Neutral Citation Number: **[2025] EWFC 236**

IN THE FAMILY COURT
SITTING AT THE ROYAL COURTS OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2025

Before :

MR JUSTICE PEEL

- -

Between :

BC	**Applicant**
- and -	
BC	**Respondent**

- -
- -

Henry Pritchard (instructed by **Payne Hicks Beach LLP**) for the **Applicant**
Deborah Bangay KC (instructed by **Howard Kennedy LLP**) for the **Respondent**

Hearing date: 25 July 2025

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Approved Judgment

This judgment was handed down remotely at 2pm on 30 July 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE PEEL

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mr Justice Peel :

1. These are contested financial remedy proceedings. The issue before me today is whether the Husband ("H") is entitled to refer to events which took place at a private FDR ("pFDR"). The Wife ("W") contends not, and seeks an order excluding certain material from H's open offer made shortly after the pFDR.

2. At a First Appointment, as approved by the court and recorded in the order, the parties agreed to attend a 2 day pFDR.

3. On 18 July 2025, W applied to the court for a hearing before a judge other than the allocated trial judge. The application was to exclude or redact certain parts of H's open proposal sent after the conclusion of the pFDR which were said to make reference to confidential material covered by pFDR privilege. To have made the application to the allocated judge would have defeated the purpose of the application, as the judge would have seen the disputed material.

4. The open proposal starts with the following paragraph (the disputed words are in bold):

> "We write further to the first day of the private FDR before [the pFDR evaluator] yesterday. **Of course, today would have been the second day of the hearing were it not for your client's retrograde decision to leave the building yesterday, not thirty minutes after receiving [the pFDR evaluator's] written indication".**

I am told by W's counsel that (i) she left with her legal team and (ii) they left over an hour after the indication.

5. It then goes on to set out a series of numbered paragraphs which comprise the open proposal. On H's presentation, it amounts to an equal share of the matrimonial assets, excluding pre-marital wealth.

6. In the penultimate paragraph, H says (again placing the disputed words in bold):

> "[H] hopes very much that, **despite [W's] impulsive decision to end the pFDR process so immediately yesterday**, some sense will now prevail".

7. W's solicitors took exception to the highlighted words, asserting that they breached the pFDR privilege and inviting H to refile an amended open offer. They further asserted that the intention was to prejudice the trial judge against W by implying a lack of willingness on W's part to negotiate after the indication.

8. H's solicitors responded that the letter makes no reference to the detail of the offers made during the pFDR process, nor to the pFDR evaluator's indication. They describe the disputed wording as applying to "logistical details" and say that "If [W] suffers prejudice as a result of her own decision, the blame for that cannot be set at our client's door."

9. So it was that W issued the application which is now before me.

10. I note that the combined costs for this discrete application are £37,000. Even for people who have wealth, which is vast by most standards, that is a startling sum to be spent over a total of 46 words.

The legal principles

11. By FPR 2020 r9.17(1):

> "The FDR appointment must be treated as a meeting for the purpose of discussion and negotiation".

12. Para 6.2 of FPR 2010 PD9A reads as follows:

> "In order for the FDR to be effective, parties must approach the occasion openly and without reserve. Non-disclosure of the content of such meetings is vital and is an essential prerequisite for fruitful discussion directed to the settlement of the dispute between the parties. The FDR appointment is an important part of the settlement process. As a consequence of Re D (Minors) (Conciliation: Disclosure of Information) [1993] Fam 231,evidence of anything said or of any admission made in the course of an FDR appointment will not be admissible in evidence, except at the trial of a person for an offence committed at the appointment or in the very exceptional circumstances indicated in Re D."

13. I said this about the benefits of the FDR process at paragraph 5 of **GH v GH [2024] EWHC 2547 (Fam)**:

> "The FDR (which for these purposes includes the increasingly popular Private FDR) is an integral part of the court process. Its value has been proved time and again. Its without prejudice status allows the judge to look behind the litigation posturing which is so familiar in these cases and give clear, robust views. Anecdotally, it facilitates settlement in a significant number of cases. It is not only relatively straightforward cases which are susceptible to settlement at FDR. So, too, are complex cases. In my personal experience, even the most intractable case can yield to settlement at the FDR. The purpose of it is to enable the parties to hear (probably for the first time) an independent evaluation of the likely outcome, and the risks (in terms of costs, uncertainty, delay and emotional toll) of continued litigation. The FDR judge is there to tell the parties if their proposals are sound or devoid of merit, or if particular points or arguments are or are not likely to find favour at trial. It is often those hard cases where one or other party appears utterly intransigent that the FDR judge's indication and observations can be of greatest utility. The FDR judge is well able to deal with factual issues (such as, in this case, W's earning capacity), not by determining them but by expressing a view as to how they appear on the available evidence and how relevant they are. The FDR judge is also well able to give a clear overview even if (as the judge assumed to be the case here) one or other party's position is not fully crystallised."

14. For some years now, the pFDR has been a common feature of financial remedy proceedings, particularly in London and the southeast of England. The court is routinely requested by the parties to disapply the court FDR hearing in favour of attending a private FDR before an independent evaluator (usually a specialist barrister or solicitor, and occasionally a retired judge).

15. The pFDR practice was endorsed by the President's Circular: Financial Remedies Court Pilot Phase 2, 27 July 2018 at paragraphs 7-11:

> "7. I hope that the lead and other judges will take the opportunity to develop and encourage the use of "private" FDRs locally. A private FDR is a simple concept. The parties pay for a financial remedy specialist to act as a 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.
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> 8. At present, demand on court resources has led to instances of over-listing of FDRs. A high settlement success rate is not likely to be achieved if the district judge's list for the day has more than five FDRs in it. This has the inevitable knock-on of far more cases being listed for a final hearing than should be so – a classic example of the law of diminishing returns.
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> 9. Although a private FDR does require some (often quite modest) investment by the parties, this expense can be greatly outweighed by the advantages gained. The very fact of investment by the parties will signify a voluntary seat at the negotiating table rather than a sense of being dragged there. The "hearing" can take place at a time convenient to the parties, even in the evening or at a weekend, and for as long as the parties want. The private FDR judge will, by definition, have been given all the time needed to prepare fully for the hearing. 10. Anecdotal evidence suggests that private FDRs have a very high settlement rate. Of course, each settlement frees up court resources to deal, sooner and more fully, with those interim and final hearings that demand a judicial determination.
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> 11. Usually, where the parties have agreed to a private FDR, the order made at the first appointment will record such an agreement in a recital, and will provide for a short directions hearing shortly after the date of the private FDR. That directions hearing can be vacated if agreed minutes of order 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 process takes place. In that event an order in the terms of para 81 of standard order No. 1.1 would normally be made."

16. The benefits of the pFDR are recognised by practitioners and judges alike. As Mostyn J said in **AS v CS [2021] EWFC 34:**

> "14. Private FDRs are to be strongly encouraged. They seem to have a higher success rate than in-court FDRs. This may be a result of more time being available to the judge both for preparation and in the hearing itself. Private FDRs take a lot of pressure off the court system which is highly beleaguered at the present time. They free up judicial resources to hear cases that must be heard in court."

17. Importantly, in my judgment the pFDR process must operate by the same essential principles as the court FDR process for two reasons: (i) it is hard to see why the court FDR hearing should be disapplied if parties simply elect an entirely different process governed by different principles and (ii) the FDR principles of confidentiality and frankness underpin the ethos of the FDR.

18. As Roberts J said in **LS v PS [2021] EWFC** at para 84:

> "For my part, I can see no good reason for drawing a distinction between the application of para 6.2 of PD9A to a FDR hearing which takes place in court before a judge and one which takes place outside court with the agreement and engagement of the parties. The *President's Circular* issued in July 2018 to which I have already referred makes it plain that parties can pre-empt the formal court attendance mandated by the rules provided that they engage in a similar process of negotiation guided and led by a suitably qualified individual whom they trust to provide them with the clear steer towards overall resolution. Whilst that individual lacks the ability to formalise matters on that occasion in the context of a private FDR, exactly the same principles of confidentiality apply to those negotiations as to any formal court dispute resolution process. The language of para 6.2 itself speaks of privileged "meetings" between the parties for the purposes of "fruitful discussion directed to the settlement of the dispute" between them. It seems to me artificial in these circumstances to draw a distinction between the privilege which attaches under para 6.2 of PD9A to a formal 'in house' court-led FDR and one which is convened outside court for exactly the same purposes."

19. One notable difference, however, is that the judge in a court FDR can make directions and, at least in theory, make a costs order although the latter would be highly unusual but might be appropriate if, for example, one party does not attend the FDR without good reason. By contrast, the pFDR evaluator can do neither.

20. The confidentiality of the FDR process (and by extension the private pFDR process) is jealously safeguarded. In **V v W [2020] EWFC** 84 a husband wished to rely on the transcript of a court FDR to assist him in civil proceedings against the single joint expert accountant. Sir James Munby refused the application, saying at para 34 that para 6.2 of PD9A "…means what it says" and operates "…as an absolute bar by Mr V to make use of anything said **or done** at the FDR" (emphasis added).

21. Counsel for W drew my attention to practice in the civil jurisdiction:

    i) **Passmore on Privilege, 4 edn (2020)** provides at 10-071:

    > "In addition to the bar on inspection of without prejudice communications, **parties are not entitled to adduce evidence of how parties behaved** during without prejudice discussions" (emphasis added).

    ii) In **Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576,** the Court of Appeal considered the issue of whether refusal to participate in ADR should sound in a costs award. **Dyson** LJ (as he was) said at para 14:

    > "As is submitted by the Law Society, if the integrity and confidentiality of the process is to be respected, the court should not know, and therefore should not investigate, why the process did not result in agreement".

22. I readily accept that basic factual details of the FDR or pFDR are ordinarily disclosable, including:

i) Whether or not it took place and, if so, whether both parties attended (essential information for the court given that by FPR 2010 r44.2(5)(e) the court, when considering whether to make a costs order, can take into account "whether a party failed to comply with an order for alternative dispute resolution, or unreasonably failed to engage in alternative dispute resolution").

ii) The identity of the pFDR evaluator and the legal teams.

iii) The location of the pFDR.

iv) The length of the pFDR.

23. These are unremarkable facts, some of which are referred to at paragraph 71 of Order 1.1 of the Standard Orders which requires the parties to inform the court about the following:

> "If the case does not settle at the pFDR then the parties shall provide an explanation to the next FRC Judge dealing with the case so that the court can be assured that a thorough FDR exercise has taken place. This explanation should not include reference to any without prejudice positions, but should give the date of the pFDR, the identity of the tribunal, and how long the hearing and negotiations lasted."

24. It should be noted that this draft order does not require the parties to inform the court about the content of the pFDR or the behaviour of the parties. Further, it only applies when an actual order to this effect is made, which is not the case here. The obligation on the parties is to comply in a neutral way. And at the end of it all, the aim is simply to enable the court to know that the pFDR exercise has been undertaken, which will in turn inform the court as to whether further attempts at settlement (including perhaps a court FDR) should be considered.

25. Counsel for the Husband drew my attention to paragraph 8 of the Financial Remedies Court – Primary Principles, of 11th January 2022 :-

> "Where a case has been referred to be dealt with by an out of court settlement mechanism, it shall be not ordinarily be given further court time save for a short directions appointment which may be vacated by consent in the event an agreement is reached and a consent order presented and approved. Where a private FDR has taken place, the next FRC Judge dealing with the case will ordinarily wish to be satisfied that a thorough FDR exercise has taken place and parties should provide a written explanation to that judge of what has happened so the FRC Judge can be so satisfied. Absent specific enquiry by the FRC Judge, this explanation should not include reference to any without prejudice positions, but should describe the date of the private FDR, the tribunal, the time spent and an assurance that offers were made on each side and an indication given."

26. I was referred to a decision by Recorder Allen KC in **DF v YB (No 2 Costs) [2025] EWFC 76 (B)** who relied upon this paragraph in the Primary Principles to decide that he was entitled to know that at a pFDR the husband had left immediately after the indication with no further negotiation. In my judgment:

i) This decision is not certified as citable as authority on a point of principle (see the President's Guidance of Citation of Authorities: Judgments of Circuit Judges and District Judges" dated 24 February 2025).

ii) As I explain below, in my view the words in the Primary Principles "and an assurance that offers were made on each side and an indication given" should not be relied upon.

27. Having reviewed the Primary Principles set out above, it seems to me that the passage quoted, saying that the court is entitled to know (i) that offers were made and (ii) that an indication given was given goes too far. I say this for a number of reasons:

i) As Sir James Munby explained in **V v W (supra)**, the FDR is a creature of statute, being part of the process for dealing with financial remedy proceedings under the Matrimonial Causes Act 1973 (and its equivalent under the Civil Partnership Act 2004). The Primary Principles, which form part of the constitutional documents of the Financial Remedies Court, do not override rules and practice directions which I have cited, and which seem to me to be more restrictive than the Primary Principles in terms of what can be disclosed from the FDC/pFDR process. Further, there is no citable case law suggesting that disclosure of these two specific matters is permitted and it seems to me that the authorities cited point the other way, even if they do not directly address the issue.

ii) To refer even to whether or not offers were made and an indication given, in my judgment intrudes upon the content of the process and, in a sense, to what end? If both parties make offers, of which one is entirely reasonable and one entirely unreasonable, the court is no further forward as it cannot know what is contained in the offers. If the pFDR evaluator does not give an indication, that may be for a sound and justifiable reason and it is not for the court or anybody else to inquire into why. And if (for argument's sake) one party leaves without making an offer before or after the indication, that may be for a perfectly good reason (e.g to obtain further disclosure, or advice on a particular point, or simply to think about it). Context is all and to permit inquiry by a later court even into whether offers were made and an indication given is, to my mind, unprincipled, risks undermining the process and could lead to ancillary disputes.

Determination

28. In this case, in my judgment the offending words should be deleted from the open proposal for the following reasons:

i) If the integrity of the FDR (and pFDR) process is to be respected, there should be no disclosure of the words or conduct of either party during the FDR. They are entitled to expect that anything they say or do cannot subsequently be referred to. If they cannot be confident of such matters, there is a risk that the FDR process will be undermined. The sanctity of confidentiality should not be eroded.

ii) In this case, H goes far beyond saying whether offers were made and an indication given which, even at its highest, and assuming that the Primary

Principles are to be followed, is as far as he can go on his case. He does not say that W did not make an offer at all. The issue here is his description of how the pFDR came to an end. It would be unexceptional for the parties to tell the court the fact that the private FDR came to an end on the first day at a particular hour; that simply refers to timing. Much more controversial is the portrayal of W's alleged responsibility for it ending, and the linkage between the indication and W's departure shortly afterwards which inferentially blames her for the failure to reach settlement.

iii) True, there is no disclosure of the content of negotiations, or the evaluator's indication, but the words themselves are capable of being interpreted as critical of W's approach to the FDR. They draw a clear (if implicit) link between the indication and W leaving the building, as much as to say that she rejected the indication. I accept the submission that the words used in the open offer are pejorative, or at the very least thinly veiled criticism, of W's conduct. Whether what H says is justified is impossible to know without understanding all the nuances of the pFDR process, and nobody outside the pFDR process is entitled to know any of that.

iv) Why a party behaves in a particular way at the pFDR, and why W terminated it in this case, is not for any court subsequently to know. It is not sensible or feasible to extract a snapshot of behaviour from the FDR without understanding the whole context. Put another way, it is not enough to know that a person acted in a particular why; one would have to know why they did so, but that would be impermissible. To allow H to depict W's conduct in this way would, as a matter of fairness, require W to be able to respond and explain why the characterisation of her behaviour is unfair. She might say that she simply disagreed with the indication, which she is entitled to do. She might say she wanted to reflect on the indication and consider her position over the next few days. She might not have been satisfied with H's presentation. She might have felt overwhelmed by the process. No doubt she will have had discussions with her own lawyers, and may have received certain advice. Importantly, in my judgment, it is not ordinarily incumbent on either party to explain why they approached the FDR/pFDR in a particular way, including why they decided to end it after the indication has been given. The court, in my judgment, risks satellite litigation if one party is permitted to criticise the conduct of the other at the pFDR in this way, as has happened here to great expense.

v) Ultimately, H does not say that W did not attend, or make proposals. Both parties had their legal teams present. What he does is make a self-serving, prejudicial statement which implies, but does not state in terms, that W rejected the indication and refused to negotiate further. Even if true, it is impermissible to so state or imply. Further, it is impossible to know the context; the whys and wherefores. We are left with words which are hanging, and without a separate inquiry into the pFDR process, untested and unexplored. These are not, as described by H's solicitors, merely "logistical details". They strike at the heart of what takes place in a pFDR. And when H's solicitors say in correspondence "If [W] suffers prejudice as a result of her own decision, the blame for that cannot be set at our client's door", in my judgment that reveals the potential effect of writing these words.

29. This case demonstrates why, to my mind, the integrity of the FDR and pFDR process requires full respect for confidentiality. Without laying down an absolute rule, it seems to me that the only exceptions to this principle are likely to be the circumstances identified in the Practice Direction, and the sort of bare factual matters set out above at para 22. To repeat, the essential principle is that what is said and done at the FDR/pFDR cannot be subsequently deployed by either party.

30. I was told that there is, or may be, a practice developing of parties attending a court hearing after the pFDR, and one blaming the other for the pFDR coming to an end, in particular asserting that the pFDR ended when the other party left after the indication without further negotiating. If there is such a practice, in my view it should cease.

31. I therefore accede to W's application and order that the offending words are deleted. The amended version should bear the same date as the original offer.

32. Finally, I observe that in my judgment this dispute has been an unnecessary sideshow, although it raises points of wider application. The court at final hearing is far more likely to be assisted by the substantive content of H's open proposals, and the stated division of assets, and any open offers made by W. What matters here is not how parties characterise each other's behaviour at the pFDR, but what they are actually proposing openly.