

Costs in financial remedy proceedings

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Framework for costs in family proceedings

Section 51 Senior Courts Act 1981

- *'Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in ... the family court ... shall be in the discretion of the court.'*

Civil Procedure Rules 1998 Pts 44 (subject to r. 28.2 & 28.3), 46, 47 & r. 45.8

- *Applies to all civil proceedings*

Family Procedure Rules 2010 Pt 28 & PD28

- *Incorporates the above rules into family proceedings but disapplies a small number of the above rules by virtue of r. 28.2(1) & 28.3*

No order as to costs principle

FPR 2010 r. 28.2

- *Disapplies the rule that 'the unsuccessful party will be ordered to pay the costs of the successful party'*
- *Applies to substantive financial remedy proceedings (marriage or civil partnership), variation application and financial relief following overseas divorce (Pt III MFPA 1983)*
- *Other parts of CPR 1998 in respect of costs still apply*

No order as to costs principle and conduct

FPR 2010 r. 28.3(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).'*

FPR 2010 r. 28.3(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 or any practice direction which the court considers relevant;*

No order as to costs principle and conduct

- (aa) With effect from 29 April 2024, any failure by a party, without good reason, to attend a MIAM or NCDR;*
- 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.*

No order as to costs principle and conduct

FPR 2010 PD28A para 4.4

- *“This may be of particular significance in applications for variation orders and interim variation orders or other cases where there is a risk of the costs becoming disproportionate to the amounts in dispute. 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.’*

Case law

OG v AG [2020] EWFC 52 (Mostyn J)

- *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 to sharing.'*

WC v HC [2022] EWFC 40 (Peel J)

- *'It is, in my view, important for parties to be aware that even in needs based claims no litigant is automatically insulated from costs penalties, notwithstanding the possible impact on the intended needs award.'*

Case law

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

- *'The authorities make plain that a costs order may be made even if it reduces the needs as found by the court. These comments apply particularly to big money cases, although I take the view that in smaller value cases the court should also be willing, in the right case, to make an award for costs, even if only in a modest amount, to register condemnation of the party whose open proposals are far removed from the eventual outcome. The message must get across that 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.'*

Clean sheet rule

The following applications are outside the general rule that the court will not make an order requiring one party to pay the costs of another party:

- *Schedule 1 Children Act 1989*
- *MPS / Interim periodical payments*
- *An interim order*
- *A Legal Services Order / costs allowance*
- *Section 37 freezing order or set aside a transaction*
- *Set side of a financial order*
- *Permission to apply under MFPA 1984 Part III*
- *Appeals*

Clean sheet rule

Proceedings that are not for financial orders but are “about” or “in” connection with financial proceedings:

- *Challenging an arbitration award*
- *Civil proceedings heard together with financial order proceedings*
- *Contempt proceedings and other enforcement proceedings*
- *Interveners and other preliminary issue applications*
- *Set aside applications*
- *Strike out applications*

Clean sheet rule

Clean sheet means that neither the general rule of no order or the usual civil rule that the loser pays the winner costs

Relevant factors:

- *It has been held that the civil rule should apply in proceedings not covered by the general rule in financial except Schedule 1 CA 1989: KS v ND (Schedule 1: Appeal Costs) [2013] where the court should start with a clean sheet.*
- *Conduct of the parties*
- *Success or partial success of a party*
- *Admissible offers*
- *Disparity of the parties' means*
- *Court can make such costs orders and it thinks just.*

Summary assessment

CPR 1998 Pt 44 & PD44

- *Where the court orders a payment of a specified sum of money assessed at the conclusion of that hearing*
- **PD44 para 9.5:** *Must file and serve an N260 not less than 24 hours before the hearing*
- **PD44 para 9.6:** *'The failure by a party, without reasonable excuse, to comply with paragraph 9.5 will be taken into account by the court in deciding what order to make about the costs of the claim, hearing or application, and about the costs of any further hearing or detailed assessment hearing that may be necessary as a result of that failure.'*
- **PD44 paras 9.8 & 9.9:** *Where a party is legally aided and/or is a child/protected party*

Detailed assessment

CPR 1998 Pt 47 & PD47

- *r. 47.1: 'The general rule is that the costs of any proceedings or any part of the proceedings are not to be assessed by the detailed procedure until the conclusion of the proceedings, but the court may order them to be assessed immediately.'*
- *r. 47.6: The receiver of the costs order must within 3 months of the final order issue a notice of commencement (**N252**), along with a copy of the bill of costs, copies of fee notes of counsel and of any expert in respect of fees claimed, written evidence of any disbursement which is claimed and exceeds £500*
- *r. 47.9(1): The payer of the costs order must within 21 days of being served the above, set out any points of dispute*

Detailed assessment

- *r. 47.13: The receiver of the costs order may within 21 days of being served with the points of dispute, reply to those points*
- *r. 47.9(4): If the payer does not complete a points of dispute, default costs certificate can be applied for*
- *r. 47.10 (1): If the costs are agreed, either party may apply for a costs certificate in the amount agreed*
- *r. 47.14: If the costs are disputed, the receiver of the costs order must complete an **N258** requesting a detailed assessment hearing, and this must be done within 3 months of the date when the expiry period for commencing detail assessment proceedings ended*

Standard basis

Standard Basis: the normal basis

- *Only costs that are proportionate and reasonably incurred*
- *And proportionate and reasonable in amount are allowable.*
- *Any dispute is resolved in favour of the payer.*

Indemnity basis

Indemnity Basis: in cases where the payer's conduct has been highly unreasonable

- *The assessment differs in two ways:*
 1. *No requirement for proportionality*
 2. *Any dispute resolved in favour of the payee.*
- *Indemnity basis has been rare, but with certain requirements now enshrined in the FPR and case law they are becoming more common. Repeated failures to comply can lead to highly unreasonable conduct.*

Security for costs

FPR 2010 r. 20.6

- *'A respondent to any application may apply under this Chapter of this Part for security for costs of the proceedings ... Where the court makes an order for security for costs, it will determine the amount of security; and direct the manner in which; and the time within which, the security must be given.'*

FPR 2010 r. 20.7

- *'The court may make an order for security for costs under rule 20.6 if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and either one or more of the conditions in paragraph (2) applies; or an enactment permits the court to require security for costs. The conditions are: the applicant is resident out of the jurisdiction; the applicant has changed address since the application was started with a view to evading the consequences of the litigation; the applicant failed to give an address in the application form, or gave an incorrect address in that form, or the applicant has taken steps in relation to the applicant's assets that would make it difficult to enforce an order for costs against the applicant.'*

Security for costs

MG v AR [2021] EWHC 3063 (Fam), Mostyn J

- *Para 53: summarises the key principles to be applied in a family law case*

L v O (Stay of Order; Hadkinson Order; Security for Costs) [2024] 2 FLR 343, Cobb J

- Barder application

Calderbank Offers

- *Meaning: A written offer to settle a case or the element of a case marked without prejudice save as to costs. So called from the Court of Appeal Case in 1975.*
- *Only normally seen in financial remedy proceedings at FDR stage.*
- *By definition, it is not an open offer to settle, so cannot be referred to in costs hearings in proceedings for a financial order as covered by the general rule.*
- *BUT can be referred to in costs hearings in cases which are not covered by FPR 28.3 (5).*
- *It is important to note this distinction when advising a client when to make an open offer and when to make a without prejudice save as to costs offer.*