Costs in financial proceedings: the evolving landscape

By Elaine Strachan
3PB

A. Introduction

1. Costs are at the discretion of the court. In family proceedings the court can make such orders as to costs as it thinks just: **FPR 2010 r28.1.** This short document intends to discuss how that discretion is likely to be exercised and recent developments in this area of law.

B. Divorce, Dissolution and Separation Act 2020 (DDSA 2020)

2. The **DDSA 2020** came into force on 6 April 2022. Before this date, the approach of the court in respect of costs on applications to divorce or dissolve civil partnerships, is succinctly summarised in the note to **FPR 2010 7.21** of the **FCP**:

> *"In practice, most courts are likely to follow a broad rule that fault applications…may attract an order for costs, but that living apart applications only attract an order much more rarely."*

The rule of thumb was that the district judge would award costs in applications based on adultery, unreasonable behaviour or desertion for a period of 2 years. This has now changed.

3. The **DDSA 2020** represents a fundamental reform of divorce law. In summary, the requirement to prove evidence of 'behaviour' [one of the 5 facts under **MCA 1973 s1(2)** or 4 facts under **CPA s44(5)**] to establish irretrievable breakdown of marriage has been removed. The court now merely requires a statement from the applicant(s) that there has been "irretrievable breakdown"; this will stand as conclusive evidence enabling an order for divorce or dissolution to be made, without the apportionment of blame. The concept of 'no-fault divorce' has had consequences for costs.

4. The President's Guidance, Costs in Proceedings for Matrimonial and Civil Partnership orders was issued on 28 March 2022. It is noted that the great majority of cases are likely to be undisputed and will not involve any consideration by the court of the reasons for the breakdown of the relationship. Those applications which are disputed are likely to involve argument limited to issues such as the court's jurisdiction or the validity or subsistence of the relationship. The Guidance provides at paragraph 6,

> *It follows that while the court will retain a discretion to make a costs order, the circumstances in which an order for costs will be appropriate are likely to be very limited.*

5. The purpose of the legislative reform is to reduce conflict between couples who are either married or in a civil partnership. Costs orders in divorce and dissolution proceedings, which once were commonplace, will now be very rare.

C. Financial Proceedings

6. By contrast, costs orders in financial proceedings are plainly on the rise.

7. The notion that each party will bear their own costs, is no longer a safe assumption. All practitioners should be alert to:

   - The potential to achieve a costs order in favour of their client.
   - The need to protect their client from a costs order in the event that negotiations are not conducted openly and reasonably.

8. There are two regimes that apply to costs within the Family Court (a) no order (the financial remedy regime – as per FPR 2010, r 28.3) and (b) clean sheet (the general FPR 2010 regime). I shall consider each in turn.

No Order Regime: FPR 2010 r28.3

9. The starting point is that costs in proceedings for a financial order are subject to,

   "the general rule… that the court will not make an order requiring one party to pay the costs of another party': **FPR 2010 r28.3(5)**

10. The court may make an order requiring one party to pay the costs of the other if it considers such an order appropriate by reason of conduct: **FPR 2010 r28.3(6)** In doing, the court will have regard to the factors at **FPR 2010 r28.3(7)**, namely:
    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.

11. In assessing conduct, the court will have regard to these provisions and the need to further the overriding objective, pursuant to **FPR 2010 PD 28A 4.4**. This rule was extended with effect from 27 May 2019 as follows:

    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.

12. The duty to negotiate in an open and responsible manner is compounded by the extension in the rules, introduced in July 2020, through **FPR 2010 9.27A**, requiring parties to file and serve open proposals within 21 days of FDR (or another date if directed by the court). If there is no FDR, open proposals should be filed and served not less than 42 days before the final hearing.

13. These changes coincided with an extension in the obligation for practitioners to provide more information about costs incurred and projected costs in Form H1: **FPR 2010 9.27**. The intention is to ensure that litigations are aware of the level of legal costs throughout proceedings and that costs (should) remain proportionate to the issues.

Costs: Authorities

14. It is perhaps not surprising that an intervention by Mostyn J has been the impetus in turning the tide in relation to financial remedy costs. In **OG v AG [2020] EWFC 52,** the parties had run up a high costs bill in excess of £1m. Mostyn J held that following the PTR the wife had been in a position to negotiate reasonably, yet she had not done so. In providing judgment he made the following observations about the amended FPR:

    30. 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.

    31. 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.

15. Mostyn J made findings as to conduct on the part of the husband, arising from his dishonesty. However the wife award of costs was discounted by £50,000. Mostyn J conveyed a stark warning in his judgment [93]:

    "I hope that this will serve as a clear warning to all future litigants: if you do not negotiate reasonably you will be penalised in costs."

16. Since **OG v AG**, there have been several high-profile authorities dealing with cost issues. The courts are developing a more nuanced approach to costs and inter parties' orders for costs are no longer considered 'exceptional' in financial proceedings.

17. In **E v L (No 2: Costs) [2022] 1 FLR 980,** Mostyn J described the husband's stance in negotiations as "intransigent" rendering the case unsettleable. The husband would not accept that a fair disposition would be an equal sharing of the marital acquest, wishing instead to confine the wife to her needs. He had failed to negotiate reasonably and responsibly and had sought to introduce conduct into the proceedings. A costs order was made against the husband for 25% of the wife's costs, in the sum of £109,000. A costs order was also made against the wife in the sum of £23,400 (by way of offset) to reflect her misconduct in relation to the husband's computer and his private correspondence.

18. In **X v Y [2022] EWFC 143**, HHJ McCabe calculated that the parties' asset pot had been depleted by around £312,000 due to the husband's unreasonable presentation of his case. The judge considered that the husband should pay two-thirds of the wife's costs. However there would be 'double-counting' if the husband was simply ordered to pay the wife's legal fees. Rather, the figure of £150,000 was notionally added back to the pot and the wife received an increased lump sum of £100,000 (equivalent to two-thirds of the add-back). In addition, the husband was ordered to pay two-thirds of the wife's outstanding legal costs, namely £24,000 of £36,000.

19. In **Rothschild v de Souza [2020] EWCA 1215** the Court of Appeal emphatically endorsed the principle that a party who is guilty of misconduct may receive an award less than his or her needs would otherwise demand (and indeed may recover possibly the entire matrimonial capital).

20. Since then the court have in several cases, been prepared to make a costs order notwithstanding that such an order would cause the payee to dip into (and thereby reduce) the needs-based award.

21. In **Traharne v Limb [2022] EWFC 27** Sir Jonathon Cohen dealt with a case where assets were valued at £4m. The combined costs of the parties exceeded £650,000. Whilst the wife succeeded in a fundamental aspect of the claim (regarding a PNA) the judge was critical of her conduct which had resulted in legal fees of £403,150 – funded to a large extent by the husband under a LSPO.

22. The judge expressed the view that the wife's costs were disproportionate and that her approach to the litigation had been misconceived. He found that she had 'set her sights far too high'. The judge considered that the husband should fund only £80,000 of the remaining balance of her legal fees, leaving the wife with a liability of £70-£80,000 to her solicitors. The judge held that the wife would need to finance this liability, either through her income or via a mortgage. At paragraph 99, the judge reflected,

    "That W is left with a costs bill to pay is entirely the result of her prodigal expenditure on costs and her approach to this litigation."

23. In **WC v HC [2022] EWFC 40**, Peel J considered that a wife had acted unreasonably. Her proposal was 'wide of the mark'. The judgment provided at paragraph 13:

> *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….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.*

24. The wife's needs were assessed to be £7.45m. She was ordered to pay a contribution towards the husband's costs of £150,000 despite the fact that this would (to a modest extent) reduce her award below the need assessment.

25. The interplay between needs and an applicant seeking an increased lump sum to meet costs, was critically analysed by the Court of Appeal, in **Azarmi-Movafagh v Bassiri-Dezfouli [2022] I FLR 15**. King LJ stated at paragraph 63,

> *'..in my judgment in cases where it is argued that an order substantially in excess of the sum required to meet a party's assessed needs is sought in order to settle the outstanding costs (or liabilities referrable to costs) of that party, the judge should:*
>
> *i. Consider whether in any event the case is one in which consideration should be given as to the making of an order for costs under FPR 2010, r 28.3(6) and (7) in particular by reference to FPR 2010, PD 28A, para 4.4.*
>
> *ii. Whilst not carrying out a full costs analysis, the judge should have firmly in mind what the order which they propose to make by way of additional lump sum to meet a party's costs would represent if expressed in terms of an order for costs. To do this would act as a cross-check of the fairness of the proposed order.*

26. King LJ observed that the judge at first instance had a wide discretion as to the extent to which it was appropriate to order an enhanced lump sum to a party in receipt of a needs award to satisfy a costs bill. The argument that this was tantamount to an order for indemnity costs and thus unfair, was not accepted.

27. **HD v WB [2023] EWFC 2,** is the most recent and arguably the most illuminating reported authority of significance, in the field of FR costs. Judgment was handed down on **13 January 2023**. Peel J, provided a comprehensive evaluation of the respective positions

adopted by the parties in relation to various issues throughout the litigation. There had been a PNA: the wife had prevailed on this issue. However she had not succeeded on other matters concerning the husband's business and his drawing of dividends.

28. The open offers of each party missed the target by a considerable margin. Nevertheless the judge proceeded to make an order for costs against the husband which would deplete his needs-based award. The order was equivalent to 20% of the wife's costs at £120,000. In his judgment at paragraph 122, Peel J stated:

> *I consider that it is reasonable and proportionate to invade, to that extent, the needs based award made by me in his favour. He cannot be insulated from the consequences of litigation.*

Clean Sheet Regime

29. Rule 28.3 constitutes a distinct procedure for costs in financial remedy proceedings. Different rules apply for interim applications or hearings which are determined separate from the main proceedings (eg. MPS application, s37 MCA, preliminary issue hearing, appeal, etc). In terms of costs, these are known as "clean sheet cases". Whilst this regime purports to adopt the 'no presumption as to costs' rule, costs will tend to follow the event in such cases.

30. **Baker v Rowe [2009] EWCA Civ 1162** is the foremost authority in respect of 'clean sheet' cases. As per Wilson LJ at paragraph 25:

> *Even where the judge starts with a clean sheet, the fact that one party has been unsuccessful, and must therefore usually be regarded as responsible for the generation of the successful party's costs, will often properly count as the decisive factor in the exercise of the judge's discretion.*

31. In **M v M [2013] EWHC 3372** King J reviewed the 'clean sheet authorities' and observed at paragraph 21:

> *Under CPR Part 44.2(4) (which does apply in family proceedings by virtue of FPR Part 28.2(1)), the court has a discretion as to whether costs are payable by one party to another, the amount of those costs and when they are to be paid. The court is to have regard to all the circumstances, including:*
>
> *a) the conduct of the parties*

b) *whether a party has succeeded on part of its case, even if that party has not been wholly successful and*

c) *any admissible offer to settle. The conduct of the parties includes whether it was reasonable to raise, purse or contest a particular allegation or issue.*

32. King J found that there was litigation conduct on the part of the husband and (at his direction) on the part of the intervenor companies, of the most extreme kind. Orders were made for the husband to pay the wife's costs in the sum of £1,041,063; and for the husband and the intervenors to be jointly and severally liable to pay the wife's costs to cover a specified period, in the sum of £473,535.

33. **LM v DM [2021] EWFC 28** is the most recent case of substance in this area. It has served to extend the factors relevant to costs in clean sheet cases. The proceedings involved an application for maintenance pending suit, interim periodical payments for the children, and for a legal services payment order. Mostyn J determined that pursuant to FPR r. 28.3(5) these proceedings were not governed by the usual no order rule, but by a "soft costs-follow-the-event principle". Mostyn J opined,

"This obligation to negotiate clearly applies to these interim proceedings notwithstanding that PD 28A para 4.4 technically applies only to r.28.3 cases."

34. Mostyn J noted that the wife had clearly won (albeit the quantum of her award was less than she had sought). However the judge considered that the wife had failed to negotiate openly and reasonably within the proceedings. Accordingly the wife was awarded only 50% of the costs which the judge would otherwise have ordered.

35. **LM v DM** represents a significant development. Whilst PD 28A paragraph 4.4 has not been drafted to include interim applications and other proceedings 'about or in connection with' a final order, a 'purposive construction' has been adopted by Mostyn J. The obligation to negotiate openly and reasonably clearly applies to proceedings within the 'clean sheet regime'.

Costs: Summary

36. Drawing the threads together, the current law may be summarised as follows:
    a. Costs do not follow the event in financial proceedings, but the court is increasingly willing to make costs orders.
    b. Costs and the need to litigate responsibly underpin the amendments to **FPR 2010 Part 28**.
    c. All parties must make open proposals: **FPR 2010 r9.27A:**
    d. The failure to negotiate responsibly may be penalised in costs: **OG v AG [2020] EWFC 52**
    e. Litigation conduct may be reflected in an adjusted lump sum, to avoid double-counting when making a costs order: **X v Y [2022] EWFC 143**
    f. If allowing an additional lump sum to meet costs, there should be a 'cross-check' of the fairness of the order: **Azarmi-Movafagh v Bassiri-Dezfouli [2022] I FLR 15**
    g. In the event of litigation conduct, a needs-based order may be depleted to satisfy a costs order: **Traharne v Limb [2022] EWFC 27**
    h. The invasion of a need-based order, is not restricted to circumstances where 'open proposals have been beaten: **HD v WB [2023] EWFC 2**
    i. The express obligation to negotiate openly and reasonably has been extended to the clean-sheet regime: **LM v DM [2021] EWFC 28**

D. Calderbank makes a comeback?

37. The more senior practitioners may recall the 'Calderbank' offer – where a proposal is made on a without prejudice basis, save as to costs. Pursuant to **FPR 2010 r28.3(8)** the court may not take such an offer into account when considering costs. However the demise of the Calderbank offer and it's tactical use in litigation to define the parameters of a parties' position (and thereby promote settlement) has been noted: see comments of Moor J in **MAP v MFP [2015] EWHC 627**.

38. Further, the current rules for making open proposals within 21 days of FDR, will not apply in the event of a Private FDR. The parties must be alert to achieving appropriate directions at First Appointment to ensure proper case management.

39. The Family Procedure Rules Committee has undertaken a consultation in relation to the treatment of Calderbank offers when determining issues relating to costs. The issue under consideration is whether such proposals should once again be admissible within proceedings for a financial order. The consultation period has closed. The outcome of the consultation has not yet been reported. Watch this space…

E. Conclusion

40. There is no doubt that costs are a growth area; they will increasingly feature in financial proceedings. Clients should be advised to make open and realistic proposals as soon as the financial landscape is clear. In the event that the matter proceeds to a final hearing, this will assist in supporting an application to recover costs. It will also protect a client who may be the subject of a costs-application.

41. As demonstrated in **HD v WB**, some judges are prepared, to examine the outcome of litigation on an issue by issue basis. This can make it difficult to for practitioners to foresee, with certainty, how discrete issues will be resolved and the approach to costs that may ensue. What is clear is that the time has undoubtedly passed, when parties to a financial remedy application could comfortably proceed on the basis that costs would not follow the event.

09 February 2023

Elaine Strachan

Barrister
3PB

01865 793736
elaine.strachan@3pb.co.uk

3pb.co.uk