ST. MARY'S
CHAMBERS

The new costs landscape in Financial Remedy Proceedings

Gareth Jacques

29th October 2020

@stmarysflc
www.stmarysflc.co.uk

Family Law Specialists

Gareth Jacques practices exclusively in financial remedies and TOLATA applications and has been consistently ranked as a leading practitioner in the field by the Chambers and Partners and Legal 500 directories, describing him as "exceptional, approachable and extremely knowledgeable." Gareth's professional profile can be viewed here.

***

For many years practitioners have advised clients that it is usual that both parties will pay their own costs in financial remedy proceedings and that it is extremely rare to secure a costs order following a final hearing of any such a claim. Indeed, it is the authors experience that even in the face of the most unreasonable stance by a party, the Courts (especially so on a regional level) are reluctant to even entertain such applications.

In many cases, this lack of costs penalty has removed a proper focus from the parties when negotiating at FDR stage. As practitioners we commonly come across unreasonable litigants (and opponents) at FDR who wish to pursue a case to a final hearing and are not prepared to negotiate, notwithstanding what indication a Judge may have given. I have often wondered if this is on the basis that there is no real penalty if their position is wrong and that instead they wish to "chance their arm" at a final hearing.

Judges at FDR will commonly warn the parties of the costs they will spend to a final hearing if matters do not settle and it is not uncommon for parties to expend double what they spent to get to FDR by the time the case has concluded at the final hearing.

A recent amendment to Practice Direction 28A of the Family Procedure Rules (FPR) 2010 changes the landscape with respect of costs orders and widens the discretion of the Court to make costs orders when faced with a litigant or opponent who has taken an unreasonable stance during the proceedings.

Rule 4.4 of Practice Direction 28A now states that:

"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** (see rules 1.1 and 1.3) **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."

This is quite a sea change from the previous jurisprudence in the area.

It is worth reminding ourselves of the rules on costs in financial remedy proceedings which are governed under Part 28 of the FPR:

28.3 deals in particular with costs in financial remedy proceedings (which are defined at 28.3(4)(b)).

28.3(5) confirms that subject to **28.3(6),** the general rule in financial remedy proceedings is that the court will not make an order requiring one party to pay the costs of another party. (It is worth pausing here to remember that certain applications are outside of the usual costs rules including but not limited to MPS applications and certain other interim applications.)

However, under rule **28.3(6),** the Court has a discretion as to whether to award costs in financial remedy proceedings:

"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.)"

28.3 (7) goes on to consider the particular circumstances where a court may exercise its discretion to award costs:

"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;

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.

It is clear therefore that the amendment of Rule 4.4 to PD28A enlarges the scope under which costs orders can be made in financial remedy proceedings. Indeed, in **OG v AG [2020] EWFC 52**, Mr. Justice Mostyn specifically warns practitioners about the need to negotiate reasonably and on an open basis:

"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."

The decision in OG v AG echoes a number of recent decisions coming out of the High Court on the issue and hopefully will make judges more prepared to consider the issue of costs at a final hearing, especially where one party has refused to negotiate reasonably.

Alongside the addition of Rule 4.4 to PD28A there have been a number of additions to the rules which many practitioners may have missed, which directly relate to the issue of costs. These came into force on 6 July 2020:

FPR 9.27 relates to service of the Form H:

This rule provides that before each hearing the parties will have to provide an estimate of their costs to the date of that hearing. This must occur not less than one day before every hearing or appointment (save for final hearings where under 9.27(4) full particulars of all costs must be filed not less than 14 days before the final hearing). In respect of FDA's not only must a party file the costs that they have incurred to date, but the costs estimate up to FDR (9.27(2)) and in respect of FDR's the parties must file the costs incurred to date and the costs they would expect to incur up to a final hearing if a settlement is not reached (9.27(3)). The legal costs incurred will be recorded in the court order so that everyone is aware of the costs of the litigation (9.27(7)).

It is important also to note 9.27(5) which states that any costs estimate and full costs particulars must include:

a. Confirmation that they have been served on the other party;

b. In the case of a legally represented party, that they have been discussed with the client;

They must also include a signed statement of truth (PD 9A).

Under 9.27(6) the parties must bring a copy of the document filed by them to the hearing (or by extension have one available when the hearing is being conducted remotely.)

FPR rule 9.27A relates to the duty to make open proposals:

This rule provides that where at an FDR appointment, the court does not make an appropriate consent order or direct a further FDR appointment, each party must file with the court and serve on each other an open proposal for settlement:

a. at a date that the court directs;

b. if no date is specified then 21 days after the FDR, or

c. where there has been no FDR, and no court direction, not less than 42 days before the date of the Final Hearing.

Rule 9.28 remains unaffected, and the parties still have a duty to provide open proposals prior to the final hearing as follows (unless the court directs otherwise):

1. Not less than 14 days before the final hearing the applicant must provide open proposals for settlement;

2. Not more than 7 days after service of the applicant's open proposals, the respondent must reply and make their open proposals for settlement.

The amendments to FPR 9.27, 9.27(A) and 4.4 of PD28A should therefore be considered together as a more complete package on the issue of costs. Practitioners would be well reminded to comply with the rules and ensure that their client has as much protection as possible on costs issues.

The new amendments also reinforce the need for realistic and sensible advice at an early stage in proceedings so as to avoid those costs risks identified by Mr. Justice Mostyn.

It is an interesting new landscape therefore on the issue of costs and one which will hopefully lead to an increase in cases settling at the FDR stage.

Contact Us

gareth.jacques@stmarysflc.co.uk

St Mary's Family Law Chambers

26-28 High Pavement, The Lace Market, Nottingham NG1 1HN
Tel: 0115 950 3503 DX: 10036 Nottingham
Email: clerks@stmarysflc.co.uk

ST. MARY'S
CHAMBERS