COSTS IN FINANCIAL REMEDY PROCEEDINGS:

YOU HAVE BEEN WARNED!

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Introduction

01 Disproportionate costs, all too prevalent in financial remedy cases, make it increasingly challenging either to settle cases or to achieve an outcome that is either fair to both parties or meets their respective needs. Judicial frustration at this is common. As observed recently by Peel J in *Crowther v Crowther* [2021] EWFC 88 *"The only beneficiaries of this nihilistic litigation have been the specialist and high-quality lawyers."*

02 The abolition of *"Calderbank"* offers and the introduction of the general "no order as to costs" rule (FPR r.28.3(5)) has sometimes meant that the costs implications of a particular stance in proceedings assumed less prominence. Amendments to the FPR and a run of recent cases have changed this, underscoring the responsibility to litigate sensibly and proportionately or risk the costs consequences of not doing so.

Costs: the new rules

03 On 6 July 2020, an amended version of rule FPR r.9.27 and a new FPR r.9.27A came into force, requiring, *inter alia*, detailed estimates of historic and future costs liabilities to be filed and served, the figures recorded on the court's orders, and the early exchange of open offers post-FDR.

04 These rules ensure greater emphasis on the role that costs will play in a dispute and mean that parties can be given appropriate warnings as to likely future costs expenditure. The early open offers require parties to engage with the parameters of their dispute. Indeed, read in conjunction with Practice Direction 28A r.4.4, it is clear that a party's negotiating stance will be highly influential as to whether there will be a departure from the general "no order as to costs" rule referred to above:

> *"The court 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."*

Judicial warnings

05 Fortified by the rule changes, judges are now far readier both to criticise litigants and to impose costs sanctions on them. As Mostyn J said in OG v AG [2021] 1 FLR 1105:

> *"I hope that this decision will serve as a clear warning to all future litigants: if you do not negotiate reasonably you will be penalised in costs.".*

06 This was reiterated by Mostyn J in *E v L* (No. 2) [2021] EWFC 63, where a costs order was made against the husband due to his pursuit of a case characterised as *"completely fruitless"* and by his apparently attempting to insinuate "conduct" into the proceedings:

"As I have said before, and will no doubt have cause to say again, if you do not negotiate openly, reasonably and responsibly you will suffer a penalty in costs."

07 This decision was made even though the award of £1.5m made to the wife was far closer to the husband's open position (£600,000) than the wife's (£5.5m). The costs order derived principally from the judge's rejection of the husband's argument to exclude the application of the "sharing principle" even though this had *prima facie* support from the Court of Appeal decision of *Sharp v Sharp* [2017] 2 FLR 1095. The message is clear: lose on the law and it may sound in costs.

Interim hearings

08 The obligation to negotiate reasonably applies to *interim* proceedings also – even though, technically, PD 28A r.4.4 only applies to r.28.3 cases. In *LM v DM* [2021] EWFC 28, the outcome was described as a "*win*" for the wife. Even so, Mostyn J reduced her costs award by 50% due to her lack of apparent willingness to negotiate.

09 In *Re Z (No.2) (Schedule 1: Further Legal Costs Funding Order; Further Interim Financial Provision)* [2021] EWFC 72, Cobb J, in dealing with an interim application to increase the costs allowance he had set the applicant at an earlier stage, sent out some words of warning, plainly frustrated that the costs had exceeded his earlier estimate:

"I set a budget within which I expected the mother's solicitors to work.

I am not prepared for my legal funding orders, and the rationale which lies behind them, simply to be disregarded.[...]

I am prepared to allow the mother a further sum [...] Any potential overspend will require prior court authorisation, or will otherwise need to be accepted at the solicitor's risk."

10 This approach is likely to gain greater traction in future as judges seek to exert greater control over costs, or, at least, greater control over the extent to which they can expect to be met by the other party.

Costs and needs

11 In *ND v GD* [2021] EWFC 53, the wife's costs were paid off in full from her needs-based award. The husband's liability in this regard was, the judge held, a consequence of his failure to negotiate openly in a reasonable manner (regardless of what his without prejudice position may have been).

12 If, however, the "receiving" party has incurred costs unreasonably, they cannot assume that their "reasonable needs" will be allowed to "trump" their liability to their solicitors/litigation funders. In MB v EB (No 2) [2020] 1 FLR 1086, the husband was left with a significant liability to his solicitors, even when such liability would leave him unable to meet his life-long income needs. Cohen J's conclusion was robust (particularly given the wife's resources amounted to c.£50m):

"This case has been conducted by the husband in a manner that I find to be irresponsible and unreasonable. [...] I see no reason why he should expect the wife to pay his costs unreasonably incurred."

13 Similarly in *WG v HG* [2019] 2 FCR 124, where a wife had to fund a costs liability of £500,000 from her Duxbury fund:

People who adopt unreasonable positions in litigation cannot simply do so confident that there will be an indemnity for the costs of the litigation behaviour, however unreasonable it may have been.

14 It is likely that meeting a costs liability from a needs-based *income* fund will be more readily acceptable then a liability that undermines a party's ability to re-house. In *Azarmi-Movafegh v Bassiri-Dezfouli* [2021] EWCA Div 1184, a wife had to pay a lump sum to her husband to enable him to re-house *and* pay off the bulk of his outstanding legal fees. In considering *WG v HG* and *MB v EB* the court concluded that, *"in none of these cases would the recipients' security of accommodation have been jeopardised as a result of the order made by the court"*, concluding that a first instance judge has *"a wide discretion"* as to whether an enhanced lump sum order should be made to satisfy an outstanding liability for costs.

15 Given the above, however, it would plainly be risky to litigate on the assumption that housing needs will invariably be met: anything that flies in the face of reasonableness and proportionality may well attract significant judicial censure.