

***N v J* [2024] EWFC 184: The nail in the coffin for conduct?**

N v J [2024] EWFC 184 was a case management hearing before Mr Justice Peel. The central issue was whether the Court can and should use its case management powers to prevent one party running a conduct case. Michael Glaser KC succeeded in having that assertion dismissed by the Court at a preliminary hearing.

The parties are male civil partners. N is 56 and works in the creative industry and J is 60 and is a retired businessman. The parties met in 2004. The parties dispute their year of cohabitation; according to N it was 2006 whereas according to J it was 2009. There is, however, no disagreement that J brought substantial wealth into the parties' cohabitation and thereafter continued to be a high-earner whereas N brought negligible assets to the partnership.

The key factual background to the conduct argument advanced is N's history of mental ill-health. N has a diagnosis of bipolar affective disorder against a background of depressive illness, anxiety, poor sleep, low mood, suicidal ideation and panic episodes prior to and over the course of the relationship. N suffered a deterioration in his mental health from mid-2012 onwards which declined to a low point in 2016, which he attributes to J's conduct:

'N alleges that during their relationship, J lied about his cheating and infidelity. As a result, says N, he increasingly required treatment (hospitalisation, rehabilitation, medication and Electroconvulsive Therapy) based on false assumptions that he was paranoid, delusional and psychotic. He says he felt he had lost his mind and "embraced madness", believing he was delusional when in fact J was indeed liaising sexually with other men. It was not until August 2021 that J admitted he had had paid sexual encounters with other men from 2011 onwards.' [16, iv]

In other words, N's conduct argument was that J "gaslit" him by lying about his infidelity which led N to believe that he was delusional and therefore to undergo various, invasive mental health treatments such as electroconvulsive therapy. The concept of "gaslighting" is a relatively new colloquialism (though by no means, a new practice) which Merriam-Webster defines "gaslighting" as the practice 'to psychologically manipulate (a person) usually over an

extended period of time so that the victim questions the validity of their own thoughts, perception of reality, or memories and experiences confusion, loss of confidence and self-esteem, and doubts concerning their own emotional or mental stability’. An interesting question raised by this factual matrix is whether gaslighting could *ever* constitute “conduct” for the purposes of financial remedy proceedings.

The “conduct” consideration is set out at section 25(2)(g) of the Matrimonial Causes Act 1973: *‘the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it’* which is repeated at paragraph 21(2)(g) of Schedule 5 of the Civil Partnership Act 2004. The two-stage test for a party asserting conduct is set out in *Tsvetkov v Khayrova* [2023] EWFC 130 at paragraphs 43-46 are restated in this judgment at paragraph 3. These two stages are in summary:

- (1) The party asserting conduct must prove (a) the facts relied upon (b) that the facts, if established, would meet the high/exceptional conduct threshold and (c) there is an identifiable negative financial impact on the parties caused by the alleged wrongdoing.
- (2) The court must then go on to consider how the misconduct and its financial consequences should impact the outcome of financial remedies proceedings.

The judgment duly considers Practice Direction 12J and Section 1 of the Domestic Abuse Act 2021 as *‘plainly contextually important and relevant to all family proceedings, including financial remedies’* [21] and reviewed the authorities on conduct cases in financial remedy proceedings. In *OG v AG* [2020] EWFC 52 Mostyn J at paragraph 34 held *‘Conduct rears its head in financial remedy cases in four distinct scenarios’*. In this case, the first scenario of *‘gross and obvious personal misconduct’* is relevant, for which *‘The authorities clearly indicate that such conduct would only be reflected where there is a financial consequence to its impact.’*

J had admitted to his infidelity; the court’s consideration was therefore whether there had been any financial consequence of the impact of the alleged conduct. Mr Justice Peel interprets this financial consequence as *‘a direct impact on the resources (e.g. something which leads to a diminution in resources, including earning capacity) or something which necessarily has a financial impact on one of the other s25 criteria; for example increased needs.’* [30] The court’s review of the authorities revealed that *‘It is, in fact, hard to find any cases where a financial impact is not discernible even if the judgments have not directly addressed the point.’* [32] Mr

Justice Peel observed that the s25 criteria are considered to affect the distributive process under section 23 and 24 and therefore *‘It would be highly unusual to include a factor which has no financial consequence under the terms of the Act which is directed to reordering the finances of the parties.’* [38] Even taking N’s case at its highest, a financial consequence of J’s conduct may be limited to any cost of mental health treatments which, in any case, could be addressed by his “needs” claim in the proceedings.

It may therefore come as no surprise that the court excluded N’s conduct claim from consideration at trial and provided reasons at paragraph 43:

- (1) *‘Having extra partnership encounters, and dishonestly concealing them, does not in and of itself constitute conduct for the purposes of financial remedies.’*
- (2) *‘It does not seem to me that the nexus between J’s behaviours and N’s mental health decline is “obvious” for there may have been many factors at play.’*
- (3) *‘J, on the evidence before me, did not know that the treatment was as a result of one particular aspect (morbid delusions) rather than in respect of deep-rooted depression generally, caused by a confluence of factors over many years’*
- (4) *‘I doubt very much whether establishing the genesis of his current mental health presentation, and in particular whether J has contributed to it, will assist or better inform the court in its evaluation of the appropriate division of finances.’*
- (5) *‘N’s claimed needs are relevant regardless of cause...I cannot see how his conduct case will increase the award he will receive. The conduct claim would therefore not make a material difference to the outcome.’*
- (6) *‘I consider the conduct argument to be disproportionate. It will considerably add to the length of the case and the costs to no purpose. This is a highly contentious case.’*

The judgment demonstrates how, when pleading conduct arguments in financial remedy proceedings, the bar remains exceptionally high. Any suggestion of a departure from the exceptionally high conduct threshold made by Macur LJ in *Goddard-Watts v Goddard-Watts* [2023] EWCA Civ 115 of conduct providing “the glass” through which to address unnecessary delay, was resisted by Mr Justice Peel: *‘I struggle to envisage many situations where personal misconduct will have a material impact on the ultimate evaluation’* [38] and continues in the same paragraph:

‘I occasionally have the sense that parties who wish to rely upon conduct do so in order to seek from the court validation and justification of their own sense of ill treatment at

the hands of their partner during the marriage, and/or condemnation of the other party; in short, personal vindication. Whilst that may be understandable at a personal and human level, it is not the function of the court to make findings for the sake of it and simply to assuage one or other party's sense of grievance and injustice. I repeat, misconduct must be directly relevant to the distribution of finances to be entertained.'

The judgment in part explored whether “gaslighting” can ever constitute conduct in financial remedy proceedings. In conclusion, it is still unlikely to reach the exceptionally high bar for a conduct claim. It does bear thought, however, whether if N had a discrete episode of poor mental health, proximate in timing to the infidelity or if N had experienced a more direct negative financial impact, i.e. a loss of income or earning capacity, the court may have been satisfied of financial consequence and therefore whether this could have satisfied the *Tsvetkov v Khayrova* test. It therefore remains to be seen whether with a different factual matrix, “gaslighting” *could* constitute conduct and whether the re-statement of the exceptionally high bar for conduct, truly is the nail in the “conduct” coffin.

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