

# **Evolving Costs Rules in Financial Remedy Proceedings**

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**QEB**

## **Key areas of evolution:**

### **Conduct as an exception to “no order”:**

- **failure openly to negotiate**
- **Failure to attend non-court Dispute Resolution (NCDR)**

## Recap: FPR 2010 Part 28 and PD 28A

r28.1 – the court may at any time make such order as to costs as it thinks just.

r28.2 – “costs follow the event” rule disapplied in family proceedings.

r28.3(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. (i.e. the no order principle).

# Recap: FPR 2010 Part 28 and PD 28A

## The general rule:

r28.3(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. (i.e. the no order principle).

# Recap: FPR 2010 Part 28 and PD 28A

And yet...

- r28.3(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).**

# Recap: FPR 2010 Part 28 and PD 28A

- r28.3(7) – in deciding what order (if any) to make under paragraph (6), the court must have regard to –
  - (a) any **failure by a party to comply with these rules**, any order of the court of 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.

# Recap: FPR 2010 Part 28 and PD 28A

## Rules for financial remedies proceedings cont'd...

On 27 May 2019, FPR PD 28A, para 4.4 was expanded, to add:

- 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... ”

# Recap: FPR 2010

**On 6th April 2020, FPR 9.27A was added to the FPR:**

“(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.”

# Family Procedure (Amendment No 2) Rules 2023

- New rules on NCDR – In force on **Monday 29 April 2024**
- Amendment to r.3.3(1 A) – parties may be required to complete a form outlining their views on using NCDR.
- Also, gives power to court (where timetabling permits) to adjourn proceedings to encourage parties to undertake NCDR, even where parties are not in agreement.
- Amendment to r3.9(2) – MIAM providers must inform attendees about suitable forms of NCDR and provide guidance on the processes.

# Family Procedure (Amendment No 2) Rules 2023

**FPR rule 28.3 (7)(aa) was inserted (i.e. how the court applies the exception to the general ‘no order’ rule):**

**“(aa) any failure by a party, without good reason, to—  
(i) attend a MIAM (as defined in rule 3.1); or  
(ii) attend non-court dispute resolution;”.**

# Caselaw

**OG v AG (*Financial Remedies: Conduct*) [2020] EWFC 52, [2021] 1 FLR 1105 (Mostyn J):**

• ¶¶30-31:

***“... 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.”***

# Caselaw

***James v Seymour* [2024] 1 FLR 614 (Mostyn J):**

**¶¶58-59**

**When will the court consider making an order for costs:**

- ***a refusal to negotiate openly;***
- ***a failure to explain the basis of a claim;***
- ***a failure to comply with the court's procedural directions;***
- ***making a ludicrous claim.***

# Caselaw

***HO v TL (Costs) [2023] EWFC 216 (Peel J):***

**¶¶10-12:**

***“... to run an untenable case risks adverse costs orders being made...even if [the costs order] reduces the needs as found by the court...although the starting point is no order as to costs, the courts are increasingly willing to depart from that so as to do justice to the party who has been put to unnecessary costs by the other party’s overstated proposals”***

# Caselaw

***ND v GD (Financial Remedies) [2022] 1 FLR 716  
(Peel J):***

**¶¶81-82:**

***[H] did not make an open proposal until 30 April 2021, some 6 weeks before the final hearing, whereas W made an open proposal nearly a year ago on 13 July 2020.”***

***NB: FPR 2010 r.9.27A (2)(b): ref. to 6 weeks before final hearing***

# Caselaw

**CG v SG [2023] EWHC 942 (Fam) (HHJ Hess):**

**¶10 (viii) of the supplemental costs judgment:**

***“...the purpose of Rule 9.27A is to promote negotiation and settlement, but if (as here) there is a particular and good reason for holding back for a period then it is difficult to regard that as being regarded as bad conduct.”***

# Caselaw

***HD v WB* [2023] EWFC 2) (Peel J):**

**¶119:**

***“In Rothschild v de Souza [2020] EWCA 1215 the Court of Appeal held it was not unfair for the party who is guilty of misconduct to receive ultimately a sum less than his/her needs would otherwise demand... [e.g.]:***

- ***Sir Jonathan Cohen in Traharne v Limb [2022] EWFC 27, [***
- ***Francis J in WG v HG [2018] EWFC 84***
- ***Peel J in WC v HC [2022] EWFC 40 and***
- ***Peel J in VV v VV (No 2)2022] EWFC 46***

# Caselaw

## Anecdotal (anon):

***“... the obligation to negotiate reasonably and openly when the financial landscape is clear does not arise solely once proceedings have been issued and applies when matters are being dealt with on a voluntary basis.”***

# Caselaw

## **X v Y [2024] EWHC 538 (Fam) – Knowles J**

- *“...a serious effort must be made to resolve their differences before they issue court proceedings and, thereafter, at any stage of the proceedings where this might be appropriate”;*
- *“at all stages of the proceedings, the court will be active in considering whether non-court dispute resolution is suitable” and*
- *the changes to FPR Part 3 “will give an added impetus to the court's duty in this regard”.*

# Caselaw

**NA v LA [2024] EWFC 113 – Nicholas Allen KC  
(DHCJ)**

- **Financial remedy proceedings were stayed:**

***“...the power to “encourage” [NCDR] at r3.4(1A) is now backed by an amendment to the costs rules...”***

# Open Offers:

## Timing – when you must and when you should?

- as soon as the financial landscape is clear;
- think about what you need to know, and what you do not need to know before you make an offer;

## Content - How do you pitch them?

- Think about “judgment” and “order” – “reasons” and “outcome” – and focus on the “order/outcome”.
- Be confident: *DR v UG* [2023] EWFC 68 at ¶22

# **WP Offers:**

## **Timing – when you must and when you should?**

- **There is no obligation to make a WP (as opposed to an open) offer and no power of court to compel a WP (as opposed to an open) offer, but...**

## **Content - How do you pitch them?**

- **Pre-FDR?**
- **Post-FDR?**

**NB: WPSATC in non financial remedy proceedings**



**Questions?**

**QEB**

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# **Thank you!**

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