TANFIELD CHAMBERS

# Case Summary: - *J v J* [2014] EWHC 3654


## Gwyn Evans (2007), Barrister, Tanfield Chambers


Judgment (Bailii): http://tinyurl.com/kbwnqbv

Mostyn J handed down this interesting judgment on 6 November 2014, which is highly critical of lawyers and current sloppy practices.

**Facts**

1. Middle money divorce involving c. £2.9m following a 15-year marriage which bore two (now teenage) children and involved various market gardening businesses which required valuation. The parties had racked up £920k in costs, £700k post-FDR. Thus there remained but £1.97m to divide.
2. The court divided limited pensions (total c. £115k CETV) equally. W, who was to remain in the FMH with the children, was awarded spousal maintenance until H had sold enough shares to raise a Duxbury fund. H had incurred £182k more costs than W, ergo, applying *RH v RH* [2008] 2 FLR 2142 and *LS v JS (Appeal: Costs)* [2012] EWHC 2690 (Fam) "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" (§ 27).

**Experts**

3. A warning to follow PD25D FPR 2010 § 2.1 as to the appointment of Single Joint Experts (§ 45): - "is quite wrong to append a very full expert report [to Form E] and yet more wrong then to turn up at the first appointment and argue that that report should stand as the only evidence … 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."

**Costs for "litigation misconduct"**

4. Mostyn J was against re-introduction of principle of *Calderbank* offers (disallowed by FPR 2010 r 28.3(8)): - "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" (§ 55). In this case it would have been "grossly unfair" (applying FPR § 28.3 (7) (f) to elevate W's capital position by reflecting H's litigation misconduct "other than symbolically" (i.e. here H was ordered to pay an additional £50k as opposed to the requested £277k).

**Proposals for legislative reform**

5. Generally, arguments for no limits to be imposed when spending money on lawyers - "the right to … spend your money on whatever you like", do "not wash when those

very costs come out of a finite pot over which the other party has a valid claim" (§ 12).

6. Citing with approval remarks made by Lord Neuberger in his speech to the Association of Costs Lawyers in May 2012, Mostyn J deprecated hourly billing, as rewarding inefficiency, and encouraged fixed costs regimes for each stage of financial litigation (§ 13)

7. Cost capping was also to be encouraged (§ 14) with limited powers to deviate from this.

**Bundling**

8. As for the observance of PD27A (bundling!), Mostyn J referred to § 5.1 of revised PD27A of 10.4.2014 (i.e. unless the court directs otherwise, the trial bundle should be <= 350 pages), and 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). At § 50, Mostyn J was critical of the lack of time taken to fillet the papers, and the waste of the parties' and the court's time in having to deal with the 12 lever-arch files which resulted from the failure to edit when "all of the documents used in this case could have comfortably fitted in one file" (§ 51).
9. Mostyn J referred to *Re X and Y (Bundles)* [2008] EWHC 2058 (Fam) [2008] 2 FLR 2053, a judgment of Munby J referring to the then PD on bundling, which remains "routinely ignored by the profession" (§ 52).

**Sanctions against lawyers for non-compliance with PD**

10. Sanctions in the future, stated Mostyn J at § 52, may require the President 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 SSHD* [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."

**Arbitration**

11. There are alternatives to court-based litigation: "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." (§ 53).

**Gwyn Evans, Barrister**

**Tanfield Chambers**

**17 November 2014**