

# What's new in matrimonial finance?

**Alexis Campbell QC**

**June 2020**

**COSTS**

**BARBER APPLICATIONS**

# The old costs rules

# No order as to costs, unless justified by a parties' conduct FPR 2010, SI 2010/2955, 28.3(6) and (7)

Having regard to:

1. any **failure by a party to comply** with FPR 2010, any **order** of the court or any relevant **practice direction**
2. any **open offer** to settle made by a party
3. whether it was **reasonable** for a party **to raise, pursue or contest** a particular allegation or issue
4. the manner in which a party has pursued or responded to the application or a particular allegation or issue
5. any other aspect of a party's conduct in relation to proceedings which the court considers relevant, and
6. the financial effect on the parties of any costs order

# The not so new costs rules

## FPR 2010, PD 28A, para 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. **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.'*

## *WG v HG [2018] EWFC 84*

- Pre-acquired wealth, with no marital acquest, Francis J found that W's claim was limited to her needs, (housing and Duxbury fund) not in excess of more than 50% of H's wealth.
- W had suffered a serious accident towards the end of that marriage which led to her needing life-long care costs. Her legal fees (and loans) amounted to £915k.
- The wife was awarded a sum of £400,000 (on top of her housing and Duxbury needs) towards her outstanding fees of £915,000, thereby forcing her to eat into her Duxbury fund by £500,000.

**WG v HG [2018] EWFC 84**  
**Francis J**

*“...people could not litigate on the basis that they would be bound to be reimbursed for their costs and no one ought to enter litigation expecting a blank cheque..”*

## **MB v EB [2019] EWHC 3676**

- Cohen J found parties' collective costs of £1.25m as 'grossly disproportionate to what was in issue'

*'I find that the wife's offer was light, but I am in no doubt that, if there had been a sensible (or any) response, there would have been a quick resolution of this case. This case has been conducted by the husband in a manner that I find to be irresponsible and unreasonable.'*

- H had spent £650k on costs. He was awarded £325,000 (Duxbury fund) and W was ordered to meet £125,000 of the outstanding bill of £380,000 costs. H would have to make up the £230,000 shortfall from his Duxbury fund.

# **SCHEDULE OF ISSUES**

Opportunity to identify the issues. Require parties to pin their colours to the mast.  
Issues which are fought and lost may have cost consequences.

- ❖ In advance of FDA
- ❖ Directions orders – record recitals about agreements and disputes
- ❖ On open offers, set out basis of offer
- ❖ In advance of final hearing, requirement to set out schedule of issues – be specific

# The new costs rules

**Family Procedure (Amendment) Rules  
2020 (SI 2020/135) came into force  
partly on 6th April 2020 and will come  
into force fully on 6th July 2020**

## **New substitute rule 9.27 (Estimates of costs)**

- 1 day prior to FDA/FDR costs up to FDR/Final Hearing
- 14 days prior to final hearing costs to end of trial
- Costs estimates to be recorded in recitals to all orders
- Failure to comply will to be recorded on face of the order
- Forms H to include statement of truth and that the costs have been discussed with the client

## **New rule 9.27A (Open Offers)**

- Duty to make open proposals 21 days after FDR  
  
and if no FDR
- Duty to make open proposals 42 days prior to final hearing

# ARBITRATION

INCLUDING SINGLE ISSUES

- MPS
- SJE INSTRUCTIONS
- VARIATION APPLICATIONS

# **BARBER APPLICATIONS**

## Unforeseen and unforeseeable

- *Myerson v Myerson [2009] EWCA 282*  
2008 crash led H to argue that his share of assets (57%) shrunk in value from £14.5m to a net loss of £500,000
- Dramatic change in share price justified setting aside the order – “*natural processes of price fluctuation...*”

## Unforeseen and unforeseeable

- If the collapse of the banking sector was foreseen or foreseeable...
- What about Covid-19 after Ebola, SARS and Bird Flu?
- Impact of world events on business? (Any difference between bankers and airlines?)

## Is Covid-19 a Barder event?

- Certainty for litigants
- The proper administration of litigation in matrimonial finance disputes

...a robust response from the senior courts is needed

# Managing Covid-19 in financial remedy disputes

- *Wells v Wells*
- Deferred claims
  - **Sally Harrison QC** deferred lump sums and sale of family companies
  - **Sam Hillas QC** treatment of pre-matrimonial businesses developed during the marriage

## Ongoing periodical payments provision

- **Philip Cayford QC** touching upon relationship-generated disadvantage
- **Abigail Bennett** on applications to vary maintenance

- **Loans & gifts**

- **Nicholas Yates QC** talking about joining third parties and protecting parental loans

- **Nuptial Agreements**

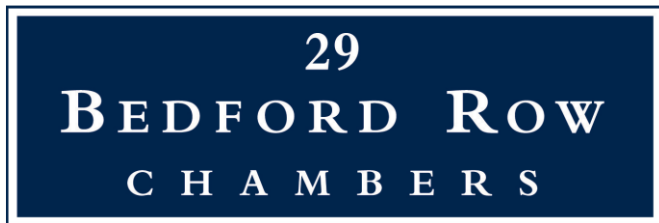
- **Nick Allen QC** discusses how the court should approach nuptial agreements under the s.25 checklist

- **Inherited assets**

- **Leslie Samuels QC** touching upon relationship - generated disadvantage

- **Pensions**

- **Grant Lazarus** give us some highlights of the Pensions Advisory Group Report from 2019



**ALEXIS CAMPBELL QC**

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