St.Mary's
FAMILY LAW SPECIALISTS

Financial Remedies Case Law Update

Phoebe Duterloo

September 2025

This judgment is of particular interest to practitioners working in financial remedy law, relating to the importance and scope of confidentiality in (private) financial dispute resolution.

BC v BC [2025] EWFC 236 (30 July 2025)

Introduction [1 - 10]

Mr Justice Peel hands down judgment on contested financial remedy proceedings. The issue the court had to decide upon was if the Husband ("H") was entitled to refer to events which took place during a private FDR ("pFDR"). The Wife ("W") sought for this not be permitted and sought an order excluding certain material from H's open offer made after the pFDR.

During the First Appointment, upon consent of the court and recorded in the order, H and W agreed to attend a 2-day pFDR.

On 18 July W applied to court for hearing in front of a judge other than the allocated trial judge, this application was to exclude/redact parts of H's open proposal sent after the pFDR was concluded. The material was said to reference confidential material covered by pFDR privilege and therefore could not be made to the allocated trial judge.

H's open proposal started with the following words:

> "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"** (the disputed words are in bold)

Mr Justice Peel was told that:

1. W left with her legal team and;
2. They left over an hour after the indication.

It continues to set out a number of paragraphs which form the open proposal. It sets out H's offer to an equal share of the matrimonial assets, excluding pre-marital wealth.

In the penultimate paragraph, H states:

> *"[H] hopes that very much, **despite [W's] impulsive decision to end the pFDR process so immediately yesterday**, some sense will now prevail". (the disputed words are in bold)*
>
> *W's solicitors contended the words in bold, stating that these amounted to a breach of the pFDR confidentiality and invited H to refile and amend the open offer. They continued that the intention was to prejudice the W's position in front of the trial judge, by implying W lacked the willingness to engage in negotiations after the indication was received.*

> *H's solicitors replied that the words did not amount to a breach of confidentiality as the details of the offer made during the pFDR and the pFDR's indication are not referenced. Instead, they asserted the words are "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."*

This is the crux of the application of W, which was now before Mr Justice Peel.

> *Mr Justice Peel pointed out that the combined costs for this application amount to £37,000, which he asserted was "a startling sum to be spent over a total of 46 words".*

The legal principles [11 – 27]

FPR 2020 r9.17(1):

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

Para 6.2 of FPR 2010 PD9A reads:

> *"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."*

Mr Justice Peel considers his words on 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."*

Mr Justice Peel pointed out that pFDR has now, for some years, been an increasingly common measure utilised in financial remedy proceedings, particularly in London and southeast England.

The court is commonly requested to disapply the court FDR, to instead have the benefit of a pFDR before an independent evaluator.

The pFDR was endorsed by the President's Circular: Financial Remedies Court Pilot Phase 2, 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.*
>
> *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.*
>
> *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.*
>
> *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 direction 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."*

The benefits of pFDR are recognised by both practitioners and judges. 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."*

Mr Justice Peel continues, judgment in an pFDR process must have the same mechanism as the court FDR process, in that:

i) *It is difficult to conceive why the court FDR hearing should be disapplied, if a different process is selected, governed by entirely different principles.*

ii) The FDR's ethos is underpinned by confidentiality and frankness.

After which Mr Justice Peel reiterates Roberts J in LS v PS [2021] EWFC 108 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 an 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."*

However, Mr Justice Peel does note that a judge in a court FDR can make directions, and, in theory, a costs order, albeit highly uncommon. However, this may be appropriate if, for example, one of the parties does not attend the FDR with the absence of good reason. Which is opposite from the pFDR evaluator, who can do neither.

Confidentiality in the FDR process, including pFDRs, is zealously protected. In V v W [2020] EWFC 84, H aimed to rely on a court transcript of his FDR proceedings, which was to be used 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 is says", thereby to be used as "…an absolute bar by Mr V to make use of anything said **or done** at the FDR". Mr Justice Peel emphasised "or done", underlining this to include the acts of the parties during the pFDR process.

W's counsel accentuated 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).*

Which counsel for W related to the W's alleged conduct during the pFDR.

ii. Continuing with 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".*

Mr Justice Peel asserted that he readily accepts that the factual basic details of FDR or pFDR are usually disclosable including:

i) Whether or not it took place, and if so, whether both parties were present (essential to the court when considering FPR 2010 (r44.2(5)(e)).
ii) The identity of the pFDR evaluator and the legal terms
iii) The location of the pFDR
iv) The length of the pFDR

To the court, 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."*

Mr Justice Peel continued, stating that it must be noted for that there is no requirement of parties informing the court regarding the content of the pFDR in their draft orders, nor the behaviour of the parties during the process of the pFDR. It should also be noted that this only applies when an order to this effect is made, which is not relevant in the instant case. The requirement of the parties is to comply in a neutral way. Besides, the aim is simply to ensure the court knows that the pFDR exercise has transpired, which is to be considered by the court when deciding if further attempts at settlement should be attempted.

Counsel for H cited paragraph 8 of the Financial Remedies Court – Primary Principles, of 11 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."*

Then Mr Justice Peel was referred to a judgment of 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 he was entitled to be made aware of the choice of the H immediately leaving after the indication at a pFDR without any further attempt to negotiate. Mr Justice Peel responded to this stating:

i) This judgment is not certified as a citable authority on a point of principle
ii) As explained below, the above words and "an assurance that offers were made on each side and an indication given" should not be relied upon.

After reviewing the Primary Principles, set out above, Mr Justice Peel asserted that the court should not be entitled to know that (i) offers were made and (ii) that an indication was given. The judge gave the following reasons:

i) In V v W (supra), as explained by Sir James Munby, the FDR is based upon statute, being part of a mechanism to deal with financial remedy proceedings under the Matrimonial causes Act 1973. The Primary Principles, forming part of the constitutional documents of the Financial Remedies Court, do not have an overriding power over the practice directions cited above. They also seem to be more cautious regarding what can and cannot be disclosed during the pFDR/FDC process. Besides, no citable case law exists suggesting that disclosure of these two factors during the pFDR process are permissible.

ii) Even referring to the fact that offers were or were not given is an intrusion on the process. If both parties make offers, one being unreasonable and one reasonable, the court cannot progress on the basis of that information, as the content of the offers remains unknown. If no indication can be given at the pFDR, this may be for a good reason, and it is not for the court or anyone else to enquire as to why. Besides, if, one party leaves without making an offer prior or after the indication, this may be for a good reason (for example, to obtain further disclosure or advice on a particular point). The context to these situations are all, and to allow inquiry from a later court, even just to obtain if any offers were made or indications were given, is undermining the process and could lead to ancillary disputes.

Determination [28 – 32]

Mr Justice Peel concluded that the offending words should be deleted from the open proposal for the following reasons:

i) If the integrity of the pFDR/FDR ought to be respected, no disclosure of the conduct or words of either party should be given, during the FDR. The parties are entitled to expect such things are not subsequently referred to, this would erode the process of the FDR.

ii) In the instant case, H does not simply state whether offers were made or if an indication was given. Even at its highest, assuming the Primary Principles are considered, it is as far as he can go on his case. H does not state W did not put forward and offer at all, the issue is simply the description of how the pFDR concluded. It would be unremarkable for the parties to inform the court that the pFDR concluded on the first day, at a particular time. This would simply refer to timing. What is more controversial, is the description of W's alleged responsibility of it ending, and the connection between the indication and W leaving shortly afterwards, which would imply W is to blame for the failure to reach a settlement.

iii) Although there is no disclosure of the content of negotiations, or the indication, however, the words are able to imply W's approach to the FDR. They illustrate a clear connection between W leaving after the indication, amounting to the assumption she rejected the indication. Accepting the submission that the words used in the open offer are pejorative, or at least thinly veiled criticism of W's conduct, the fact remains that it is impossible to know whether H's words are justified. For this, the nuances of the pFDR would have to be known, and no one outside this process is entitled to know this.

iv) It is not for the court to know why a party behaved in a particular way during the pFDR, nor is it sensible or feasible to extract only a part of the process without understanding the entire context. Put simply, it is not enough to know that a person acted in a particular way, one must know why, and this would be impossible. To permit H to describe W's conduct, would also require W to respond and explain her behaviour at the pFDR, which would be unfair. Her behaviour could have occurred for several reasons. It is not commonly incumbent on either party to explain why they acted in a certain way during the pFDR

process, including why it was decided to conclude after an indication is given. The court, in risks satellite litigation if one party is allowed to criticise the behaviour of the other, and this has happened here, at great expense.

v) Finally, H does not state that W was absent or failed to make proposals. Both parties attended along with their legal team. H's words are self-serving and prejudicial which imply that W rejected the indication and refused to progress negotiations any further. Besides, it is impossible to know the context. The court is left with words which remain untested and unexplored and cannot progress unless there is inquiry into the pFDR process. H's solicitors described these words as "logistical details" which is not true. They conceptualise the core of the pFDR process. 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", this reveals the potential effect of writing these words.

Mr Justice Peel demonstrates here why, the integrity of the FDR and pFDR process requires full respect for confidentiality. If this is not an absolute rule, the only permitted exceptions are those defined in the Practice Directions and the factual matters as set out above. To reiterate "the essential principle is that what is said and done at the FDR/pFDR cannot be subsequently deployed by either party".

To conclude, Mr Justice Peel emphasises that disputes like the above are unnecessary. The court at a final hearing is not assisted by how parties characterise each other's conduct, but what they are proposing to each other openly, clearly setting out the substantive content of the offer, along with the stated division of the assets.

Phoebe Duterloo

E: phoebe.duterloo@stmarysfamily.co.uk

T: 0115 950 3503