PUMP COURT

CHAMBERS

Costs Orders in Family Proceedings

Annie Ward

PUMP COURT
CHAMBERS

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)

PUMP COURT
CHAMBERS

When 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
- Schedule 1 proceedings

PUMP COURT
CHAMBERS

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

PUMP COURT
CHAMBERS

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.

PUMP COURT
CHAMBERS

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.

PUMP COURT
CHAMBERS

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.*'

PUMP COURT
CHAMBERS

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.

PUMP COURT
CHAMBERS

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. 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 against the other side).
- 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.

PUMP COURT
CHAMBERS

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.

PUMP COURT
CHAMBERS

RM v TM continued

- The court awarded the parties each 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"*

PUMP COURT
CHAMBERS

Rothschild v De Souza [2020] EWCA Civ 1215

- This is the main new 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"

PUMP COURT
CHAMBERS

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.

PUMP COURT CHAMBERS

LM v DM [2021] 1 EWFC 28 / [2022] 1 FLR 393

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.

PUMP COURT CHAMBERS

NG v GD [2021] EWFC 53 (Peel J)

- This case endorses the most normal and practical way of dealing with costs, i.e. to treat any outstanding costs liability as a capital need;
- Peel J specifically rejected an application for a costs order to be made against a Husband who had failed to negotiate openly and reasonably, and who failed on various matters of principle, because the order which the court had already made met the Wife's needs and left her debt free. A further costs order would have been, in effect, a double recovery.

PUMP COURT
CHAMBERS

Traharne v Limb [2022] FC 20 (Cohen J)

- This case involves an argument about a pre-nuptial agreement which the Wife wanted to argue she should not be bound by because she had been coerced into signing it, and it failed to meet her needs.
- The Husband had argued all along that she should be bound by the PNA, and only moderated that to saying the PNA should be given considerable weight, at the final hearing.
- The costs of the litigation were out of proportion with the assets in the case.
- The Wife lost on her allegations of coercive control but the court agreed that the PNA did not meet her needs.
- The Husband had made reasonable open offers (one of which exceeded the court's final order) but had stuck to an untenable argument about the PNA.
- The Wife case had always been pitched too high, and the bulk of the costs had been wasted on issues she lost on.

PUMP COURT
CHAMBERS

Traharne v Limb (cont'd)

- The court concluded that the Husband should make a modest contribution to the Wife's costs (£80,000) which would leave her with less than she needed, but was an adequate balancing of the competing aspects of their unreasonable litigation conduct.

PUMP COURT CHAMBERS

Crowther v Crowther [2021] EWFC 88 (Peel J)

- A case with a disastrous litigation history described at the start of the judgment:

1. *When starting my reading into this financial remedy case, I noted with dismay that W's s25 statement is her 15th statement in the proceedings and H's is his 26th. There have been no fewer than 34 court hearings. The bundles (4 of them; a core bundle, a library bundle and two supplemental bundles) exceed 6,000 pages. The parties have argued before me about almost every imaginable issue, no matter how trivial. Unsurprisingly, the legal costs are enormous:*

   i) W's costs (excluding divorce, children, and occupation order proceedings, but including the costs of Admiralty proceedings and a preliminary issue referable to financial remedies) are £1,427,606;

PUMP COURT
CHAMBERS

Crowther

ii) *H's costs (on a like for like basis) are £920,316.*

2. *The total costs are therefore about £2.3m.*
3. *Given that at the start of the hearing I was presented with a composite asset schedule on which W asserted the net assets to be £1,374,266 and H asserted the net assets to be £386,547, it can be seen that, subject to any finding of hidden resources, the costs are utterly disproportionate. My task is far more difficult than it should be precisely because the visible assets are now so limited. In the end, I have largely had to concentrate on how to divide the debts fairly.*

PUMP COURT
CHAMBERS

Crowther

- The judgment ends with:
- *87. The only beneficiaries of this nihilistic litigation have been the specialist and high quality lawyers. The main losers are probably the children who, quite apart from the emotional pain of seeing their parents involved in such bitter proceedings, will be deprived of monies which I am sure their parents would otherwise have wanted them to benefit from in due course.*

- The judgement is critical of both parties, but more so of the Husband, and ordered him to pay 25% of the Wife's costs to reflect his greater culpability.

PUMP COURT CHAMBERS

WC v HC [2022] EWFC 40 & VV v VV [2022] EWFC 46 (both Peel J)

- Two short judgments about the interaction between needs and costs. In WC v HC Peel J identifies the unafirness which can accompany the "normal" process of simply teating all costs liabilities as capital needs;

- *There is a risk in needs based awards, such as the one I have made, of requiring the payer to act as the ultimate insurer of the payee's costs with little or no incentive on the payee to negotiate reasonably. An applicant for a financial remedies award can, and frequently does, seek a sum which, inter alia, clears all indebtedness including costs. Thus, however high the level of costs incurred by the payee, he/she will frequently seek what amounts to an indemnity for any costs outstanding so as to be able to exit the marriage debt free. Similarly, if and insofar as the payee has already spent large sums on legal fees which have been provided by the payer (either voluntarily or by way of a court imposed legal services funding order), he/she will argue that to be required to reimburse the payer will lead him/her into debt. It is, in my view, important for parties to be aware that even in needs based claims no litigant is automatically insulated from costs penalties, notwithstanding the possible impact on the intended needs award.*

PUMP COURT
CHAMBERS

WC v HC / VV v VV

- As a consequence, having assessed the Wife's needs, he then made a costs order requiring her to pay £150,000 to the Husband.
- However, it was a small gesture given that the Wife was awarded £7.45 million, so the costs order was a pin prick into her resources
- In VV v VV, Peel J adopted a similar reasoning to order a wife to pay £100,000 to the Husband to reflect her unreasonable open position (£6 million, she received £750,000) and the fact that she had lost on two issues of fact (length of cohabitation and allegations of financial misconduct). However, this was a more severe penalty than in WC v HC, because the Wife's overall award was only £750,000 and she had £237,000 of debt.

PUMP COURT
CHAMBERS

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”)

PUMP COURT
CHAMBERS

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.

PUMP COURT
CHAMBERS

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.

PUMP COURT
CHAMBERS

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 (or make sure that the orders contain the correct recitals about costs incurred to date).
- 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.

PUMP COURT
CHAMBERS

Costs in Children Act cases

- The basic position remains – costs orders in private law (and public law) cases are exceptional. Any privately paying client must be advised from the outset that they are highly unlikely to recover their costs, even if they are successful.
- The only area with some flexibility are applications or hearings which do not directly involve a consideration of the child's welfare, but are more geared towards resolving factual or legal disputes:

  a) a fact-finding hearing

  b) a declaration as to parentage

  c) a declaration as to habitual residence
- In Re J [2010] 1 FLR 1893 the Court of Appeal (Ward LJ and Wilson LJ) awarded a mother two thirds of her costs after her allegations of violence were found proved. That led to a raft of costs applications in fact-finding cases.

PUMP COURT
CHAMBERS

Costs (Children Act)

- However in Re T [2013] 1 FLR 133 the Supreme Court gave this reminder:

  "*The general practice of not awarding costs against a party, including a local authority, in the absence of reprehensible behaviour or an unreasonable stance, was one that accorded with the ends of justice and which should not be subject to an exception in the case of split hearings. The judge's costs order was founded on that practice and should not have been reversed by the Court of Appeal.*"

- This was upheld in Re S [2015] 2 FLR 208 (another hearing about care proceedings rather than private law proceedings)
- It therefore remains to be argued in private law proceedings that failing to admit allegations which are proved, or making allegations which are found to be false, is both "reprehensible" and "unreasonable".
- Where allegations are found to have been minimised/exaggerated, or where they are found but not considered significant enough to make a difference, then recovering costs is going to be unlikely.
- The impact on the paying party of making a costs order is likely to be given weight in Children Act cases.