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# COSTS IN FINANCIAL REMEDY PROCEEDINGS

# *Costs*

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Under evolving costs rules, 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?



# *NO ORDER PRINCIPAL - FPR 2010 r.28.3(5)*

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Unless justified by “conduct” having regard to:

- *Failure to comply with rules and directions;*
- *Any open offers to settle;*
- *Whether it was reasonable to raise, pursue or contest a particular issue; and*
- *The manner in which a party has pursued or responded to issues.*

# *Proceedings under r.28:*

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Covers applications for:

- A financial order (but excluding interim orders)
- Part III applications under Matrimonial & Family Proceedings Act 1984 (relief after a foreign decree)
- Section 10(2) MCA 1973 (financial provision for respondents)
- Civil partnership equivalents of the above

# *Proceedings **NOT** under r.28:*

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- Interim applications (MPS, interim periodical payments & LSPO)
- Schedule 1 applications
- TOLATA applications
- Inheritance applications
- S.17 MWPA 1882 (beneficial ownership - chattels)
- Applications to make a final order in the terms of a concluded agreement
- Appeals (including challenging a final arbitration award)

# *Proceedings **NOT** under r.28:*

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And...

- Preliminary issues
- Costs of intervenors
- Set aside applications
- Permission to bring a Part III claim (s.13)
- Variation of maintenance agreement s.35 & 36 MCA
- Application under s.27 MCA (failure to maintain)
- Maintenance applications under DPMCA (before lay justices)
- An order for a transfer of tenancy under s.53 FLA 1996

*Large Hatchet  
Mushroom*



# *Clean sheet*

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Where r.28.3 does not apply, the court will consider costs on a clean sheet basis (*Baker v Rowe [2010] 1 FLR 761*)

- Applying a “soft” rule that costs will often follow the event
- In Sched 1 proceedings, there is a harder “clean sheet” (*KS v ND [2013] EWHC 464* (where applicant applies in a representative capacity))

# *Offers Without Prejudice Save As To Costs*

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These are Calderbank offers, or marked “WPSATC”, which can be produced at the conclusion of the trial of proceedings excepted from the r.28.3 “no order” principle

## **MUST SAY:**

- *“WITHOUT PREJUDICE SAVE AS TO COSTS” or*
- *“CALDERBANK”*

(to be CPR compliant)



*Jumping spider*

# *Duty to make open proposals*

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## FPR 2010 r.9.27A

- 3 weeks after final FDR;
- If no FDR, 6 weeks prior to the final hearing; or
- Such other date as the court may direct

# *No statutory duty to make a WP proposal*

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FPR 2010 r.9.17(3):

Not less than 7 days prior to the FDR the applicant must file with the court details of all offers and responses

- No requirement to make an offer, only file those offers made.

# *Impose a duty to make a WP offer*

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At the FDA include provision that requires the parties to make WP offers by a date prior to the FDR –

*“The parties shall by X date exchange without prejudice offers...”*

# *FPR 2010 PD28A para4.4*

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*...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***

# *Duty to openly negotiate could not be clearer*

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Several examples of the court making adverse costs orders for failure to negotiate openly, even when open offer is poor.

# *Mostyn J in LM v DM [2021] EWFC 28*

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*Open offer/WPSATC offer does not have to be a good offer...*

- *W's successful application for MPS & LSPO*
- *Outside r.28.3 "No order" principle, so, soft "costs – follow-the-event" principle*
- *PD28A (para 4.4) still applies – even though outside r.28.3*
- *W should have had her costs, but she failed to respond to H's poor offer to settle*
- *H ordered to pay just 50% of W's costs even though she "won"*

# *Mostyn J in OG v AG [2020] EWFC 52*

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*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 (£50,000 reduction in her costs award).*

*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.*

# *Mostyn J in OG v AG [2020] EWFC 52*

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- *A couple involved in “Ducting” related manufacturing*
- *H hid disposal of assets in Dubai used to fund a competing company to the matrimonial company operated by W*
- *Costs were c.£1m – a large part referable to the husband’s conduct*
- *W did not recover all costs (£50k discount) because she failed to openly negotiate reasonably – seeking 2/3 of assets to compensate for H’s misconduct*

*Tiger Beetle with  
prey*



# *Rakshina v Xanthopoulos [2023] EWFC 50*

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Part III application between Russian wife and Russian/Greek husband, with valid Russian PNA:

- Total costs £9m (jurisdiction, children & money)
- Financial costs £5.4m spent arguing about money
- H owes £1m to W in adverse costs orders

# *Rakshina v Xanthopoulos [2023] EWFC 50*

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- September 20 H served his petition on W
- May 2021 W made an open offer
- Forms E in December 2021
- Trial in March 2023
- H never responded to W's offer and did not make a single offer

# *Rakshina v Xanthopoulos [2023] EWFC 50*

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- H found to be responsible for all costs after FDA - his last “constructive” participation
- Post FDA costs plus adverse costs of £1m would *“completely eliminate any sharing claim ... and leave a large deficit. This must inevitably impact upon his needs-based claim.”* [161]
- No outright housing provision (occupation permitted until H did not need it) and periodical payments for 4 -year term
- W agreed not to enforce costs without leave and forgo application for costs in extant orders

## *See also:*

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- **WG v HG [2018] EWFC 84 (Francis J)**
- **MB v EB (No 2) [2019] EWHC 3676 (Cohen J)**
- **JB v DB [2020] EWHC 2301 (Mostyn J)**
- **AA v AB [2021] EWFC B16 (Rec Salter)**

*Dragonfly with  
dew drops*



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# When to make offers

# *Early Open Offers*

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Occasionally, prior to disclosure, reasonable to make early open offers

- When outcome is obvious, or issue is “magnetic” eg:
  - Short marriage, equal sharing, clean break
  - PNA (*Rakshina*)

# *Open Offers - Generally post disclosure*

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Once each party has understood the extent of assets (After Forms E and/or after replies to questionnaire) – reasonable to make open offers

- Indicates confidence in your case
- Invites early settlement discussions
- “Reasonable” to respond

# *Open Offers - Generally post disclosure*

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- Open offers do not have to predict the final award
  - can offer less, but start the negotiation
- Ignore (even a poor) open offer at your peril - don't need to accept but do not ignore or fail to respond (*LM v DM*)

# *Open Offers – for specific issues*

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Make open offers to avoid specific issues – and warn that costs will be sought in respect of that specific issue if the other party is unsuccessful, eg:

- Joinder/intervenors  
(Useful to keep separate billing to identify costs associated with the specific issue)
- Keep specific issue open offers short and to the point

# *Open Offers – can resile from offer at trial*

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MAP v MFP [2015] EWHC 627 (Moor J)

*“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. The court would have no hesitation in a suitable case in awarding an applicant more than an open offer he or she had made if that was justified.”*

# *Post FDR offers (3 weeks)*

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- Important open offer
- Don't wait 3 weeks
- Opportunity to show the court reasonable open negotiations
- Suggests you are considering guidance from FDR judge

*Green Ground  
Beetle with dew  
drops*



# *Postponing offers*

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- WP Offers – any point prior to the FDR?
- Unless for interim hearings (WPSATC)

# *And if the other party will not negotiate...*

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Send a formal letter, single issue, headlined “Costs” – recording your open offers, the lack of any substantive response, giving notice that you will be relying upon their conduct pursuant to r.28.3(5) and PD28A para 4.4 in an application for your costs at the end of trial

# *If the other party will not negotiate...*

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In a needs case, write an open letter citing PD28A (4.4) and *WG v HG*, *OG v AG*, *MB v EB* and *Rakshina*, to make clear you will be arguing that costs should be met from the claimant's needs-based award, and that the court will be referred to this letter on the question of costs

*Robber fly with  
dew drops*



# *Pitching open/WP offers*

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- Back of the envelope
- Simplify the issues
- If not able to produce specific figures, make broad proposals (equal division of capital, *Wells v Wells* sharing, etc.)

# *Pitching Open offers*

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- Set the approach and priorities  
(sale, top slicing, education fund, term, S.28(1A) bar, etc.)
- But give yourself “wriggle” room – rare for a judge to award equal to or better than your open offer

# *Pitching WP offers*

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- Try to come as close to the likely award as you can
- Make a significant concession
- Leave issues to negotiate over

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# Think of the family...



*Green  
Huntsman  
Spider (with  
babies)*

# *Thank you*

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...and Alexander Mett for the wildlife images.

