



White Paper Conference

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COSTS IN FINANCIAL REMEDY PROCEEDINGS

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❖ Question Posed

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 PRINCIPLE – FPR 2010 r.28.3(5)

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:

This Covers applications for:

- A financial order (but excluding interim orders)
- Part III applications under Matrimonial & Family Proceedings Act 1984 (relief after a foreign decree)
- (save for applications for *leave* to bring such applications)
- *AS v RS (Costs: Clean Sheet/General Rule) [2023]*
EWFC 284
- Section 10(2) MCA 1973 (financial provision for respondents)
- Civil partnership

❖ Proceedings **NOT** under r.28:

- Interim applications (MPS, interim periodical payments and LSPO)
- Schedule 1 applications
- TOLATA applications
- S.17 MWPA 1882 (beneficial ownership – chattles)
- Inheritance applications
- Applications to make a final order in terms of a concluded agreement
- Appeals

❖ Proceedings **NOT** under r.28

And....

- Preliminary issues
- Set aside applications
- Permission to bring a Part III claim (s.13)
- Cost of Intervenors
- Variation of maintenance agreement s.35 & 36 MCA
- Maintenance applications under DPMCA (before lay justices)

Clean sheet

Where r. 28.3 does not apply, court will consider costs on a clean sheet basis (*Baker v Rowe* [2010] 1 FLR 7610)

'soft' rule that costs will often follow the event

Harder 'clean sheet' in Schedule 1 (*KS v ND* [2013] EWHC 464)

❖ Offers Without Prejudice Save As To Costs

Offers which are marked 'Without Prejudice Save As To Costs', can be produced at the end of the trial, where proceedings excepted from the r.28.3 "no order" principle

THE OFFER MUST SAY:

"WITHOUT PREJUDICE SAVE AS TO COSTS"

(to be CPR compliant)

❖ Duty to make open proposals

- FPR 2010 r.9.27A
- 3 weeks after final FDR
- If there has been FDR, OP 6 weeks prior to final hearing; or
- Other date as the court may direct

❖ No statutory duty to make a WP proposal

FPR 2010 r.9.17(3)

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

There is no requirement to make an offer, you must only file those offers made.

❖ Impose a duty to make a WP offer

- At the FDA, include a provision that requires the parties to make WP offers by a date prior to the FDR, which everyone agrees to.

❖ *FPR 2010 PD28A para 4.4*

...The court would take a broad view of conduct for the purpose 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**

❖ There is a clear duty to negotiate

We now have numerous examples of the senior courts making adverse costs order for failure to negotiate openly, even when open offer is poor.

❖ Mostyn J in LM v DM [2021] EWFC 28

- *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*
- *W should have her costs, but she failed to respond to H's poor offer to settle*
- *H ordered to pay 50% of W's costs even though she 'won'*

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

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).

❖ Mostyn J in OG v AG [2020] EWFC 52

*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

- *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*

❖ CG v SC [2023] EWHC 942 (Fam)

- What is the approach of the court when the landscape is clearer?
- **CG v SC [2023] EWHC 942 (Fam)**

❖ Rakshina v Xanthopoulos[2023] EWFC 50

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

Total costs £9m (jurisdiction, children & money)

Final costs £5.4m spent arguing about money

H owes £1m to W in adverse costs orders

❖ Rakshina v Xanthopoulos[2023] EWFC 50

September 20 H served his petition on W

May 2021 W made an open offer

Forms E in December 2021

Trial March 2023

H never responded to W's offer and did not make a single offer

❖ Rakshina v Xanthopoulos[2023] EWFC 50

- 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.

❖ On appeal

Just when they thought it was all over.....

- H appealed the outcome
- Increased term PP and housing provision
- No other aspect of the final award was altered
- The issue of costs of appeal was dealt with separately.

 See also:

- WC v HC [2022] EWFC 40
- HO v TL (Costs) [2023] EWFC 216
- VV v VV [2022] EWFC 46



**When should we make
offers?**

❖ Early Open Offers

- Occasionally, prior to disclosure, reasonable to make early open offers
- When outcome is obvious, or issue is “magnetic” eg:
 - DINKWADS

❖ Post disclosure

Once each party has understood the extent of assets (Post exchange of Forms E and/or after replies to questionnaire)

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

❖ Open Offers – post disclosure

- Open offers do not have to predict the final award
 - you can offer less, but try and 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 – specific issues

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
- Specific issue open offers should be short and to the point

❖ Open Offers – can resile from offer at trial

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 offer (3 weeks)

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

❖ Postponing offers

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

❖ And if the other party will not negotiate

Send a formal letter, single issue, headlined “Costs” – recording your open offers, the lack of any substantive response, give 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...

In a needs case, write an open letter citing PD28A (4.4) and 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

❖ How to pitch open / WP offers

- Make them short and to the point
- Simplify the issues
- If you are not able to produce specific figures, make broad proposals (equal division of capital, Wells v Wells sharing, etc.)

❖ Open offers

- 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

WP offers

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



Thank you

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