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Costs Orders in Financial Remedies Proceedings

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Costs: the general rule

- FPR 2010 part 28.3(5) the general rule in financial remedy proceedings is that the court will not make an order requiring one party to pay the costs of another party.
- BUT
- FPR 2010 part 28.3(6) the court may make an order requiring one party to pay the costs of another party at any stage of the proceedings where it considers it appropriate to do so because of the conduct of a party in relation to the proceedings (whether before or during them)

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Does the general rule not apply

- Applications for/under/in relation to:
- MPS/Interim maintenance
- LSPO
- Any other interim order (for example on a preliminary issues, Part 25 applications, disclosure applications etc)
- Applications to strike out
- Set aside a financial remedy order or arbitral award on the grounds of mistake and/or non-disclosure
- Notice to Show Cause
- Financial remedy appeal
- Costs of third party joined to the proceedings
- Costs of civil proceedings heard together with financial remedy proceedings

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The "Clean Sheet" Category

- If the general rule does not apply, then the starting point for costs is that costs follow the event, but that presumption may be displaced more easily in a family case than in a civil case:
- *Baker v. Rowe* [2009] EWCA Civ 1162
- *Gojkovic v Gojkovic* (No. 2) [1991] 2 FLR 233

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FPR 2010 28.3(7)

These are the criteria which the court needs to consider when asked to make a costs order in proceedings to which the general rule applies:

- (a) any failure by a party to comply with these rules, any order of the court or any practice direction which the court considers relevant;
- (b) any open offer to settle made by a party;
- (c) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
- (d) the manner in which a party has pursued or responded to the application or a particular allegation or issue;
- (e) any other aspect of a party's conduct in relation to proceedings which the court considers relevant; and
- (f) the financial effect on the parties of any costs order.

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Open offers

- Only **open offers** can be shown to the court during a costs argument in which the general rule applies. Calderbank and Without Prejudice offers cannot.
- **Calderbank offers** still provide costs protection in all of the types of cases where the general rule does not apply.
- **Without prejudice** offers can only be shown to the court at FDRs. They offer no costs protection at all.

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The Family Procedure Rule Committee Costs Working Group

- “The FPRC is concerned that insufficient emphasis is given to encouraging parties to engage reasonably and responsibly in negotiations. In particular, there is concern that little positive guidance was given in PD28A to assist the parties to understand the likely costs consequences of failing to litigate sensibly and failing to engage in sensible negotiations and/or of making an open proposal which is significantly higher or lower than the award
- ultimately made by the court”

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FPR 2010 PD28A 4.4

- This amendment to the FPR was enacted on 29th May 2019:
- **PD28A paragraph 4.4**
- 'In considering the conduct of the parties for the purposes of rule 28.3(6) and (7) (including any open offers to settle), the court will have regard to the obligation of the parties to help the court to further the overriding objective (see rules 1.1 and 1.3) and will take into account the nature, importance and complexity of the issues in the case. This may be of particular significance in applications for variation orders and interim variation orders or other cases where there is a risk of the costs becoming disproportionate to the amounts in dispute. *The court will take a broad view of conduct for the purposes of this rule and will generally conclude that to refuse openly to negotiate reasonably and responsibly will amount to conduct in respect of which the court will consider making an order for costs. This includes in a "needs" case where the applicant litigates unreasonably resulting in the costs incurred by each party becoming disproportionate to the award made by the court. Where an order for costs is made at an interim stage the court will not usually allow any resulting liability to be reckoned as a debt in the computation of the assets.*'

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Duty to make an open offers within 21 days of the FDR

- On 6th July 2020 the new FPR 9.27A came into force which requires parties to make open offers within 21 days of an FDR, or 42 days before final hearing where there has been no FDR. The court can make a different timetable if appropriate.

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The “new” misconduct

- The combined policy logic of these developments is clear: the “old” wisdom of structuring the WP offer to be realistic, and the open offer to be aspirational, now carries with it significant risks. Not only will it be harder to get a costs order against the other party if your own open position has been branded as unreasonable (even if you can prove litigation conduct), PLUS it will be easier to attract a penalty in costs.
- In effect, the new rules penalise a failure to be realistic and negotiate as much as they penalise a failure to be honest or to comply with court orders.

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WG v HG [2018] EWFC 84

- This authority precedes the legislative changes, but is symptomatic of the thought process that informed them.
- Francis J awarded W a Duxbury fund of about £900,000 having found that she needed it.
- W had not made a reasonable open offer. Her only open offer came late, and was pitched at double the amount she actually received.
- Her costs came to £926,000 of which about half remained outstanding. She put forward this liability as a capital need. The judge accepted that it was a capital need but found that it had been an unnecessary and unreasonable spend: “people cannot litigate on the basis that they are bound to be reimbursed for their costs…no one enters litigation simply expecting a blank cheque…She will have to make the sort of decisions about budget managing that other people have to make day in day out”. Consequently W would only be left with half of her Duxbury fund.

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Case law – paying costs vs. meeting needs

- MB v EB [2019] EWHC 3676 (Fam) Cohen J.
- The parties (a struggling penniless artist and wife worth £50 million) were married in 2000 and separated in 2004, but remain married and "emotionally entangled". H issued divorce and financial proceedings in 2017.
- H's case was only ever going to be a needs case, but he ran an ambitious claim and spent £650,000 in costs, of which only £36,000 had been paid by H, and £236,000 by W, but secured by way of a charge in her favour against his home.
- W offered £300,000 early in the claim, then £336,000. Both were open offers. H did not engage. He made no open offers until a week before the final hearing. He sought £1.3 million, which Cohen J described as "about as wide of the mark as can be imagined". Cohen assessed his needs based claim at £325,000 on a Duxbury calculation. He already owned his home.

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MB v EB continued

- H argued that W had to pay his costs, otherwise he could not meet his needs.
- W argued that she should not be required to bankroll unreasonable and unrealistic claim, and the disproportionate costs it had fuelled.
- Cohen J decided that if the case had gone to final hearing on the basis of "reasonable" arguments, H's costs bill may have been £150,000 and in reality the Wife would have been made to pay that, given it was a "pin prick" in her resources.
- H was therefore awarded £325,000 + £150,000 = £485,000. However, he already owed the Wife £236,000 (secured) and his solicitors £380,000 = £616,000. The judgment does not stipulate how the £485,000 was to be apportioned but in all likelihood the Husband could end up with nothing.

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RM v TM [2020] EWFC 41

- 22 year marriage, parties 53 and 50. Equity in FMH £630,000
- W's open position was for an equal division after a topslice to her brother who had helped pay the mortgage.
- H's open position was to seek £480,000.
- W ran a conduct case.
- H ran a case that W's business interests were worth £2 million.
- At a preliminary hearing, a costs order was made against W for £15,000
- The outstanding legal fees to the solicitors came to £466,000. Other "hard" debt came to £154,000. Total debt £620,000.

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RM v TM continued

- The court awarded the party sufficient capital so that they could pay off their hard debt and be left with £5,000 each.
- Both sides sought a costs order. The court concluded that H had been more unreasonable than W, and her open offer was closer to the final outcome. H was penalised with a costs order for £15,000, which simply cancelled out the costs order of the identical amount that W owed him.
- *"It is scarcely credible that at the end of this litigation, they emerge with about £5,000 each of liquid assets, having incurred nearly £600,000 of costs, but such is the reality. There may be worse examples of disproportionate and ill-judged litigation, but none spring readily to mind"*

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TT v CDS [2020] EWCA Civ 1215

- This is the main new ruling on costs from the Court of Appeal (leading judgment from Moylan LJ).
- It does not deal with the issue of open offers. It is a case about the interaction between meeting needs in circumstances where the legal expenditure has been unreasonable.
- The Husband's litigation conduct had caused the Wife to incur £900,000 of costs, much by way of litigation funding. At first instance, Cohen J made an award which made provision for her debts to be paid, and the effect of that was that the Husband was left with less than the court had found he needed. He appealed on that basis.
- The decision endorses an earlier view put forward by Moor J in R v B [2017] EWFC 33: "an order can be made which does not meet needs because to exclude that option would be to give a licence to litigate entirely unreasonably", and that the court "must be entitled to prioritise the needs of the party who has not been guilty of such conduct"

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OG v AG [2020] EWFC 52

- Both parties ran unreasonable cases, and both were guilty of material non-disclosure. H's poor litigation conduct was worse than W's, but W continued to run an untenable case.

"The revised para 4.4 of FPR PD28A is extremely important. It requires the parties to negotiate openly in a reasonable way. To take advantage of the husband's delinquency to justify such an unequal division is not a reasonable way of conducting litigation. And so, the wife will herself suffer a penalty in costs for adopting such an unreasonable approach.

It is important that I enunciate this principle loud and clear: if, once the financial landscape is clear, you do not openly negotiate reasonably, then you will likely suffer a penalty in costs. This applies whether the case is big or small, or whether it is being decided by reference to needs or sharing."

- Mostyn decided that if the case had proceeded "normally" it might have cost her £100,000, and not the £617,000 that she had spent. She sought 100% of her costs. She received 45% of her costs, they having been reduced by the "normal" amount she would have spent anyway, 10% for the difference between indemnity costs and a "reasonable" assessment, amounts she wasted on pursuing applications that had been pointless, and finally for persisting in running an untenable argument that H's litigation conduct should effect the overall distribution, and not just the costs order. The logic is clear, but the numbers are highly arbitrary.

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LM v DM [2021] 1 EWFC 28

An MPS case, so not a case to which the general rule applied, but in this decision Mostyn J decided that the obligation to negotiate openly applies with equal force to “clean sheet” cases as it does to “general rule” cases.

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AA v AB [2021] EWFC B16

- This is a first instance decision of a Recorder, but it contains a useful summary of the costs authorities to date.
- The W was found to have been unreasonable in her litigation conduct, and had failed to engage in a realistic negotiation. She had pursued a ridiculous claim in relation to the parties' pets. The costs were described as "ruinous" and the parties' net capital position was -£60,000.
- Although W was left in debt by the award, the court imposed a £10,000 costs order against her, to be paid in instalments

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Practical considerations

- When to make an open offer? Remember what Mostyn J says, “as soon as the financial landscape is clear”. That does not mean once you have a fully agreed schedule with every penny identified, it means when you understand the broad parameters of the assets. If there is an area of ambiguity in the assets, then include an area of ambiguity in the offer to provide “wriggle room”.
- Conclusion – make it as early as possible.
- Options – an order can be time limited (but this will restrict the level of costs protection it might provide), it can be on the basis of no order as to costs within 28 days, but not thereafter, it can stipulate that the provision it seeks may increase over time (i.e. seeking “a lump sum to cover my debts which currently stand at £30,000 but which will increase as my legal fees increase”

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WP offers?

- When to make a without prejudice offer? We now have to think hard about what the purpose of a WP offer actually is. It may still be worthwhile where the parties would be happy with an outcome that the court probably would not order, eg W keeps 100% capital and H keeps 100% of his pension.
- It gives no costs protection at all, even in “clean sheet” cases
- It sets the bar for negotiations at the FDR, so it can influence the court’s indication.

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Calderbank offers

- These are worth making in clean sheet cases, but they do not enable the court to see that your client is engaging in an “open” negotiation.
- Calderbank offers originally bit the dust because in too many cases courts would make a needs based award, and then the costs order they had to make, but did not anticipate making, “drove a coach and horses” through a party’s ability to meet those needs.
- The authorities we have looked at suggest that the courts are now happier to make orders which do not meet needs if there has been an unreasonable costs spend, but they are more likely to do it if they have all the information from the beginning, rather than making an award and then having to retrofit the impact of a costs order upon it.
- Conclusion – think carefully about the benefit of the Calderbank offer over the open offer. If there is none/not much, make the open offer.

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Boring bits

- Costs schedules – you have to prepare and serve an N260 at least 24 hours before the hearing
- If you are preparing a bundle for a final hearing where costs are likely to be an issue, put all of the Forms H in so that the gradual increase in costs from FDA to FDR to final hearing can be evidenced.
- Make sure that your open offers contain a provision about costs
- Make sure all your consent orders for directions say “costs in the application” and not “no order as to costs”.
- If it is case where there might be an issue based costs order (eg in relation to conduct allegations), try and run a separate ledger to record your time in dealing with that matter.