Offers and cost consequences; and Pensions: How have the courts responded in recent cases to “needs” arguments when an order is sort?

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COSTS

Costs and offers: Will the Court realistically make orders in light of the general rule?

- **The general in financial remedy proceedings is that the court will not make an order requiring one party to pay the costs of another party. (FPR r28.3 (5))**

- **Notwithstanding this, where one party's conduct is considered to be inequitable to disregard, the court may make an order for costs. When considering conduct, the court will have regard to (FPR r28.3 (7)):**

(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;
(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.

What are financial remedy proceedings under r28.3

- **FPR r28.3 (4) (b) confirms that the general cost rule to 'financial remedy proceedings' also includes:**

(i) a financial order except (excluding interim orders)
(ii) an order under Part 3 of the Matrimonial & Family Proceedings Act 1984;
(iii) an order under Schedule 7 to the Civil Partnership Act 2004;
(iv) an order under section 10(2) of the Matrimonial Causes 1973 Act;
(v) an order under section 48(2) of the Civil Partnership Act 2004.

Costs outside of FPR r28.3

- ***Baker v Rowe [2010] 1 FLR 761*** **found that where r28.3 does not apply a 'clean sheet' basis will be applied. This introduced the provision that 'costs will follow the event'.**

- **r28.3 does not apply to Schedule 1 Children Act 1989 applications, however the court has considered that a harder 'clean sheet' will apply in light of the applicant acting in a representative capacity. (*KS v ND [2013] EWHC 464)***

- **Some examples of other proceedings <u>not</u> covered by 28.3:**
  - **TOLATA Applications**
  - **Interim applications**
  - **Set aside applications**
  - **Appeals**
  - **Notice to show cause applications**
  - **S17 Married Women's Property Act 1882**
  - **Preliminary issues (and costs of intervenors)**
  - **Variation of maintenance agreements (s35 / S36 Matrimonial Causes Act 1973)**
  - **Transfer of tenancy (s53 Family Law Act 1996)**

Offers

- **FPR 9.27A sets out the duty to make open proposals:**

  - **By any such date the court directs;**
  - **Within 21 days after the date of the FDR;**
  - **Where no FDR, no less than 42 days before the final hearing.**

- **There is no statutory duty to make Without Prejudice proposals, only file any offers made not less than 7 days prior to the FDR (FPR r9.17(3))**

- **Without Prejudice save as to costs offers are also outside the remit of r28.3 general costs principle and can be produced at the conclusion of trial.**

FPR PRACTICE DIRECTION 28A (Paragraph 4.4)

4.4

In considering the conduct of the parties for the purposes of rule 28.3(6) and (7) (including any open offers to settle), the court will have regard to the obligation of the parties to help the court to further the overriding objective and will take into account the nature, importance and complexity of the issues in the case. 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.

FPR PRACTICE DIRECTION 28A (Paragraph 4.5)

4.5

Parties who intend to seek a costs order against another party in proceedings to which rule 28.3 applies should ordinarily make this plain in open correspondence or in skeleton arguments before the date of the hearing. In any case where summary assessment of costs awarded under rule 28.3 would be appropriate parties are under an obligation to file a statement of costs in CPR Form N260.

CASE LAW CANTER….

OG v AG [2020] EWFC 52

- **This case highlights the court's stance in respect of the highlights the importance of negotiating reasonably, even in the face of abysmal litigation conduct, late disclosure and s.25(2)(g) conduct, and even when the financial position is not clarified until weeks before trial. It is never too late and if a party fails to do so they will suffer a costs penalty.**

- **As a result of H's conduct in this case, which Mostyn J described as abysmal and dishonest, there was in excess of £1 million generated in costs, including two aborted FDRs.**

- **H's conduct included disposal of assets in Dubai and creating a competing company in the same industry, which was the matrimonial company operated by W.**

HOWEVER…..

- **Mostyn J considered W had failed to openly negotiate reasonably (her position being that she should receive 2/3 of all assets to compensate for H's misconduct.) This failure resulted in a £50,000 deduction in her costs. Thereafter H was to pay 90% of W's costs on an indemnity basis.**

The principle of engaging in open offers continues in *LM v DM (Costs Ruling) [2021] EWFC 28*

- **W's successful application for MPS, interim periodical payments and a Legal Services Payment Order. Moisten J considered that 'no order for costs' did not apply as per FPR r28.3 (5). As such, the 'clean sheet' basis applies for costs to follow the event. As such the starting point was awarding costs in favour of W**

HOWEVER….

- **Mostyn J considered that the parties in this case were still obliged to negotiate openly and reasonably. He held that the W had made no serious attempt to negotiate openly and reasonably beyond setting out her in-court position. (FPR PD28A 4.4)**
- **Mostyn J's impression of the wife was that she had chosen to litigate the applications, regardless of the potential outcomes. On this basis, the wife was penalised, and Mostyn J reduced by 50% (!!) the costs order that he had made in the W's favour**

It is important to remember…

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." (Paragraph 87)

Rakshina v Xanthopoulos [2023] EWFC 50

- **Parties were embedded in multiple proceedings; Part 3 jurisdiction, children and financial remedy proceedings .**

- **This case involved a Russian post-nuptial agreement, which the court determined was freely entered into by the parties. (Paragraph 136)**

- **Total costs of proceedings was a considerable £9million with financial remedy costs equating to £5.4 million!!**

- **This included an adverse costs order of £1million made against H following a preliminary issues hearing.**

- **In May 2021, W made an open offer to transfer a London property to H to meet his housing needs with a value of £5million. (Paragraph 129). This offer was never responded to, nor did H make any counter-offers throughout proceedings.**

- **At the final hearing, circumstances had changed and notwithstanding this offer, W asserted a case that H did not require anymore than 600,000 euros to meet his housing need. This was accepted by the court as a 'proper figure'. (Paragraph 164)**

Rakshina v Xanthopoulos [2023] EWFC 50

- **When considering H's conducts in respect of offers, Sir J Cohen determined that the "It is obvious that H should have accepted the offer. At the very least, he should have responded constructively to it. What could never have been the right course was for him to do nothing. No, no offer in reply was ever made" (paragraph 130)**

- **Further, "H has in effect taken no constructive step in these proceedings since the FDA in April 2022. He should be solely responsible for the costs incurred by both sides thereafter." (paragraph 159)**

- **"It follows from everything that I have set out that appropriate orders for costs would completely eliminate any sharing claim that H might have and leave a larger deficit. This must inevitably impact upon his needs-based claim" (paragraph 161)**

- **W ultimately accepted that any order for costs would not be enforced without leave of the court, as the construction of the order would result in H's bankruptcy. W also agreed to forgo application for other costs she may be entitled to. (paragraphs 172-173)**

Final warning to note from Rakshina v Xanthopoulos [2023] EWFC 50 (paragraphs 152-153)

- **“There is the sum of £900K by which H’s solicitors have overshot the sums granted by way of LSPO. One of these firms thought it appropriate to write to the court stating that they intend to make a claim against H.**

“It is not the job of the court to act as the insurers of solicitors who overshoot, let alone dramatically overshoot, the sum provided by way of LSPO. I respectfully agreed with Cobb J said to the same effect in *Re: Z(No 2) [2021] EWFC 72*. If the solicitors run short of funds then it is their duty to apply to the court for a further order. If they choose to carry on with their work and incur further fees, then they do so at their pwn risk. I do not intend to make any provision for this liability of H, if that indeed is what it turns out to be.”

PENSIONS IN ‘NEEDS’ CASES AND A BRIEF CASE LAW REVIEW

What are needs when considering orders on pension assets?

- **Family Justice Council's report (Financial Needs on Divorce) April 2018 set out 'In small to medium money cases...where needs are very much an issue, a more careful examination of the income producing qualities of a pension may well be required in the context of assessing how a particular order can meet need'**

- **Thereafter the Pensions Advisory Group (PAG) July 2019 report was released and a key point of Part 4 sets out 'In a 'needs' case, the court can have resort to any assets to meet the parties' needs; in such cases it is rarely appropriate to apportion the pension based on the length of the marriage and existence of the pension'**

- **It is important to appreciate that in needs- based cases, just as is the case with non-pension assets, <u>the timing and source of the pension saving is not necessarily relevant</u>**
  – that is to say, a pension-holder cannot necessarily ring-fence pension assets if, and
  to the extent that, those assets were accrued prior to the marriage or following the parties' separation. It is clear from authority that in a needs case, the court can have resort to any assets, whenever acquired, in order to ensure that the parties' needs are appropriately met.

Part 6 PAG Report July 2019

- **The overall aim in divorce financial remedy cases is to achieve fairness between the parties. This applies to pensions as much as other assets and income. But pensions are difficult to value and difficult to divide, and the assistance of a PODE may be needed whether the case is contested or not.**

- **It will often be fair to aim to provide the parties with similar incomes in retirement, but equality may not be the fair result depending on needs, contributions, health, ages, the length of the marriage, or, *in non-needs cases*, the non- matrimonial nature of the asset**

- **Regardless of whether pensions are to be valued according to their income or capital value, it is important for all pensions in the same case to be valued on a consistent basis**

- **In some cases, an equal division is not appropriate; for example, in a short marriage with no children. Where the parties have worked throughout the marriage and each have their own pensions, no adjustment may be needed. On the other hand, an unequal adjustment might be appropriate in favour of a primary carer whose earning and pension accumulation capacity has been significantly impacted by looking after children.**

What is need?

Law Commission report No.343 Matrimonial Property, Needs and Agreements (2012)
'A very broad concept with no single definition in family law' [3.8]

The intended outcome is 'to enable a transition to independence to the extent that this is possible in light go the choices made within the marriage, the length, standard of living, expectation of a home and continued shared responsibilities (importantly, child care

The needs of the parties are a question of fact and is commonly referred to as 'elastic':

"I would suggest that these swirling considerations cannot be pressed into a formula which provides an answer, and it is right that that should be so, for the assessment of need is elastic, fact-specific and highly discretionary. For as King Lear pointed out, needs are exceedingly hard to reason; even the poor have things superfluous to their basic needs; and most luxuries are strictly unnecessary" (Mostyn J, *SS v NS (Spousal Maintenance) [2015] 2 FLR (Paragraph 40)*

Case law Review

WC v HC [2022] EWFC 22 per Peel J

"Where the result suggested by the needs principle is an award greater than the result suggested by the sharing principle, the former shall prevail. In vast majority of cases the enquiry will begin and end with the parties' needs. It is only in those where there is a surplus of assets over needs that the sharing principle is engaged." (Paragraph 21)

Income or capital equality?

- **HHJ Hess considered this question in *W v H (Divorce: Financial Remedies) [2020] EWFC. (paragraph 60)***

- ***Further, the court considered whether it is right when dividing pensions with a view to promoting equality, to exclude a portion of the member spouse's pension if prior to the marriage. (paragraph 61)***

W v H (Divorce: Financial Remedies) [2020] EWFC. (paragraph 60)

(i) There is no 'one size fits all' answer to this question. There are undoubtedly scenarios where the fair solution is probably to divide pensions by CE value. For example, where the CEs are relatively small in themselves or as a portion of the assets overall. For example, where the parties are relatively young and any projections about the future income-producing qualities of the pensions are likely to be speculative or unreliable. For example, where all the pensions are simple defined contribution funds so that the CE values can be regarded as reasonably reliable and simple predictor of future income streams. For example, where the sole pension involved is a non-uniformed public sector defined benefit scheme offering internal transfers only.

(ii) There are, however, scenarios where a simple division of CEs may well not represent a fair solution. For example, where the pensions are medium or large, both in themselves and as a portion of the assets overall, but needs issues still arise. This is particularly the case where one or more of the pensions involved is a defined benefit scheme (and income from within the scheme per £ of CE is likely to be higher than annuity income outside the scheme per £ of CE on an external transfer). This is particularly the case where the parties are no longer young and retirement issues are on the horizon.

(iii) The PAG report expresses its view on this as follows:-

"In a needs-based case, in particular where there is a significant Defined Benefit pension involved, for the parties or court seeking to identify a fair outcome the appropriate analysis will often be to divide the pensions separately from the other assets, based on an equalisation of incomes approach, such approach often requiring expert evidence from a PODE."

"Dividing pensions according to their potential income value.

Equality: Given that the object of the pension fund is usually to provide income in retirement, it will often be fair (where the pension asset is accrued during the marriage) to implement a pension share that provides equal incomes from that pension asset. This is particularly the case where the parties are closer to retirement. Where they are further from retirement, it is arguable that the number of assumptions made in an 'equal income' calculation will render a calculation less reliable

Equality of income will often be a fair result

Needs: In many cases the parties will be dividing modest pension funds. It follows that, in order to determine whether the parties' needs are met in retirement, they will need to know what their respective incomes are likely to be following any pension sharing order. A division that pays little or no attention to income-yield may have the effect of reducing the standard of living of the less well-off party significantly." (page 31).

Para 60 continued

(iv) **The PAG report also endorses similar sentiments expressed in the Family Justice Council's report "*Guidance on Financial Needs on Divorce*" (2018 edition) where it is stated:-**

***"In bigger money cases, where needs are comfortably met, the courts are now likely to be less interested in drawing a distinction between pension and non-pension assets than hitherto. This is partly because other assets will also be deployed for income production so the distinction is less obvious, but more because the "pension freedoms" introduced by Taxation of Pensions Act 2014... as a result of which those aged 55 or above have the option of cashing in some categories of pension scheme, have blurred the dividing line between cash and pensions and in such cases the trend is now to treat pensions as disposable cash assets, thus disregarding their income producing qualities: see SJ v RA [2014] EWHC 4054 (Fam) and JL v SL [2015] EWHC 555. In small to medium money cases, however, where needs are very much an issue, a more careful examination of the income producing qualities of a pension may well be required in the context of assessing how a particular order can meet need. The need to avoid the possibly punitive tax consequences of cashing in a pension may be more important in these cases and the mathematical consequences of making a Pension Sharing Order (for example because of an external transfer from a defined benefit scheme to a Defined Contribution scheme or the loss of a guaranteed annuity rate) can be unexpected and often justify expert actuarial assistance: see B v B [2012] 2 FLR 22"* (page 23).**

(v) **In my view the facts of the present case (the ages of the parties, the size and largely defined benefit nature of the pension funds, the relative paucity of non-pension assets) place it firmly in that category of case where the fair and equal outcome is to identify, as a starting point anyway, the pension sharing orders which would bring about equal incomes at a specified time in the future. The mathematics in the PODE report indeed illustrate on the facts of this case the general proposition that income from within the scheme per £ of CE is likely to be higher than annuity income outside the scheme per £ of CE on an external transfer.**

W v H (Divorce: Financial Remedies) [2020] EWFC. (paragraph 61) Apportionment

HHJ Hess considered that straight line apportionment "carries with it significant risks of unfairness". Such arguments are akin to those made about the distinction between matrimonial and non-matrimonial property. However, pensions are rarely mingled.
HHJ sets out from (i-vii) at paragraph 61 but concludes that :

Where the pensions concerned represent the sole or main mechanism for meeting the post-retirement income needs of both parties, and where the income produced by the pension funds after division falls short of producing a surplus over needs, then it is difficult to see that excluding any portion of the pension has justification. In the words of Lord Nicholls in *White v White* [2000] UKHL 54: *"in the ordinary course, this factor"*..i.e. the factor that the property concerned is non-matrimonial…*"can be expected to carry little weight, if any, in a case where the claimant's financial needs cannot be met without recourse to this property"*.

This is supported by the PAG review (Page 22):

"an important initial question is whether pensions should be handled any differently according to whether the case is governed by the needs principle (where, broadly speaking, the assets do not exceed the parties' needs), or the sharing principle (where, broadly speaking, the assets do exceed needs). The vast majority of cases - including cases involving low £millions - will be needs-based. Given the Lifetime Allowance, even a 'big' pension case will usually be a needs-case - it is non-pension assets that will generally take a case out of the needs bracket…One central issue is when regard may be had to the timing and source of pension savings. It is important to appreciate that in needs-based cases, just as is the case with non-pension assets, the timing and source of the pension saving is not necessarily relevant - that is to say, a pension-holder cannot necessarily ring-fence pension assets if, and to the extent that, those assets were accrued prior to the marriage or following the parties' separation. It is clear from authority that in a needs case, the court can have resort to any assets, whenever acquired, in order to ensure that the parties' needs are appropriately met"

KM v CV [2020] EWFC 174 - HHJ Robinson

- **This was a small money case; lengthy 24 year marriage with one child. H was a serving police officer with a pension CEV of £131K. HHJ Robinson heard the Appeal of the first order, which took place 7 years after separation. HHJ concluded that the Judge had erred by over emphasise to non-matrimonial accrual over needs.**

"The correct approach must be to conduct a comparative analysis of the parties' respective income and needs in retirement, taking into account s25 criteria, including health, needs and contributions, and the extent to which the Wife's pension should be apportioned. Only then can a fair decision be reached. (Paragraph 31)

W v H (financial Remedies: Pensions) [2021] EWFC 63 - Recorder Salter

This case involved a lengthy 23 year marriage with 3 children (one remained a minor) with modest assets. H's pension was considered a significant asset valued at £628,000. Recorder Salter refused arguments of apportionment for post-separation contributions made on behalf of H:

"This is a needs case.. I am satisfied that the appropriate approach is to equalise pension income from age 60. This approach accords with the approach recommended by the PAG." (Paragraph 93)z

- **The court have taken a consistent approach in recent cases on the importance of pensions as assets in their own right. As such, as practitioners we must be alive to the need to advise clients accordingly. (*Joanna Lewis v Cunnington Solicitors [2023]* EWHC 822 (KB) HHJ Koe KC (Sitting as HCJ)**

S v S (Conduct: Pensions) [2022] EWFC 176- HHJ Robinson

- **This case was a long marriage with three children. W had a diagnosis of MS and was unable to work, whereas H was an active police officer. H was later convicted of rape of W and perverting the course of justice. Thereafter, the Police and Crime Commissioner sought to penalise H for his conduct through a reduction in his pension. This caused a delay in the financial remedy proceedings.**

- **As part of this process, the police were entitled to seek up to 65% reduction of H's pension. However, this was limited to 1% in light of the tribunal considering that such deduction would further penalise W as the victim in any orders sought in financial remedy proceedings.**

- **W sought a pension sharing order and ultimately received 66% share of H's pension**