

WESTGATE CHAMBERS



Financial Remedy Update: Validity of documents, Disclosure, Conduct and how we as practitioners are to navigate this veritable nightmare in an unregulated vacuum!

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Example: I was recently instructed in a FH, which echoes X v Y [2022] EWFC 95

Facts of X v Y [2022] EWFC 95:

Neither of the parties were from the UK. They had married in 2002, and lived in the husband's home country where he had a successful career as a tech entrepreneur and they and their two children had a good lifestyle.

Interestingly, the main forged document in question was not produced during the proceedings, in 2015, when it sought to deflate the husband's financial position – not inflate as you would expect – but to the most deleterious effect on the wife.

In 2015 the husband tricked his wife into moving to England using forged documents. The husband had been running, and largely owned, a successful business, and wanted to move to England. The wife was less keen, but the husband persuaded her that the move would increase his financial success. He told her that a company wished to buy his business for £80,000,000 and produced a draft sale contract at that price, as well as a bank statement purporting to show that the buyer had made a down-payment of £8,000,000. On the basis of those documents, the wife agreed to move.

Whilst they initially continued to live a good lifestyle, after the move, in 2018 the husband ceased paying the rent on the family home and the children's school fees. By the time of the hearing the wife was dependent on benefits and the children (now 15 and 18) had serious medical problems, worsened by stress, and were no longer in any education.

The husband maintained in the proceedings that the 2014 documents were genuine but that the deal had unravelled. However, the wife had obtained from the bank a genuine bank statement for the account from the period, which did not show the transaction. The husband suggested that because he had had to return the funds they ceased to appear on the bank statement.

Substantive Outcome and additional poignant take-homes

The judge concluded that the husband was dishonest and unreliable and that everything he said should be treated with a great deal of caution; ultimately the wife's capital claims were adjourned for 10 years on the basis that a one-off division of capital at this point would be unjust!

Despite the fact W had not established H had any current income there was evidence of H's earning capacity during the marriage, and because W had a clear need HHJ Hess made a global PPs order for W and the children to commence 9 months hence for £5,000pm for a 10-year term to coincide with the capital claims order.

Court could not draw firm conclusions about whether H had had genuine business success nor was there solid evidence of any assets in H's name.

In such circumstances the usual objective of finality of litigation was overridden to enable W to relitigate claims should better evidence emerge at a future point in time – so an order for Periodical Payments can also be made where there is no evidence of current income but there is evidence of earning capacity.

HHJ Hess stated the emerging principle from a line of cases is that:

‘If a litigant engages in conduct, which may include full or partial non-disclosure, which causes the court to conclude that a once-off division of capital now is likely to cause unfairness and injustice to the other party then the court, in exception to the normal practice, has a discretion to decide that the normal desirability of finality in litigation should be overridden to preserve the possibility of a fair outcome for the parties’

Pertinent Findings as to ‘Dodgy Documents’

HHJ Hess found, that the husband had “dishonestly and falsely manufactured the presented 2014 bank statements to mislead the wife into moving to London”. Whilst there was no direct evidence that the draft sale contract was fake, HHJ Hess regarded it with suspicion.

As HHJ Hess noted, this issue was “by no means the only unsatisfactory evidence of the husband’s evidence”; the husband was ‘both evasive and obstructive’. In a further indication of his casual approach to the manipulation of digital media, the husband claimed that recent social media images of him enjoying expensive activities, at a time when he purported to be insolvent, had been deliberately photo-shopped, as he understood “everybody did this sort of thing on the internet”. – **Note that the wider approach ‘tapestry’ to online authenticity is worth considering to buttress your overall case!**

Therefore, F was generally found to be a dishonest and unreliable witness who had not provided meaningful disclosure.

HHJ Hess, the Lead Judge of the London Financial Remedies Court, was so alarmed, that he staged an intervention all of his own to raise awareness amongst professionals, of what is undoubtedly a cause for concern by publishing a postscript to his judgement:

POST-SCRIPT

One reason for my wishing to have this judgment published is that I wish to draw wider attention to the ability of dishonest parties to manufacture bank statements (and other documents) which, for all practical purposes, look genuine, but which are in reality not in that category. This has occurred in the present case and the wife has significantly suffered as a result of it and it is important for litigants, practitioners and judges to be aware of the issue. May I draw the reader’s attention to an article in the Financial Remedies Journal: Dodgy Digital Documents: Where are we now? Where are we

going? by Helen Brander [2022] 2 FRJ 139 which gives a full description of the existence of this issue.

In the absence of guidance practical steps we practitioners can take until then are as follows:

What to look out for...

1. Remarkably, it is very easy to download documents from institutions and, providing they are not protected by significant security, which they often aren't, it is perfectly possible to open them in Microsoft Word, Google Docs or a similar program and re-write them with the content they want to show;
2. Since the pandemic, security settings have been set up so such manipulation is not so easy but they can then be printed with a good quality colour printer, such as inkjet and then scanned into a digital format and manipulated thereafter;
3. Adobe programs, such as Acrobat Pro, can be downloaded and used free of charge or at a low monthly rate. Adobe programs replicate the flaws already present in a digital document and will try to match fonts, including proprietary fonts, of documents. Banks such as NatWest, for example, uses a proprietary font in its communications, and Adobe programs will automatically try to match that font with something so similar that it is unlikely to warrant any scrutiny;
4. Again, amending spreadsheets, for example, bank statements or otherwise micro-fiche-style documents of historical bank records, which are easily manipulable in Microsoft Excel or similar spreadsheet program;
5. It is also possible to take photographs of documents and edit them on a smart phone or tablet. Litigants in person frequently provide photographs rather than direct downloads of documents, so they are photographs of copies. Be alive to this!
6. Lastly, there are companies on the internet that will provide you with 'novelty' documents for a fee, all of which look completely real.
7. **Get your hands on the docs physically and the meta data...In the X v Y case, it wasn't until genuine documents for the same period were recovered direct from the bank and a physical and digital comparison was run that the irregularity was confirmed.**
8. **It has been proposed that future guidance states that the starting point is not to trust the content of any document which has not been verified by the original third party or through the document's underlying metadata!!!** However, the difficulty with this is the additional time involved, and thus greater expense to our clients.
9. Be vigilant and look for the red flags of digital manipulation. A history of fraudulent behaviour by a party may be a red flag large enough to justify seeking that all documents supporting their disclosure be sent directly to solicitors from the third-party providers. Other flags should include our client's insistence that something is not right with the documents, inconsistencies (even seemingly minor ones) in a document's appearance, discrepancies between documents, and a general approach of evasiveness or obstructiveness on the part of the other party.

10. The challenge for the profession is to work out the appropriate balance in circumstances where the prevalence of fraudulent manipulation of digital documents is unknown.

THE TOP TIP BEING:

Have a candid discussion with your client at the outset as to how they wish for resources to be deployed, including the corresponding cost and get a clear attendance note on your file, should they choose not to opt for the comprehensive approach.

Prison, a last resort or a deterrent?

One suggestion was made by Mostyn J's in *Baker v Baker* [2022] EWFC 15 – that a dishonest litigant be ordered to put the outstanding information in an affidavit, so that the full force of the perjury laws are fully engaged, as per para. 4 of his judgement.

Baker v Baker [2022] EWFC 15 - Mr Bishop argues that this principle occupies centre stage in this case, and I have to say that I do agree that the disclosure made by the husband in his Form E, and through his later solicitor's correspondence, has been lamentable. The husband has some serious questions to answer. It is bizarre that so many irreconcilable statements and other pieces of contradictory evidence have been given in such a short period of time, with incorrect representations being followed hard on the heels by false statements. It is for this reason that I will order that the husband's reply to questionnaire is to be exhibited to an affidavit and sworn to be true. In this way the husband will know that if it is subsequently shown that he has deliberately given false answers, then he will potentially face a charge of perjury for which the maximum sanction is seven years' imprisonment, in contrast to the maximum sanction for making a false declaration of truth on an answer to a questionnaire, which is a mere two years' imprisonment for contempt of court.

There are a growing number of media reports of digital manipulation of documents in financial remedy cases resulting in prison sentences:

- 2022- a man who had dishonestly edited emails from estate agents to lower the value of the family home was jailed for seven-and-a-half months; That man discovered after the wife requested a copy of the email from the estate agent.
<https://www.greaterbirminghamchambers.com/latest-news/news/2022/7/11/jail-for-lying-about-finances-shows-importance-of-honesty-in-divorce-expert/>
- 2021- a man who had disclosed doctored bank statements in a variation application to show a lower income was jailed for nine months. He had been caught out after counsel spotted an entry on the statements for “31 September”, and then checked the metadata on the emailed explanation and new statements from the bank.