



Neutral Citation Number: [2021] EWFC 34

Case No: ZC20D00021

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/04/2021

Before :

MR JUSTICE MOSTYN

Between :

AS

Applicant (husband)

- and -

CS

Respondent (wife)

Harbottle and Lewis LLP for the applicant (husband)
Payne Hicks Beech for the respondent (wife)

Approved Judgment

Cite as **AS v CS (Private FDR)**

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MR JUSTICE MOSTYN

This judgment was delivered in private. The judge has given leave for this anonymised 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 members of the 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 Mostyn:

1. On 16 February 2021 the applicant applied for an order that a directions hearing listed before me on 10 June 2021 should be converted into a FDR and that a new directions hearing should be fixed for a date after 10 July 2021. The context of this application was that the respondent's solicitors had unilaterally purported to cancel a private FDR fixed before Sir David Bodey to take place on 3 March 2021 and were saying that the earliest new date for a private FDR would be in the autumn.
2. I directed that the application would be dealt with on paper. Both sides made written submissions. On 23 February 2021 I ordered that:
 - “1. The private FDR before Sir David Bodey fixed for 3 March 2021, and approved by order of Mostyn J dated 30 October 2020, shall take place.
 2. If the respondent wishes to seek an adjournment of that private FDR she must apply to Mostyn J in proper form. If such an application is made it shall be listed before Mostyn J for a hearing, if necessary at 10:00, with a time estimate of one hour.”
3. I gave my reasons in writing. I have now decided that it would be in the interests of professional practice if I were to incorporate those reasons into a judgment to be placed on the Bailii website.
4. Those reasons are as follows.
5. If this case were proceeding in accordance with FPR 9.15 then under FPR 9.15(4) the court would have ordered an in-court FDR at the first appointment. That fixture could only be broken by agreement or an order of the court.
6. In this case, however, the parties agreed a variation to the prescribed procedure; that variation was accepted by the court. Thus, on 20 May 2020 I made an order that the first appointment would be dealt with by arbitration on 3 July 2020. However, at paragraph 6 I made a mandatory order that a private FDR would take place on 23 October 2020 before Stewart Leech QC.
7. It is true that there is no specific power in Part 9 of the Family Procedure Rules to order that the parties should attend a private FDR. However, there is unquestionable power to disapply FPR 9.15(4). The court is empowered by FPR 4.1(4)(a) to make any order subject to conditions. Therefore, the order made by me on 20 May 2020 requiring the parties to attend a private FDR should be seen as a condition attaching to the order disapplying the standard in-court procedure. That condition can be expressed as an order. FPR 4.1(3)(o) empowers the court to “take any other step or make any other order for the purpose of managing the case and furthering the overriding objective”.
8. Needless to say, the parties were fully bound to comply with the requirement to attend the private FDR.

9. The award made by Mr Peel QC (as he then was) at the arbitrated first appointment was premised on that private FDR taking place.
10. The parties agreed that the private FDR would be adjourned. That agreement was, naturally, subject to the court's approval. On 30 October 2020 I made an order by consent granting that approval retrospectively and recording that the private FDR would now be heard on 3 March 2021 before Sir David Bodey – see recital No. 5, and order No. 11.
11. Following the receipt of the report from the Single Joint Expert on 8 February 2021 the respondent's solicitors wrote a letter on 12 February 2021 which stated:

“We do not consider that it is either cost-effective or proportionate to have a private FDR on 3 March 2021.... We therefore propose to jointly approach Sir David's clerks to release him from the hearing whilst your client and the SJE answer our questions. Once they have been sufficiently replied to the private FDR can be relisted”.
12. The applicant did not agree to this proposal in circumstances where the first convenient mutual dates of the parties' leading counsel for a refixed FDR would be some time in the autumn. Therefore, as stated above, the applicant applied on 16 February 2021 for an order that the directions appointment fixed before me on 10 June 2021 should be converted into an in-court FDR.
13. I have to say that I do not agree with the approach of either side.
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.
15. However, the private FDR system must not be abused. Parties cannot expect to be in a better position if they decide to take the private option than if they remain in the court system. If they were in the court system they would not be allowed unilaterally to pull out of an FDR even if they felt that there was a deficiency of disclosure likely leading to a barrier to negotiation and an ultimately fruitless outcome. If such a party were in the court system, and felt that way, then it would be incumbent on her to apply to the court for an adjournment of the FDR.
16. The position cannot be any different if the parties are in the private sector. Therefore, if the wife felt that the SJE report was so deficient that the FDR on 3 March 2021 had to be adjourned for further disclosure to take place, then it was incumbent on her to apply to the court for an adjournment in the absence of agreement. Yet she did not do so. She just assumed that she could pull out. She was clearly wrong about that. Thus, she made no application. Instead, the husband, seemingly accepting the entitlement of the wife to pull out unilaterally, has made what my mind is a completely misconceived application to convert an important directions appointment into an in-court FDR.

17. The action of the husband and the inaction of the wife are both wrong in my opinion. There is an order in place for a private FDR on 3 March 2021. I have not had a duly constituted application from the wife to adjourn that private FDR. Therefore, I confirm the order that it will take place.
18. It is, of course, open to the wife to make the application to which I have referred. However, I would point out that it is possible to have reasonable negotiations even where there is not a perfect fullness of disclosure. Thorpe LJ once famously said that there is no case that is so conflicted that it cannot be mediated. That was said in the context of a vicious dispute about children. A fortiori, the sentiment applies where the dispute is about the sufficiency of disclosure in a money case. If nothing else, the parties can identify issues of principle and receive Sir David's early neutral evaluation of them, so that they will know where the land lies when it comes to filling in the gaps in the disclosure later.
19. If the parties were to agree an adjournment of the FDR to, say, June then I confirm that I would be highly likely to approve that agreement. But in the absence of agreement the FDR goes ahead until the wife successfully makes the necessary application to adjourn. Having read the correspondence I am of the opinion that a hearing will be necessary for any adjournment application. I am prepared to sit at 10:00 one morning in order to hear such an application. My time estimate would be one hour.
20. For the future, where an agreement is reached that a private FDR will be held then an order should be made which (a) disapplies the in-court FDR process, (b) requires the parties to attend a private FDR on a specified date, and (c) provides that the date may only be altered by an order of the court (which may, of course, be made by consent).
21. That is my judgment.
