PUMP COURT

CHAMBERS

Family Finance Update

Richard Hall

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THIRD PARTY RESOURCES

M V M (Financial Remedies) [2020] EWFC 41 – Robert Peel QC

- H (53) & W (50) married 22years producing 3 children (21, 19 & 14)
- Financial Remedy proceedings described as *'ruinous & recriminatory'* by judge
- Combined legal costs £594k
- 13 oral hearings - 2 FDRs & aborted 5 day trial & 4 applications by H for permission to appeal

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THIRD PARTY RESOURCES

M V M (Financial Remedies) [2020] EWFC 41 – Robert Peel QC

- Main asset = proceeds of FMH of £630k (& pensions- H of £500k & W of £229k)
- W was 24% shareholder in 2 family businesses gifted to her in 1994 (2 years before marriage).
- W's parents held 52% and W's brother held 24% H later appointed MD of one of companies
- H had asserted that companies worth £10m gross
- Application by H at first appointment for SJE valuer rejected

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THIRD PARTY RESOURCES

M V M (Financial Remedies) [2020] EWFC 41 – Robert Peel QC

- Refused on basis that non-marital & illiquid; H sought permission to appeal and rejected on paper by HCJ

- H made further application for SJE valuer in directions at FDR but unsuccessful again.

- At a further directions hearing later in proceedings (one month before final hearing and before trial judge), SJE valuer eventually appointed.

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THIRD PARTY RESOURCES

M V M (Financial Remedies) [2020] EWFC 41 – Robert Peel QC

Comment by Robert Peel QC:

In hindsight SJE valuer should have been directed [at an earlier stage]. *Parties were c£2m apart on value. Liquidity in issue and even if non-marital (which was in issue) then illiquid capital still a resource to take into account; it is hard to see how case could have been fairly determined without this evidence.*

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THIRD PARTY RESOURCES

M V M (Financial Remedies) [2020] EWFC 41 – Robert Peel QC

- At PTR (W having filed her s25 statement with wide ranging allegations of conduct against H), order recorded that W confirmed to ct that the conduct she sought to rely on was in relation to misappropriation of children's money (those alleged in her Form E)

- H directed to respond (in his s25 statement) to the allegations recorded in the PTR order.

- In H's s.25 statement he responded to the specific allegations and continued to assert W's company assets of substantial value

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THIRD PARTY RESOURCES

M V M (Financial Remedies) [2020] EWFC 41 – Robert Peel QC

- At trial, H contended W's business interests were partly or wholly matrimonial to be reflected in sharing principle
- W responded by denying but if so then she would be entitled to rely on H's misconduct whilst MD of one of the companies
- W did not plead as conduct under s25(2)(g) but argued H's actions could be considered as one of general factors
- Described by her counsel as *(a shield not a sword)*

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THIRD PARTY RESOURCES

M V M (Financial Remedies) [2020] EWFC 41 – Robert Peel QC

- On last day of trial, judge made orders for further enquiry into H's alleged financial misconduct.

- H sought permission from trial judge to appeal and sought recusal; refused by trial judge

- Moor J allowed appeal:
  - No place for conduct to feature merely as one of general circumstances; and
  - If conduct pursued then must be specifically pleaded with each party dealing with in narrative evidence
  - Further FDR (before Cohen J directed)

PUMP COURT
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THIRD PARTY RESOURCES

M V M (Financial Remedies) [2020] EWFC 41 – Robert Peel QC

- Agreed at FDR that:
  - H would not pursue a claim that business interests were matrimonial but would assert that they are resources of the applicant; and
  - W agreed not to rely on H's conduct

- Matter listed before Robert Peel QC for 5 day hearing

- Hearing conducted entirely remotely by Zoom (including SJE and parties' evidence)

- *"Forensic examination of their evidence not in any way compromised"*

PUMP COURT
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THIRD PARTY RESOURCES

M V M (Financial Remedies) [2020] EWFC 41 – Robert Peel QC

Outcome

- No minority discount applied to W's shares as quasi partnership
- H now earning £32k gr and W earning (from companies) £36.5k
- How to deal with resources of wider family
  - Where one party has an interest in an asset together with other family members, ct may frame its order to judiciously encourage other family members to assist in extraction but should not cross the boundary of improper pressure in so doing (Thomas v Thomas)
  - Where family members are gratuitous donors are willing to make funds available by gift or loan. Party then has no legal or beneficial interest but merely an act of generosity

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THIRD PARTY RESOURCES

M V M (Financial Remedies) [2020] EWFC 41 – Robert Peel QC

Outcome

- In the instant case the second category is more persuasive but starting from the position that there is absolutely no obligation on a third party family member to provide finds from their own personal resources; and
- bearing in mind the court's function is to distribute the parties' resources and not the resources of the wider family
- Third party family member may be prepared to assist the connected party OR make funds available to pay off the other party

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THIRD PARTY RESOURCES

M V M (Financial Remedies) [2020] EWFC 41 – Robert Peel QC

Outcome

- In either scenario the evidence needs to show to the requisite standard of proof that there are likely to provide support and therefore a resource available.
- Considerations include:
  - Has a bounty been provided before? In what quantity? Over what time? may evidence a pattern
  - Court can look at specific offers made before or after separation (early on the these proceedings W's brother had offered to mortgage the FMH to allow W to remain living there)
  - Offers of interim support for legal fees or to tide a party over during proceedings have limited evidential relevance
  - Absent clear evidence of establishing a track record of historic payments and/or reliable representations as to future subvention, ct may be hard pressed to be satisfied.

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THIRD PARTY RESOURCES

M V M (Financial Remedies) [2020] EWFC 41 – Robert Peel QC

- For security and consistent with status of homeowners during their lives together, purchased accommodation should be strived for

- The *dicta* in M v B apply in the majority of cases but the later case of Piglowska v Piglowska noted (after considering M v B)

"A useful guideline…But to cite the case as if it laid down some rule that both spouses invariably have the right to purchased accommodation is a misuse of authority."

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THIRD PARTY RESOURCES

M V M (Financial Remedies) [2020] EWFC 41 – Robert Peel QC

- H found to have need of 2 bed property of £250k and W £375k
- H to receive £377k and W to receive £220.5k (after top slicing £33k paid by W's brother against mortgage)
- After payment of debt H left with £5,423 & W £5,368!!
- H could release £125k from pension in around one year and had mortgage capacity
- W had mortgage capacity of £132k and ct satisfied family will assist in shortfall.

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CONDUCT

OG V AG (Financial Remedies:Conduct) [2020] EWFC 52 – Mostyn J.

- H aged 53, W aged 51. Marriage 1994, separated 2017 & divorced in 2019
- 2 children aged 25yrs and 10yrs.
- C£16m assets.
- W pleaded conduct on basis of non disclosure of certain transactions and sought 2/3:1/3 split to reflect such
- Mostyn J gave guidelines on issue of conduct

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CONDUCT

OG V AG (Financial Remedies:Conduct) [2020] EWFC 52 – Mostyn J.

Categories of conduct

1. Gross & Obvious personal misconduct

2. Add- back

3. Litigation Misconduct

4. Drawing inferences

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CONDUCT

OG V AG (Financial Remedies:Conduct) [2020] EWFC 52 – Mostyn J.

Gross & Obvious personal misconduct:

- Normally but not necessarily during marriage
- Only taken into account in rare circumstances
- Only be reflected where it has a financial consequence
- May extend to economic misconduct (if one party economically oppresses other for selfish or malicious reasons) and provided the high standard of *'inequitable to disregard'* is met then may be reflected in substantive award

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CONDUCT

OG V AG (Financial Remedies:Conduct) [2020] EWFC 52 – Mostyn J.

Add-back

- One party has wantonly and recklessly dissipated assets which would otherwise have formed part of the matrimonial property

- Applied in only where it is clear and obvious

- Rare is principle applied in practice

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CONDUCT

OG V AG (Financial Remedies:Conduct) [2020] EWFC 52 – Mostyn J.

Litigation Misconduct

- Should be severely penalised in costs

BUT

- Difficult to conceive of any circumstances where should affect the substantive disposition

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CONDUCT

OG V AG (Financial Remedies:Conduct) [2020] EWFC 52 – Mostyn J.

Drawing inferences

- Evidential technique of drawing inferences as to existence of assets arising from one party's failure to provide full & frank disclosure

- Forms part of the computation stage rather than the distribution stage

BUT

- *Quaere*: Save that innocent party takes share of visible assets

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CONDUCT

OG V AG (Financial Remedies:Conduct) [2020] EWFC 52 – Mostyn J.

Child Support quantum

- Mostyn J also confirmed his view that CMS formula should apply to gross incomes up to £650k

- It is to be noted that this view currently remains controversial

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VALUATION OF PRIVATE COMPANY

G v T [2020] EWHC 1613 – Nicholas Cusworth QC

- Parties married in 2000 and separated in 2017
- 2 children aged 8 & 3
- W had worked in financial sector but stopped formal work following birth of first child
- H founder member and largest single shareholder (1/3) of B Ltd.

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CHAMBERS

VALUATION OF PRIVATE COMPANY

G v T [2020] EWHC 1613 – Nicholas Cusworth QC

- B Ltd involved in trading (employees traded in the markets) and market making (facilitating trades)
- B Ltd had no underlying income stream relying on profits made by traders to cover costs
- Significant bonuses paid to traders to retain them
- H's gross annual income ranged £5m to £411k over last five years.

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VALUATION OF PRIVATE COMPANY

G v T [2020] EWHC 1613 – Nicholas Cusworth QC

- SJE used a net asset value (NAV) of company criticised by shadow accountant used by W

- H's case was that value was nothing more than a pile of cash waiting to be invested and value should reflect that

PUMP COURT
CHAMBERS

VALUATION OF PRIVATE COMPANY

G v T [2020] EWHC 1613 – Nicholas Cusworth QC

- H says shareholding matrimonial up to separation (2017) but non matrimonial after and valuation should be at that date
- Between October 2017 and June 2018, profitable for business and H's shares increased by £10m
- W argued for valuation as at October 2019
- Non business assets worth £4.3m

PUMP COURT
CHAMBERS

VALUATION OF PRIVATE COMPANY

G v T [2020] EWHC 1613 – Nicholas Cusworth QC

- It was agreed that application of sharing principle would meet W's needs

- Guidance on valuing private companies when no evidence that will be sold includes:
  - H v H [2008] EWHC 935
  - Versteegh v Versteegh [2018] EWCA Civ 1050
  - Martin v Martin [2018] EWCA Civ 2866
  - M v M [2020] EWFC 41

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VALUATION OF PRIVATE COMPANY

G v T [2020] EWHC 1613 – Nicholas Cusworth QC

- Such valuations are difficult and fragile
- No obvious market for a private company
- Valuers provide widely differing results
- A snap valuation may give an unfair picture
- Acid test of what market dictates not available when no sale proposed

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CHAMBERS

VALUATION OF PRIVATE COMPANY

G v T [2020] EWHC 1613 – Nicholas Cusworth QC

- Valuation of shareholding and structure of award are interconnected so that sharing principle effects a fair balance of risk and illiquidity between the parties.

- The weight to be placed on a valuation is not a mathematical exercise but a broad evaluative exercise

- In this case NAV was the most appropriate to be used

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VALUATION OF PRIVATE COMPANY

G v T [2020] EWHC 1613 – Nicholas Cusworth QC

Valuation date of sharing claim

- Court must determine whether the assets comprise the product of marital endeavour
- Court is not required to adopt a formulaic approach
- Concept of matrimonial and non matrimonial is a legal construct not always capable of clear identification
- Court must consider continuum *versus* new ventures

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VALUATION OF PRIVATE COMPANY

G v T [2020] EWHC 1613 – Nicholas Cusworth QC

Valuation date of sharing claim

- In the instant case H had not shown that the post-separation accrual related to a 'truly new venture' in period up to June 2018 nor that the venture had no connection to the assets of the business

- Balance of fairness led to a fixing of value of W's equal share as at June 2018 with recovery and progress beyond that date being properly beyond what could be classed as marital endeavour

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VALUATION OF PRIVATE COMPANY

G v T [2020] EWHC 1613 – Nicholas Cusworth QC

Outcome

- Total matrimonial assets (including valuation as at June 2018) of c£40m with W receiving c£20m of which c£16.8m paid by way of a series of lump sums over 4 years.

- Cross check equated to W receiving c45% of total current asset values

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ARBITRATION

Haley v Haley [2020] EWCA Civ 1369 – King, Moylan & Popplewell LJJ

- Week before final hearing parties were informed judge not available

- Parties decided to use the time listed for final hearing for arbitration

- Arbitrator produced award but H believed unfair

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CHAMBERS

ARBITRATION

Haley v Haley [2020] EWCA Civ 1369 – King, Moylan & Popplewell LJJ

H applied to High Court:

1. To set aside the award for serious irregularity (s68 AA 1996)

2. For permission to appeal (s69 AA 1996)

3. For an Order that award should not be made into a final order under MCA 1973

- Judge dismissed 1 & 2 and held that test to be applied to 3 was closely aligned to test under 1 & 2 (i.e. that decision of tribunal was obviously wrong) save where supervening event or mistake and even if not (and the appeals test is applied) then award not plainly wrong

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CHAMBERS

ARBITRATION

Haley v Haley [2020] EWCA Civ 1369 – King, Moylan & Popplewell LJJ

- Permission to appeal by Moylan LJ allowed but limited to consideration of the test to be applied where one party declines to consent or challenges an order being made under MCA 1973 following an IFLA scheme arbitration

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ARBITRATION

Haley v Haley [2020] EWCA Civ 1369 – King, Moylan & Popplewell LJJ

Appeal allowed & remitted to circuit judge to determine form and extent of hearing required

- Correct test is whether party had a 'real prospect of success'

  (same as appeal under FR r30)
- Higher test in S v S & DB v DLJ incorrect
- Orders under MCA 1973 derives authority from ct
- An agreement made is influential but can be rejected as unfair
- An agreement to arbitrate carries no more weight that that given to an agreement which the parties themselves have reached

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ARBITRATION

Haley v Haley [2020] EWCA Civ 1369 – King, Moylan & Popplewell LJJ

- Ct can decline to make an order where good and substantial grounds to show that an injustice will be done

- Procedure to be followed if a party challenges an arbitral award is that party is not required to invoke remedies under AA 1996 or argue mistake or supervening event before asking Family Ct not to make order

- Cases perhaps may be triaged with reluctant party having to 'show cause' on paper

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ARBITRATION

Haley v Haley [2020] EWCA Civ 1369 – King, Moylan & Popplewell LJJ

WARNING GIVEN by KING LJ:

All other things being equal parties must enter arbitration knowing that award will subsequently be confirmed in a consent order.

BUT observation by King LJ that wording in ARB1 FS wrong in stating:

"it is only in exceptional circumstances that a court will exercise its own discretion in substitution for the award".

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ARBITRATION

Haley v Haley [2020] EWCA Civ 1369 – King, Moylan & Popplewell LJJ

Encouragement given by King LJ:

- Arbitration is not the purview only of the rich

- May well be used in the aftermath of Covid crisis and as courts cope with backlog.

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ADJOURNING CAPITAL CLAIMS

AW V AH & OTHERS (Financial Remedies) [2020] EWFC 22 – Roberts J.

- H & W cohabited from 1998, married 2001 and separated in 2011- no children of marriage

- H had enjoyed considerable success in business investing in a number of companies and ventures internationally.

- Extremely high marital standard of living and W resided in Monaco

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ADJOURNING CAPITAL CLAIMS

AW V AH & OTHERS (Financial Remedies) [2020] EWFC 22 – Roberts J.

- H became over extended and by 2008 was in serious financial difficulties.
- In 2010, H reorganised the corporate structures through which he operated
- Shortly after separation, H declared bankrupt on his own petition owing £33m to unsecured creditors as well as loans and personal guarantees to banks.

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ADJOURNING CAPITAL CLAIMS

AW V AH & OTHERS (Financial Remedies) [2020] EWFC 22 – Roberts J.

- W's case at trial was that she sought £2m or adjournment of capital claims.
- After 10 day trial became clear and W accepted that she was unlikely to be able to show undisclosed resources sufficient to meet her capital and income needs
- Judge made nominal PPs order and adjourned capital claims to stand dismissed in 7 years if not restored.
- No doubt that all the actions of H in making arrangements in the months leading up to bankruptcy and thereafter were intended to enable him to carry on business and commercial activity with the intention of trying to restore some financial traction in respect of the future.

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ADJOURNING CAPITAL CLAIMS

AW V AH & OTHERS (Financial Remedies) [2020] EWFC 22 – Roberts J.

- H had appropriated €985m from sale proceeds of French property which had been gifted to W from outset (W only found out from individual who handled sale)

- H had also drawn down his pension without disclosing to W and had repaid a friend with the monies.

- Whilst the imperative was to achieve a clean break wherever possible, the court could not achieve a fair outcome other than by adjourning W's lump sum and PAO claims.

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ADJOURNING CAPITAL CLAIMS

AW V AH & OTHERS (Financial Remedies) [2020] EWFC 22 – Roberts J.

- H had been singularly lacking in providing a clear and coherent narrative to support the many pages of disclosure which may then have enabled W to resolve the case without the need for her to pursue the forensic enquiry against H over the course of the trial.

- H ordered to pay 60% of W's costs.

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ADJOURNING CAPITAL CLAIMS

Adjourning capital claims

- Needs to be some evidence that financial position may change in interim whether by future inheritance, bonus or gratuity or likelihood financial circumstances would change for the better
- In cases where fairness would act as a counter to finality of litigation such that adjourning claims off the only real fair option
- See also
  - Joy v Joy [2019] 2 FLR 1091 (H had settled a trust fund and then excluded himself as a beneficiary
  - Re:G [2004] 1 FLR 997 (future inheritance)
  - Quan v Bray [2018] EWHC 3558 (H likely in the future to have accumulated sufficient capital to effect a capitalised clean break)

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ADJOURNING CAPITAL CLAIMS

Summary

- Exception rather than the rule
- Generally need a specific circumstance or a foreseeability of such which would, once it occurs, allow resources to become available to effect a fair capital outcome
- Ongoing spousal provision orders and the availability of capitalisation of such is not the same as adjourning (separate) capital claims
- the first is limited to capitalisation of the income order only and the latter is wider

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OTHER CASES OF NOTE

- **W v H [2020] EWFC B10 – HHJ Hess**

  Pensions

  – Equality of income or capital? [para 60]

  – Apportionment [Para 61]

  – Offsetting [Para 62]

  See also:

  PAG report (July 2019)

  "A Survival Guide to Pensions on Divorce" (Jan. 2021) www.advicenow.org.uk

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OTHER CASES OF NOTE

- **LM v DM (Costs Ruling) [2021] EWFC 28 – Mostyn J**
  - Judicial concern over high costs [Mostyn J??] where claim pursued appears unreasonable and disproportionate
  - No efforts made to compromise
  - Where interim costs order made then ct generally wont allow resulting liability to be reckoned as a debt
  - Para 4.4 clear if once landscape is known you do not openly negotiate reasonably then like to suffer in costs
  - Applies to cases big or small and whether a sharing case of needs case

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OTHER CASES OF NOTE

- **RATTAN v KUWAD [2021] EWCA Civ 1 – Macur, Moylan & Asplin LJJ**
  - Interim provision (Award £2,850pm including school fees)
  - Ct entitled to undertake such analysis of budget as is sufficient to ensure award is reasonable
  - TM v ML principles accepted but extent to which budget requires critical analysis depends on the circumstances of the case
  - No separate interim budget required in cases such as these
  - The fact that some items are not incurred monthly may not be relevant as award is pending final hearing

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PROCEDURE

Amendments to FPR

New r5.7 (with effect from April 2020)

- Any communication between a party to proceedings and the court must be disclosed to, and if in writing copied to, the other parties or representatives the other party
- Applies to any communication in which any representation is made on a matter of substance or procedure but does not apply to communications which are purely routine, uncontentious and administrative.
- Not required to disclose if compelling reason for not doing an stated in communication
- Communication should state on its face that it is being copied to other parties/persons stating identity and capacity
- Any communication not complying will be returned to sender
- Does not apply to communications authorised by rule or PD to be sent to ct without at same time being provided to others

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PROCEDURE

Amendments to FPR

New r9.27A (with effect from July 2020)

- Costs estimates for costs incurred and that are expected to be incurred must be filed with ct before hearing
- Those costs must be recorded in recital to Order made at the hearing (as will any failure to comply)

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PROCEDURE

Amendments to FPR

New r9.27A (with effect from July 2020)

- Open proposals must be filed at served within 21 days of FDR unless ct directs otherwise
- If no FDR then Open proposals must be filed not less than 42 days before final hearing
- Requirement under 9.28 appears still to apply (applicant to file Open proposals no later than 14 days before final hearing & respondent not more than 7 days after receipt of applicant's open proposals)

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PROCEDURE

Amendments to FPR

WARNING ADDITION TO PD28 (Costs) para 4.4:

"The Court will take a broad view of conduct …& 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."

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