

# Financial dispute resolution 1

An FDR is a hearing to encourage the parties to reach a settlement.

The idea is that both parties put their best points to a judge. If the judge feels able to do so, the judge considers the facts and says something like this:

"I'm not here to decide your case today, but if I was I think this is what I'd do, and this is why. I think the Wife needs to stay in the home with the children at the moment, but that the Husband should have a share of the property. If you don't agree with my views then it is your right to go to a final hearing and another judge, not me, will decide the case for you. It is right however, that I warn you that going to another hearing will mean a delay and will also cost you more in legal fees. If you go to a final hearing you lose the ability to predict what will happen. If you come to an agreement today however, you can take away that uncertainty. The art of a good agreement is often finding a situation both parties can live with. Perhaps both of you will leave court disgruntled, but with a situation you can bear."

In theory the parties should then leave court and negotiate with the judge's words "ringing in their ears".

Very often the judge's indication will be the first time the parties have heard the views of someone independent.

An advantage of an FDR appointment is that everything which is said there is without prejudice (except for the orders made). Therefore the parties and the judge can speak openly in the knowledge that no one is allowed to repeat what was said at a future hearing.

Whether the parties take into account what the judge says will depend upon:

- Whether what the judge said accorded with their views; and,
- Whether the parties view the judge as authoritative.

## Preparation for the FDR

Before the FDR you need to consider whether the case is ready for the hearing. For example:

- Have the directions from the First Directions Appointment been complied with?
- Are the assets valued?
- Have the questionnaires been answered?

If the case is not ready for any of these reasons then there could be an application to put the case off to a later date (an adjournment). It is often better for there to be an adjournment than for an FDR to take place which doesn't achieve anything. An ineffective FDR costs time, causes stress to the parties and wastes money.

If the case is ready for FDR you need to go to court with an idea of what solution you want to achieve in the case. For example:

- I want to stay in the house until our youngest child reaches the age of 18;
- After that the house can be sold;
- I think I should have more of the house proceeds because I am not able to raise much of a mortgage;
- I am going to need maintenance from my Husband because he is able to earn much more than me and I haven't got enough to get by.

There are conflicting opinions on whether it is helpful to have a bottom line, i.e. a point beyond which you will not go to settle the case. The benefits are:

- Thinking about a bottom line forces you to give serious consideration to what you want to achieve; and,
- You are likely to be thinking more calmly before you go to court, and having a set figure may help you to avoid making a bad decision in the moment at court.

The disadvantages of having a bottom line are:

- Whether your bottom line is reasonable rather depends upon how well informed your views are; and,
- There is a risk that you will not adapt to the circumstances. You may fail to take account of the advice you receive at court, or new information you get.

The best advice may be to have a broad idea of what you want to achieve but not to set it in stone. Of course you might be more dogmatic about some issues. For example it is very common for one of the parties to say: "I won't agree unless I can stay in the house, I can't see any other way to make it work." In a given case that may be a perfectly reasonable position to take. On the other side of the coin a party may say: "I don't care if I have to pay some more money over, but there's no way I am going to pay maintenance."

The Applicant must, at least 7 days before the FDR file with the court details of all offers made by either side and all responses to them.

Sometimes it happens that parties arrive at an FDR without having made any offers. It could be for example that the parties wished to see what a valuer said about the value of the assets before making an offer.

It is best practice to have at least made an offer if you are in a position to do so. Your offer does not have to be the minimum you would accept. It is perfectly sensible to build in a margin for negotiation. In fact if you do not do that then you will disadvantage yourself. The other side will presume there is a margin built in to any offer.

You are able to make either a **without prejudice** offer or an **open** offer. The advantage of a without prejudice offer is that the other side cannot refer to it at a future hearing. So for example if the case went to a 3rd hearing (the final hearing), you could not be cross-examined about a without prejudice offer.

The alternative is to make an open offer. This is an offer which is stated to be an open offer. The advantage of an open offer is as follows. Let us say that in January you make an open offer: "I will pay to Mrs Jones £100,000 in full and final settlement". Mrs Jones rejects your offer and the case drags on until September. You go to a final hearing. The judge decides you should pay Mrs Jones £100,000. In that case you would be able to say the judge: "I offered this amount of money back in January. Mrs Jones wouldn't have it. Because of that I have had to spend an extra £20,000 on legal costs. Mrs Jones should pay those costs to me." The judge might well order Mrs Jones to pay those costs.

### The Result of the FDR

After the judge has given their indication, the parties will negotiate. There are different types of negotiation styles. Some people will say: "that's our offer and that's it". This is quite a decisive strategy and can avoid a lot of backwards and forwards negotiation. The difficulty is that "it" is usually not "it".

Very often offers will go backwards and forwards. Parties will offer to concede a certain point if another point is conceded by the other side. Negotiations can be particularly extensive for example in relation to the question of maintenance. How long should the maintenance payments last for and what should they be? A significant limiting factor can be how much time the court has available to hear the case.

It is sensible during negotiations to keep a note of offers made backwards and forwards and the times when they were made. This can be useful to avoid misunderstandings or in the event there is a dispute about what was said.

### Agreement reached

If the parties are able to reach an agreement, what happens next depends upon whether the parties have obtained a decree yet in relation to their marriage. If there has been a decree, the lawyers (if present) will usually write out a consent order setting out the agreement between the parties. The negotiation usually continues in relation to the precise wording of the order.

Once the parties are able to agree a draft order, the written document is placed before the judge who may express views and ask for certain elements to be redrafted. If the judge is happy to approve the order they will endorse the draft and the order will become a binding settlement.

It is worth noting, that if the parties reach an agreement it will be difficult for them to get out of it later, even if the court has not yet approved the order.

If there is no decree nisi in the case yet, the parties will record their agreement in a written "heads of agreement document".

### Agreement not reached

If the parties are not able to reach agreement the court will set a date for a further hearing a "final hearing". That is the hearing where both parties get the opportunity to give evidence and have questions put to the other side.

When the judge is listing the case for a final hearing they will usually ask the parties whether they seek any further orders. Orders sought could be for permission to put in further evidence for example. Sometimes a party asks that the other side provide better answers to a questionnaire which has not been properly answered before.