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## WHITE PAPER SERIES - 2023

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# NEW COSTS RULES

*Under the new FPR9.27A how do you pitch open and Without Prejudice offers, postpone offers, and what do you do when the other party is not making an offer.*

# Duty to make open proposal

## FPR 9.27A

(1) Where at a FDR appointment the court does not make an appropriate consent order or direct a further FDR appointment, each party must file with the court and serve on each other party an open proposal for settlement—

(a) by such date as the court directs; or

(b) where no direction is given under sub-paragraph (a), within 21 days after the date of the FDR appointment.

(2) Where no FDR appointment takes place, each party must file with the court and serve on each other party an open proposal for settlement—

(a) by such date as the court directs; or

(b) where no direction is given under sub-paragraph (a), not less than 42 days before the date fixed for the final hearing.

# Background/Rationale

- Calderbank correspondence
- Family Proceedings (Amendment) Rules SI 2006/352
- A practice of open offers?
  
- Rule 9.27A – 6 July 2020
- Rule 28.3(7)(b)
  - Open offers are admissible and relevant to the issues of costs.
  - Can justify a departure from the “no order” principle.

# Pitching Open Offers

- “Reasonably and Responsibly” - Practice Direction 28, Paragraph 4.4
- Once the financial landscape is clear – OG v AG [2020] EWFC 52
  - “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.”
- With conviction:-
  - FB v PS [2015] EWHC 2797 (Fam) “*Now that Calderbank offers no longer feature in most financial remedy applications, the only way to be fair to litigants, whilst encouraging them to settle their litigation, is to be prepared to make awards in excess of a party's open offer where it is right and appropriate to do so*”
  - MAP v MFP (2015) EWHC 627 “*it is correct that in October 2014 the Wife did make an open proposal to divide the assets equally without add-back. Mr Molyneux attempted to rely on this as evidence of the injustice of add-back. I reject that submission. Now that we no longer have Calderbank offers, litigants must be encouraged to make open proposals as early as possible that are designed to encourage settlement. If the other party spurns such an offer, the court is entitled to ignore it completely and decide the case entirely on the merits. I will have no hesitation in a suitable case in awarding an applicant more than an open offer he or she has made if that is justified*”.
- With clarity and rationale.

# FPR 9.28

- (1) Not less than 14 days before the date fixed for the final hearing of an application for a financial remedy, the applicant must (unless the court directs otherwise) file with the court and serve on the respondent an open statement which sets out concise details, including the amounts involved, of the orders which the applicant proposes to ask the court to make.
- (2) Not more than 7 days after service of a statement under paragraph (1), the respondent must file with the court and serve on the applicant an open statement which sets out concise details, including the amounts involved, of the orders which the respondent proposes to ask the court to make.

# Pitching Without Prejudice Offers

- Benefits?
  - No costs protection
  - Parties are forced to negotiate on an open basis
- Opportunity to reinforce position at FDR
  - Family Law Protocol
- Negotiation beyond the FDR

# Postponing Offers

- Postponing WP offers
  - Common practice to send with open offer but beware of potential costs implications.
- Practice Direction 9A paragraph 6.5A
  - *Where at a FDR appointment a settlement is not reached, the parties have an obligation to make open proposals for settlement in accordance with rule 9.27A. The normal direction would be that each party must file and serve their open proposals within 21 days of the FDR appointment. The court must consider whether it is appropriate to give any further directions about the filing and service of open proposals.*
  - 21 days too soon?
- Disclosure/Further evidence

# Engaging the Other Side

- FPR 28.37(7)(b)
  - Court must have regard to any open offer to settle made by a party.
- FPR Practice Direction 28A, Paragraph 4.4
  - ***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.***
- Efficiency Statement – Paragraph 31
  - *The parties will be warned that, whatever the size of the case, a failure to make reasonable attempts to compromise cases in open negotiations will be met by costs penalties.*
- A v M [2021] EWFC 89
  - *'Litigants have to understand that they must negotiate openly, reasonably and responsibly. This means that they must pitch their claims in the area the court might award, and they must engage with bona fide attempts to settle – especially in the run up to trial. If they do not, then they will suffer a penalty in costs'*
- AA v AB (Costs) [2021] EWFC 16

# Engaging the Other Side cont....

- WC v HC [2022] EWFC 40
  - *"even in needs based claims no litigant is automatically insulated from costs penalties, notwithstanding the possible impact on the intended needs award"*
- Gallagher v Gallagher (No.2) EWFC 53
- Issue based costs orders.
- Detailed open offers.

# Summary

- Rule 9.27A – requirement to make an open offer.
- Rule 28.3(7)b applies as a consequence.
- Offers should be pitched reasonably and realistically.
- Fail to engage and fail to openly negotiate– be prepared for a potential costs award against you!

**ANY QUESTIONS?**

# Acknowledgments and further reading

- Butterworths Family Law Service – Chapter 7 – Property, Money and Tax
- Family Procedure Rules 2010
- [https://www.familylaw.co.uk/news\\_and\\_comment/open-offers-after-fdrs-is-21-days-too-soon](https://www.familylaw.co.uk/news_and_comment/open-offers-after-fdrs-is-21-days-too-soon)