. Other comparable jurisdictions offer interesting perspectives on how conduct might be expanded (such as Germany) or applied within an existing framework with clear judicial guidance (Australia). In the meantime, the treatment of conduct in financial remedy proceedings on divorce remains detached from how a large portion of general public seem to believe conduct is and should be treated.

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Citations

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[4] *FRB v DCA (No. 2)* [2020] EWHC 754 (Fam)
[5] [1990] 2 FLR 225
[6] [2015] EWHC 627 (Fam)
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[8] *Le Foe v Le Foe and Woolwich plc; Woolwich plc v Le Foe and LeFoe* [2001] 2 FLR 970
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[10] *Evans V Evans* [1989] 1 FLR 351
[11] *H v H (Financial Provision: Conduct)* [1994] 2 FLR 801
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[14] *S v* S [1982] Fam 183
[15] *K v L* [2010] EWCA Civ 125
[16] *Malandra v Malandra* (2014) ONSC 3533 (CanLII)
[17] *Lamantia v Solarino* (2010) ONSC 2927
[18] *Dillon v Dillon* (2010) ONSC 5858
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[21] *Kowaliw and Kowaliw* (1981) FLC 91-092
[22] *Kennon & Kennon* (1997) FLC 92-757
[23] *Family Law Act 1975 sections 75 and 79*
[24] *FCC Article 271*
[25] *BGB 1579*
[26] *BGH 28.03.1984, NJW 1984, 2358*