Neutral Citation Number: [2014] EWHC 3654 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Manchester Civil Justice Centre
1 Bridge Street West, Manchester, M60 9DJ

Date: 06/11/2014

Before :

MR JUSTICE MOSTYN

- -

Between :

J	**Applicant**
- and -	
J	**Respondent**

- -
- -

Sally Harrison QC (instructed by **DWF LLP**) for the **Applicant**
Peter Mitchell (instructed by **Merrick Solicitors**) for the **Respondent**

Hearing dates: 29 October – 5 November 2014

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE MOSTYN

This judgment is being handed down in private on 06 November 2014. It consists of 58 paragraphs and has been signed and dated by the judge. The judge gives leave for it to be reported only in this anonymised form.

Mr Justice Mostyn :

1. In this judgment I shall refer to the applicant as the wife and to the respondent as the husband.

2. This is my judgment on the wife's claim for what I persist in calling ancillary relief (and which I will continue to do for as long as it is so described in Part II of the Matrimonial Causes Act 1973). The claim was commenced by Form A as long ago as 20 July 2012.

3. The husband is aged 54; the wife is aged 44. Following two years' cohabitation they married on 7 April 1996. They have two children O now aged 17 and J now aged 16. In May 2011 they separated; the wife continues to live in the former matrimonial home while the husband lives in rented accommodation. The former matrimonial home is subject to an agricultural tie which has the effect of suppressing its value, although it may be possible to shift the tie to another property owned by the husband.

4. At the time of the marriage the husband was an established market gardener, although he has also since had a business in the manufacture, sale and hiring of horseboxes; that line of business is now defunct. In addition he has a portfolio of properties some of which are rented to the market gardening businesses; some of which are rented to residential tenants; and one of which stands empty and derelict. The market gardening businesses are, first, S Ltd. It produces lettuces in greenhouses which are sold to multiples. Unfortunately one multiple has recently signified that they are going to terminate their arrangement with S Ltd.

5. The second market gardening business is F Ltd. In this the husband is effectively a one third shareholder. The other two shareholders who each own a third of the ordinary shares are LW and KB. This company grows and sells tomatoes, aubergines, strawberries and blueberries. In addition it has a packing arm for certain third parties. The lettuces of S Ltd are sold to multiples through one of its subsidiaries (although there is no profit on the turn for F Ltd in doing so). F Ltd’s operations are all undertaken in the North West of England.

6. F Ltd is in negotiations to take over or merge with another unincorporated business, MS, which is owned by BGL. This is to secure a contract with a multiple in circumstances where the multiple wants to limit its suppliers and cut out middle men. According to AR, a director of SCP, which firm is advising F Ltd, and who I judge to be a witness of unimpeachable integrity, the only benefit will be the consolidation of the multiple contract; there will be no synergetic benefits. No money will change hands. What will happen is that the business of MS will be hived off into a new company which will be owned by F Ltd. BGL will become a shareholder in F Ltd and will also receive loan notes. The deal is far from concluded but everyone is hopeful that it will be. For some reason the husband was extremely guarded about revealing this negotiation in the course of these proceedings.

7. If the parties had not spent a penny on costs then, pursuant to the valuation findings which I will explain below, they would have had to share between themselves assets amounting to about £2.9m made up as follows:

FMH	291,000
Husband's bank and credit card debts	(25,000)
Wife's investments	1,000
Property portfolio	317,000
Tax	(42,000)
Husband's one third share in F Ltd	1,800,000
S Ltd	280,000
Husband's paid costs (excluding litigation loan of £120,000)	148,000
	2,770,000
Pensions	115,000
Total	**2,885,000**

8. However, the parties have spent vast sums on costs. By the time of the FDR on 12 March 2014 the parties had already spent £226,000 on costs. This was a totally disproportionate sum given the scale of the assets. That said, costs of this scale - about 8% of the assets - are not uncommon, disproportionate though they are. One reason why so much forensic acrimony was generated, with the consequential burgeoning of costs, was that the Deputy District Judge at the first appointment on 9 November 2012 permitted each party to have their own expert to value the husband's business interests, notwithstanding the terms of Part 25 FPR which clearly stated then (and even more strongly states now – see PD 25D para 2.1) that a SJE should be used "wherever possible". Not "ideally" or "generally" but "wherever possible". In this case the forensic accountants have filed a total of no fewer than six expert reports and have prepared a joint statement setting out their extensive disagreements. They have charged a total of £154,000 in fees. The husband has been permitted during the course of the case to ditch his expert and to instruct a new one.

9. In this case since the failure of the FDR a mere eight months ago the parties have between them spent on costs the staggering sum of just under £700,000. I must confess to have been almost lost for words when the scale of this madness was revealed to me. They have spent a total of £920,000 in costs. Of this they have spent, as I have said, £154,000 on forensic accountants valuing the Husband's business interests. They have spent on costs nearly a third of everything they built up over 18 years; most of it over the last eight months. The result has been to make a case that was surely so easily settleable almost impossible to compromise, and to impose on the High Court a seven day trial where the principal focus has been a bitter war of recrimination and denunciation about who was more at fault for this appalling state of affairs. This is well illustrated by the fact that of the 18 pages of Miss Harrison's final written submissions nine were devoted to costs and her argument that the husband was responsible for them.

10. The impact of the costs expenditure is not as calamitous as it was in the infamous case of *KSO v MJO & Ors* [2008] EWHC 3031 (Fam) [2009] 1 FLR 1036. There the parties spent £553,000 out of a the marital pot of £771,000 (or 71.7%), leading Munby J, as he then was, to compare the case to *Jarndyce v Jarndyce,* he quoting from Chapter 65 of Bleak House in his Appendix. Here the proportion of the estate wasted is a little under half as much but the costs themselves are nearly twice as much. In his judgment Munby J stated at para 81:

> "Something must be done about the problems highlighted by this and by too many similar cases. We simply cannot go on as we are. The expenditure of costs on the scale exemplified by this and by too many other such cases is a scandal which must somehow be brought under control."

11. Although the mantra "something must be done" is repeated time and again, nothing ever is. In the ancillary relief field the mantra has been incanted over and over ever since the iconic judgment of Booth J in *Evans v Evans* [1990] 1 FLR 319. The procedural reforms of 1996 and 2000 tried to address the problem, but with only limited success, as this and many other egregious cases show only too clearly. In the civil sphere the Jackson reforms of 2013 were intended to curb excessive litigation costs. In his lecture to the Association of Costs Lawyers on 11 May 2012 Lord Neuberger of Abbotsbury, then Master of the Rolls, said this:

> > "Excess litigation cost has for too long been an endemic and unwelcome feature of our civil justice system. In his 1986 Hamlyn lectures, Sir Jack Jacob rightly described it as having long been 'the most baneful feature of English Civil Justice.', and he was by no means the first person to do so. In the quarter century that has passed since those lectures things have got worse."

12. Yet the Jackson reforms in the civil sphere limit merely the costs recoverable by the winner from the losing party by confining them to a pre-approved costs budget. They do not seek to limit the amount of costs that a lawyer may charge his own client, even though this had been mooted during the process of the review. I suppose that to do so was regarded as an impermissible interference with the right to form whatever commercial contracts you want and to spend your money on whatever you like. Yet that argument simply does not wash when those very costs come out of a finite pot over which the other party has a valid claim.

13. In my judgment the time has come when the law-makers in this country, whether they are legislators or judges, must stop saying something must be done and actually do something. The first thing would be to insist, as Lord Neuberger did in the lecture I have cited, on fixed pricing for cases, whether they are ancillary relief cases or anything else. He said:

> > "Hourly billing at best leads to inefficient practices, at worst it rewards and incentivises inefficiency. Moreover, it undermines effective

> competition in the provision of legal services, as it 'penalizes . . . well run legal business whose systems and processes enable it to conclude matters rapidly.' It also penalises the able, those with greater professional knowledge and skill, as they will tend to work at a more efficient rate. In other words, hourly billing fails to reward the diligent, the efficient and the able: its focus on the cost of time, a truly moveable feast, simply does not reflect the value of work."

And he later stated:

> "That no-one has suggested a viable alternative is something which needs to be remedied, and the sooner the better. An approach to litigation costs based on value-pricing rather than hourly-billing is one which urgently needs to be worked out and applied. Rather than treating time as the commodity which is being sold, we should be adopting an approach where skill and experience are the commodities which are sold."

Two and a half years later nothing has happened and these wasteful and inefficient practices persist. Perhaps the culture is just too ingrained to be reformed. In my opinion a litigant should be able to demand a fixed price for each of the three phases of an ancillary relief case namely (1) Form A to First Appointment, (2) First Appointment to FDR and (3) FDR to trial.

14. The second measure that needs to be taken is for the court in ancillary relief proceedings to be able to impose at the very beginning of the case a costs cap on what may be charged by the lawyers to their client for each of the three phases of the case. Naturally this cap would be variable if circumstances change but the change of circumstances would have to be a big one for a variation to be allowed.

15. At the present time the power of the court to control the costs charged by lawyers to their own clients is very limited, and can only be done after the conclusion of the procedure in hand. A vexed client can seek what used to be called a solicitor and own client taxation. The court can disallow fees under CPR 44.11(1)(b) and/or section 51(6) Senior Courts Act 1981 but in each instance negligence or misconduct would have to be shown. There is no procedure whereby costs can be controlled proleptically.

16. In my opinion only if these two steps are taken will the grotesque leaching of costs, such as has occurred in this case, be arrested. It might also have the beneficial consequence that the present volume of self-representation deriving from the wholesale withdrawal of legal aid from private family law cases is reduced. If a litigant on the cusp of self-representation knew at the start of the case how much it was going to cost for each phase then he may well opt for representation. The benefits of representation are too obvious to spell out extensively. Far more cases with the benefit of representation settle, with the resultant avoidance of the legacy of heartache that contested litigation engenders. Those cases that do fight will be on rational and properly pleaded

justiciable issues. The lengthy delays in the court system caused by the explosion in self-representation may be reduced.

17. It by no means follows that fixed pricing will lead to a reduction in revenue for the lawyers. In his speech Lord Neuberger stated:

> "The drive for lower legal costs should represent an opportunity for forward thinking lawyers. If litigation is cheaper, elementary economics suggests that there will be more of it. Rather than charging high in a few cases, and driving away those with valid claims from the courts, lawyers should be able to charge realistic fees, and encourage many more clients to instruct them to fight their case. So, significantly lower legal costs should not lead to less money for lawyers, but it should lead to better value for money, and should give to our citizens what so many are currently denied, namely access to justice."

And he concluded:

> "Excess legal cost has for too long disfigured our civil justice system. The Jackson reforms, now enacted in large part by LASPO, and rules of court which are to be introduced in April 2013 seek to rein in such costs. Like the Woolf reforms before them, it is unlikely that they will be the end of the story. Unlike the Woolf reforms, they are not going to be adversely effected by the introduction of unconnected reforms to CFAs, although the reforms to legal aid may well play the part which CFAs played for the Woolf reforms. But we cannot be certain. What can be said with certainty is that by building on the Woolf reforms, and undoing the negative effects of the current CFA system, the Jackson reforms represent the boldest attempt to cure our costs problem yet attempted. Should they fail to reduce costs, it seems to me that we will face a stark choice: the rejection of the English costs rule and the adoption of either a US-style costs rule or a German-style fixed costs regime."

18. In the field of ancillary relief we have already rejected the traditional English rule of costs following the event. FPR rule 28.3(5) prescribes no order as to costs as the normal order following a final hearing; this rule has been in effect since 2006. That was our Jackson reform, seven years ahead of its time. Yet, as this case shows only too clearly, that reform has done nothing to curb the disfiguring impact of excessive costs. This is why we must now look to fixed pricing and judicial costs capping, in my opinion. I would also add that the merit of arbitration in a proceeding such as this would in my opinion take off if that service offered fixed pricing as a standard feature.

19. I intend to bring this judgment to the attention of the President with a view to him raising this pressing matter as a matter of urgency with the Family Procedure Rules Committee.

20. I now revert to this case and set out my findings in relation to the figures in para 7 above.

21. I take the value of the **former matrimonial home** as assessed by the agreed valuer subject to the agricultural tie. My figure of £291,000 is the assessed figure of £300,000 less notional costs of sale. There is unchallenged expert evidence that the local authority might well be persuaded to accept a transfer of the tie to one of the husband's rental properties. This would add £100,000 to the value of the former matrimonial home although there would be a reduction, but not pound for pound, in the value of the other property. By this means it may be possible to create a further £50,000 for the parties. If this step can be achieved the parties should share equally the overage. I leave it to counsel to draft the appropriate words to be inserted into the final order.

22. The only difference concerning the value of the **husband's property portfolio** is whether a debt of £60,000 which he owes his parents in respect of two loans should be taken into account or whether it should be ignored as being so soft that it will never be repaid. This sum is evidenced by memoranda signed when the two loans were advanced. The husband has always paid interest on the loans. They appear in the accounts of the property business save for one year when they were mysteriously omitted. In my judgment this is a real debt which should not be ignored.

23. The value of the husband's **shareholding in F Ltd** is now agreed at £2m gross, £1.8m net of CGT. This was agreed by the accountants during the course of this case to represent a fair valuation figure. It is the number which is derived from a net assets valuation of the business apart from the packing arm. That arm of the business is conduced from rented premises and is almost a separate business altogether. That arm has been valued on a conventional earnings basis and the figures for the two arms have been added together. That seems to me to be logical and wholly acceptable.

24. £2m is the amount for which the parties are agreed they would be prepared to sell the shares either to the other shareholders, or to the company, or to an external investor. Whether the shareholders or the company would pay £2m is another matter. I will discuss this aspect below. The agreed figure is to be contrasted with the absurd figure of £400,000 that the husband advanced in his Form E, which was vouched by a very full accountant's report (which he wrongly appended thereto without the court's permission). It is to be contrasted with the figure of £3m advanced in the schedules prepared by the wife's team for the opening in this case. That figure of £3m was the very top end of her valuer's bracket (the bottom being £1.925m). It can be seen how the failure to appoint a SJE resulted in extremely partial and partisan positions being adopted by the experts who seem to have forgotten that their first duty is to the court and that, notwithstanding the large fees they are paid, their role is not to act as a gladiator on behalf of their client. I appreciate, obviously, that a valuation is never anything more that a mere prediction of what a willing buyer might pay for the asset in question, and that as the great atomic physicist Niels Bohr memorably stated "prediction is very difficult, especially about the future", but, even so, I cannot begin to understand, having regard to the figures in the accounts and records of the company, how £400,000 or £3m could have been tenably or responsibly advanced as a fair value for this shareholding.

25. The only difference concerning the value of the husband's 100% **shareholding in S Ltd** is whether a figure of £100,000 for "goodwill" should be added to the net asset figure in circumstances where a conventional earnings valuation is a lot less than the net assets. Apart from the special situation obtaining in F Ltd (which I have explained above) I regard it as bordering on heretical that a valuation should amount to an amalgam of the two separate techniques of net asset appraisal and earnings multiplication. I would expect there to be specific evidence of transactions of comparable businesses having taken place where a buyer has paid a goodwill premium over a net asset valuation. There was none. Reference was made to F Ltd having paid for "goodwill" when it acquired another business in recent times but I am satisfied that this was an after the event accounting entry to satisfy the requirements of double entry bookkeeping. I am wholly unsatisfied that a purchaser would pay a premium on top of net assets for S Ltd especially in the current circumstances where T Ltd has abandoned S Ltd as a supplier.

26. I have not included in the table at para 7 any figure for the value of H's now defunct **horsebox business**. The wife says that on it being wound up about £60,000 would be available for the parties. The husband says that there would be no surplus after payment of the debts. The difference arises because of the different views of the parties about the values of the three remaining boxes. There is no expert evidence about them – the competing figures are mere assertion. My order will record the husband's agreement to wind up the business, and will provide for any surplus to be shared equally between the parties.

27. At this point I deal only with the quantification of **costs** and their treatment in the compilation of the assets schedule. As I have stated the husband has incurred costs of £551,000 while the wife has incurred costs of £369,000, an eye-watering total of £920,000. It can be seen that the husband has incurred £182,000 more costs than the wife. This is a gross disparity. Following the decisions of *RH v RH* [2008] 2 FLR 2142 and *LS v JS (Appeal: Costs)* [2012] EWHC 2690 (Fam) I am satisfied that it would be fair to divide the net assets so that the wife receives £182,000 more than the husband so that the costs disparity is equalised. I will consider later in this judgment whether the husband should suffer an additional costs penalty pursuant to FPR rule 28.3(6) and (7).

28. Accordingly the true net asset position is £2,885,000 (per para 7 above) less £920,000 costs (paras 9 and 27) which equals **£1,965,000**.

29. I now turn to my disposition apart from the question of whether there should be a costs penalty under FPR rule 28.3(6) and (7). In my judgment there is no reason why the net assets should not be shared equally subject to the equalisation of the costs disparity I have mentioned above. Thus the wife should receive assets of £1,073,500 and the husband should receive assets of £891,500.

30. The implementation of this division has difficult aspects given that it is not known when or exactly for how much the husband will be able to sell his shares in F Ltd.

31. My first conclusion is that it is reasonable for the wife and the children to be able to continue to live in the former matrimonial home. This has been their home for a very long time. The husband's proposal that it should be sold to pay the costs and for his wife and children to go off and live in rented accommodation would only be acceptable if there were no other solution.

32. In the period before the sale of the F Ltd shares it is reasonable for the wife to be put in funds to pay off the £250,000 element of her litigation loan which has been drawn down. Interest on that loan runs at the astonishing annual rate of 18%. I suppose that this very high rate reflects the obvious risks of default. That would leave the wife owing her lawyers £119,000. In my judgment it is reasonable for them to wait until the F Ltd money comes in. After all they have charged these vast fees and have in effect speculated on the outcome of this litigation. They are in truth classic litigation funders, a phenomenon well known in the civil sphere.

33. In my judgment it is reasonable to expect the husband to come up with a lump sum of £250,000 in the near future to enable the wife to pay off the drawn down element of her litigation loan. The husband appears to be very casual about any rigorous forward planning of his economy. For example there is within his investment portfolio an empty eight bedroom house worth around £200,000 which is now run down and virtually derelict. Although T Ltd have terminated their contract with S Ltd he has not troubled to approach any of the other multiples to see if they would take up the spare produce. It seems that it was only in the week before this hearing that he actually spoke to his fellow shareholders in F Ltd about selling his shares to them or to the company. He admitted that he has not approached his bank to ask if a loan would be made available to meet his liabilities, although the evidence shows that the bank has been in the past inclined to largesse when affording him credit. The decision of *Newton v Newton* [1990] 1 FLR 33 clearly establishes that in a situation such as this it is for the husband to show by evidence that he cannot raise the credit rather than for the wife to show that he can.

34. I am satisfied that the husband has, to use the old language of the Ecclesiastical Court, the "faculties" to raise this lump sum and can meet the interest on that, as well as the interest on his litigation loan of £120,000. Again, his ability to do this depends on his lawyers waiting until the F Ltd money comes in to be paid the remainder of his unpaid costs of £283,000. Again, I am of the view that it would be reasonable for them to do so for exactly the same reasons as I have stated in para 32 above.

35. In my judgment it is reasonable for the pensions to be divided equally.

36. The actual allocation to the wife of £1,073,500 will therefore be as follows:

now	
Transfer of FMH	291,000
investments	1,000
Pays off drawn down litigation loan	(250,000)
First lump sum	250,000
	292,000
on sale of F Ltd	
Second lump sum	843,000
pays remainder of unpaid costs	(119,000)
	724,000
50% of pensions	57,500
Total	**1,073,500**

37. My figure of £2m for the value of the husband's F Ltd shares is not very firm. It is based on a mere prediction. At court on 1 October 2014 the husband finally accepted that the shares would have to be sold, yet inexplicably he did not even start any discussions with his fellow shareholders until the week before this hearing, which commenced on 28 October 2014. Those fellow shareholders have not even had a discussion about this between themselves, let alone a discussion around the structure about how the husband's shares should be bought. In evidence it emerged that the most fiscally sensible structure would be for the company to buy the husband's shares and for the two other shareholders to lend the company the money to do so. The other shareholders have made an offer to buy the husband's shares for £1.25m, and one of them in evidence before me stated that he was not minded to shift from that. The shareholders' agreement and the articles of association provide for a pre-emptive right of purchase by the other shareholders without a discount and in default permit a sale to an external third party provided that the purchaser enters into a comparable agreement. It was plain to me that serious negotiations need to take place between the husband and his fellow shareholders.

38. In my judgment the figure of £2m is a fair and reasonable price to be paid for the husband's shares. The net assets of the business excluding the packing arm are (on revaluations) about £5.6m. The packing arm is reasonably valued on the multiplication of earnings basis at about £900,000 giving an overall value of £6.5m. In such circumstances a price of £2m for the husband's shares is fair, if somewhat conservative.

39. Because the actual proceeds net of CGT in the husband's hands has a quality of uncertainty it is fair in my view to fix the wife's second lump sum as a percentage of those net proceeds. At a net value of £1.8m that percentage is 46.8%. However that percentage slightly alters for different figures given the impact of the division and allocation decisions I have already made. The second lump sum will therefore be calculated by reference to the following table (with arithmetical interpolations being made where necessary):

proceeds after CGT	percentage
1,200,000	45.3%
1,400,000	45.9%
1,600,000	46.4%
1,800,000	46.8%
2,000,000	47.2%
2,200,000	47.4%
2,400,000	47.6%

40. My order will provide that the shares shall be sold at the best price reasonably obtainable, and in any event within 12 months. The second lump sum shall be properly secured and the wife shall be kept fully informed of all relevant negotiations. I leave counsel to agree the appropriate words to be inserted in the order.

41. I now turn to the question of income needs. Following the sale of the F Ltd shares at £2m gross (£1.8m net) the wife would have £782,500 in cash and pensions outside the value of her home. Even if the shares were sold for only £1.2m net she would have £482,500. On the Duxbury formula these sums would provide index linked net spendable annual amounts of about £37,000 and £24,000 respectively. In addition the wife will receive the agreed figure of £3,000 per child per annum as child support and child benefit of about £1,800. Further, the wife plainly has a modest earning capacity. She accepted as much in evidence. I assess this at £12,000 per annum. The agricultural tie requires the house to be occupied by someone employed in agriculture. If it cannot be shifted the wife will need to get a small job in something like a farm shop to avoid being in violation of the tie.

42. I am in no doubt that on the sale of the F Ltd shares the wife will have ample funds with which to meet her income needs and at that point a clean break will be imposed. I am equally sure that at that point the husband will have ample resources to meet all his needs both for housing and income.

43. I do need to provide however for the wife's support in the period pending the F Ltd share sale. This requires me to make an assessment of the husband's reasonable future income. In my judgment he should immediately sell the derelict empty house. This would reduce his annual debt interest charges by £10,000 and increase his rental profits *pro tanto*. The salary paid by S Ltd to the wife of £12,000 should stop and be added to his own of £19,000. On these footings I assess the husband's future income for spousal support purposes as follows:

F Ltd dividends including tax credit	33,000
F Ltd salary	1,000
S Ltd salary	31,000
S Ltd dividends including tax credit	30,000
rent profits	70,000
Total gross income	165,000
Net after tax income	105,000
less borrowing on 250k lump sum and 103k litigation loan	(18,000)
less capital repayment on existing mortgages	(40,000)
less child support	(6,000)
	41,000

44. In my judgment he should pay interim spousal support until the sale of the F Ltd shares at the rate of £10,000 per annum. This would leave him with just over £30,000. The wife would have just under £30,000 as follows:

earnings	12,000
Child benefit	1,800
Child support	6,000
Interim spousal support	10,000
	29,800

45. In a normal case that would be the end of my judgment. But this is not a normal case. The majority of the hearing before me was an attritional war about who was responsible for running up £920,000 of costs. It is worth reflecting on what those costs were not spent on. As I have explained, they did not extend to instructing an SJE in relation to the F Ltd shares at an early stage. What happened was that the husband wrongly appended a full expert report about the value of the shares to his Form E. It is of course permissible to append a short accountant's letter justifying a Form E figure; this is what the Form requires. But it is quite wrong to append a very full expert report and yet more wrong then to turn up at the first appointment and argue that that report should stand as the only evidence about the value of those shares and that the wife should be confined merely to asking questions of the husband's expert. For that is what happened here. In those circumstances the Deputy District Judge was persuaded, wrongly in my view, to allow the wife to have her own expert. He should have ordered that a SJE be instructed.

46. Following the failed FDR on 12 March 2014 the matter was listed for a five day trial before Judge Bancroft on 30 June 2014. The husband decided to change his entire professional team – counsel, solicitors and expert accountant – and applied on 9 June 2014 for the final hearing to be adjourned. That application was granted by Judge Bancroft on 17 June 2014 and she refixed the final hearing for 1 October 2014. On 17 June 2014 Judge Bancroft actually mooted the instruction of a SJE in respect of the husband's business interests but I was told that both counsel "poo-poo-ed" the idea, and in such circumstances the judge acquiesced. Again, in my view that was the wrong

decision. On neither occasion was it demonstrated that the appointment of a SJE was impossible, which is what PD25D para 2.1 literally requires. The consequences (as to whether or not they were unintended I forebear from comment) I have set out above.

47. The parties prepared for the final hearing on 1 October 2014. For that hearing they agreed and produced no fewer than 8 trial bundles, containing over 2,000 pages. It is as if they had decided that the terms of the new PD27A (as issued on 10 April 2014) just did not apply to them. This provides at para 5.1 that:

> "Unless the court has specifically directed otherwise, being satisfied that such direction is necessary to enable the proceedings to be disposed of justly, the bundle shall be contained in one A4 size ring binder or lever arch file limited to no more than 350 sheets of A4 paper and 350 sides of text."

48. Moreover the *Statement on the efficient conduct of financial remedy final hearings allocated to be heard by a High Court Judge whether sitting at the Royal Courts of Justice or elsewhere* (issued on 5 June 2014) states at para 8 that:

> "The court bundle for the final hearing must scrupulously comply with FPR PD27A. With effect from 31 July 2014 this limits the size of the bundle to a single file containing no more than 350 pages: a specific prior direction from the court must be obtained at the Pre-Trial Review if the bundle is to exceed that limit (PD27A para 5.1). The limit of 350 pages includes the skeleton arguments (see para 9 below) and the agreed documents under para 7 above. Only those documents which are relevant to the hearing and which it is necessary for the court to read, or which will actually be referred to during the hearing, may be included: correspondence (including with experts), bank or credit card statements and other financial records must not be included unless a specific prior direction of the court at the Pre-Trial Review has been obtained (PD27A para 4.1). A separate bundle of all authorities relied on must be prepared and this must be agreed between the advocates (PD27A para 4.3)."

49. The final hearing on 1 October 2014 was again adjourned, this time to me, and this time on the ground that five days was not enough time (even though it had been twice listed for five days beforehand). Judge Bancroft made an order on 3 October 2014 that:

> "The court grants permission for the parties to rely on the court core bundle currently filed comprising of four lever arch files and the additional documents bundles. The court expressing the view that it would be disproportionate to prepare new bundles for the purposes of an adjourned final hearing. The applicant's solicitors will however file an essential reading bundle".

50. I do not know for whom compliance with PD27A para 5.1 would be "disproportionate". Certainly not for the court and, in view of the waste caused

by the deployment of so many files, not for the parties. Ultimately I think that what this language meant was that it would be just too much bother for busy barristers and solicitors to have to sit down and actually work out what were the relevant documents to be inserted in the single bundle.

51. For this case I was presented with an essential reading bundle, four further "court" bundles, four "additional documents" bundles, a bundle produced by the husband's team, and two further ring files which came into existence during the course of the case. 12 bundles in all. Many of them were so full that they could hardly be opened. I placed yellow stickers on all the pages outside the essential reading bundle. There cannot have been more than 50. Yet to look at them (sometimes many times) it was necessary in each instance for a file to be taken up, opened, put away (and so on) by me, the lawyers and the witness. The waste of time was simply prodigious. The entire archive had to be taken to and fro. It was all totally unnecessary where all of the documents used in this case could have comfortably fitted in one file in compliance with the one bundle rule. I do not accept that the demands of a busy practice are a justifiable excuse for a contemptuous disregard of the rule. Nor do I accept the argument, which I have heard, that it is unfair for an applicant to have to identify her "killer" documents by placing them in the single bundle in circumstances where non-disclosure is rife and where confrontation with a document buried deep in (say) File 19 will expose dishonesty. This is, with respect, an absurd argument. If the killer document exposes fraud let it be shown at the earliest opportunity so that a settlement might be achieved. This argument smacks of playing games. I also deprecate a practice of circumvention of which I have become aware. That is for the lawyers for both sides to agree a single "core" bundle and, in addition, an archive of many volumes of expensively prepared secondary or background material. This archive is then brought to trial in the confident belief and expectation that the trial judge will grant permission pursuant to PD27A para 5.1 at the final hearing itself to use documents from the archive. This is no better than the old regime which the new prescription was designed to stamp out. Para 5.1 expects that a direction for permission to use more than one bundle is obtained before, not at, the final hearing. It is possible, of course, that, unexpectedly, further documents may be need to be deployed at the final hearing; but the starting point, and the usual finishing point must be that all the relevant documents should be in the single bundle. To describe the single bundle as the "core" bundle suggests that there will inevitably be other documents in further bundles outlying the core. That is the wrong approach. There should only be one single bundle unless prior permission to use more than one has been obtained.

52. The failure by both sides to comply with PD27A for the hearing on 1 October was very wrong. It was wrong for them to persuade the plainly embattled Judge Bancroft to allow them to carry on with their default before me. It must never happen again. If this requires a culture change in the way practices are run then so be it. I recall that in his minatory and mordant judgment of *Re X and Y (Bundles)* [2008] EWHC 2058 (Fam) [2008] 2 FLR 2053 Munby J threatened practitioners who defied the then practice direction about bundles with dire consequences. Since then the practice direction has been

incorporated within the FPR and reissued on 10 April 2014 in its current form incorporating the one bundle rule. But routinely the profession pays no attention to it. Again, it is no use the courts feebly issuing empty threats. I intend to draw this also to the President's attention with a view to him raising this further pressing matter as a matter of urgency with the Family Procedure Rules Committee. Perhaps it will be necessary for him to set up a special court before which delinquents will be summoned to explain themselves in open court, just as delinquent practitioners in the Administrative Court are summoned before the President of the Queen's Bench Division pursuant to the decision in *R (on the application of Hamid) v Secretary of State for the Home Department* [2012] EWHC 3070 (Admin). Perhaps such a court would regularly consider whether to disallow fees pursuant to CPR 44.11(1)(b) and/or section 51(6) Senior Courts Act 1981.

53. I would remark that if parties wish to have a trial with numerous bundles then it is open to them to enter into an arbitration agreement which specifically allows for that.

54. So I turn to the costs of £920,000. I first remind myself that in order to equalise the costs differential of £182,000 the husband has already paid £91,000 to the wife. Should he pay an additional amount by reference to his litigation conduct within the terms of FPR 28.3(6) and (7)? These provide:

> "(6) The court may make an order requiring one party to pay the costs of another party at any stage of the proceedings where it considers it appropriate to do so because of the conduct of a party in relation to the proceedings (whether before or during them).
>
> (7) In deciding what order (if any) to make under paragraph (6), the court must have regard to –
>
> (a) any failure by a party to comply with these rules, any order of the court or any practice direction which the court considers relevant;
>
> (b) any open offer to settle made by a party;
>
> (c) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
>
> (d) the manner in which a party has pursued or responded to the application or a particular allegation or issue;
>
> (e) any other aspect of a party's conduct in relation to proceedings which the court considers relevant; and
>
> (f) the financial effect on the parties of any costs order."

55. Subparagraph (f) is highly important. This requires the court to ensure that its primary disposition, which will usually be strongly influenced by considerations of need, is not undone and subverted by a costs order. It was for

this reason that the *Calderbank* principle was abolished (see rule 28.3(8) where *Calderbank* offers are made inadmissible). Some quarters are calling for the *Calderbank* principle to be reintroduced (and it is true that the current rules permit it to be used for certain proceedings other than the final hearing of an ancillary relief claim). For my part I will fight its reintroduction to the last ditch. In my opinion it would be retrograde and unconscionable to allow a carefully crafted disposition to be turned upside down by virtue of a without prejudice letter produced after judgment has been given.

56. I am satisfied that in certain respects the husband has been guilty of litigation misconduct which the court should, in principle, take into account under subparagraph (e). I am generally in agreement with the criticisms made of him in the second half of Miss Harrison QC's written final submissions. It is unnecessary to spell them out here. Some of his misconduct I have already detailed. Most of it happened before the FDR. I remain completely baffled as to how the professionals on each side incurred £700,000 of costs following the FDR. It seems to me to have been an unbridled exercise where the only commodity being charged for was time rather than product.

57. In my judgment, having regard to subparagraph (f), I cannot reflect the husband's misconduct other than symbolically. Miss Harrison seeks an order that he pays 75% of the wife's costs. Ignoring amounts disallowed on assessment this would require the husband to pay £276,750. It would elevate the wife's capital position to £1,350,250 and depress the husband to £ 614,750. This would be grossly unfair especially where I regard the wife as having litigated almost as disproportionately as the husband.

58. In my judgment the husband's delinquency should be reflected by a costs order of £50,000 (inclusive of VAT) to be paid from his share of the FF share sale proceeds. The upshot will be that from the pre-costs starting point of £2,885,000 the wife will receive £1,123,500 (38.9% of the assets); the lawyers and experts will receive £920,000 (31.9%); and the husband £841,500 (29.2%). These figures speak for themselves. Such a result should not be allowed to happen again.
