

## OPEN OFFERS: THE NEW COSTS RULES

### A PRACTICAL GUIDE

#### The changes

- The 3<sup>rd</sup> of April 2006 saw the Family Proceedings (Amendment Rules) 2006 (2006 No 352) introduced. These amendments, along with a President's Direction, made significant changes to the Family Proceedings Rules (FPR). The changes alter the Court's approach to making orders for costs following contested ancillary relief proceedings and their civil partnership counterparts.
- Importantly, family financial claims under TOLATA are excluded from the ambit of the new rules and will continue to be governed by the relevant CPR.

#### What is the purpose of the new Rules?

- The purpose behind the rules is to address the de-stabilising effect that costs awards can have on financial orders that have been carefully constructed by the court. Previously, the substantive order for ancillary relief that the court has just made can be undermined by an order to pay the other side's costs because of a failure by one party to 'beat' a *Calderbank* offer.
- The view had been that the previous systems lead to a degree of uncertainty and 'gambling' into ancillary relief proceedings. (See *GW v. RW* [2003] 2 FCR 289 when *Calderbanks* were likened to spread betting.) In big money cases, falling short of a *Calderbank* offer made that party liable for the costs of the other which can run into tens of thousands of pounds. Alternatively, in smaller money cases, the requirement for one party to pay the costs of the other side can produce real financial hardship.

## Summary of the new Rules

- The new starting point is:

*'The general rule in ancillary relief proceedings is that the court will not make an order requiring one party to pay the costs of another party; but...'* (r 2.71 (4) (b))

- Costs are now part and parcel of the substantive application and treated as a liability that a party has like any other legitimate debt such as a loan. Costs are not a separate issue to be determined at the end of the judgment. The court has to take into account the costs of the parties when considering the most appropriate order for ancillary relief. **Costs should not be determined after judgment.**
- *Calderbank* letters have been abolished. The only offers that are admissible are open offers. Strict without prejudice letters can still be written but they cannot be referred to except at an FDR.
- The general rule is that the court will not make an order requiring one party to pay the costs of another party. This applies to interlocutory hearings as well as the final hearing.
- Notwithstanding the general rule, the court may make an order for costs because of the litigation conduct of a party in relation to the proceedings (whether before or during them).

## What should the court consider before making an order for costs?

- In considering what order, if any, to make for costs the court has a (non-exhaustive) checklist of matters to consider:
  - 1) **Failure by a party to comply with the FPR, any Court order and any relevant PD**, e.g. Where Form E has not been filed by the time of the First Appointment in breach of FPR, r. 2.61B;

- 2) **Any open offer to settle made by a party**, e.g. Where a respondent has made a generous offer at a stage where the applicant has sufficient disclosure to evaluate that offer which is declined without adequate explanation, the court may consider the sanction of costs against the applicant;
- 3) **Whether it is reasonable to raise, pursue or contest a particular allegation or issue**;
- 4) **The manner in which a party had pursued or responded to the application or a particular allegation or issue**;
- 5) **Any other aspect of conduct in relation to the proceedings which the court considers relevant** (catch all provision);
- 6) **The financial effects on the parties of any costs order**.

- It should be noted that litigation conduct includes conduct *before* proceedings, including premature issuing without giving reasonable opportunity to settle and attempts to defeat claims.
- Conduct does not have to be obvious e.g. non disclosure and obfuscation; it can extend to whether or not it was reasonable for a party to have incurred high, disproportionate or unnecessary costs on a particular allegation or issue. Failure to negotiate, success or failure on a particular issue, might enable one side to argue that money has been wasted on costs that should be reflected in the award.

### **Examples of litigation conduct useful in the costs issue**

- 1) If H relies on expensive expert evidence on the value of his shares in his company which is misleading and partisan, W will be able to argue that H has wasted money on such an expert and therefore the costs wasted should be notionally added back as an asset and not treated as a liability of H's.
- 2) W alleges H is a non discloser and embarks on a costly discovery exercise which produces nothing. H says W has wasted costs on a pointless exercise and therefore the costs wasted should be notionally added back as a liability of W's.

- 3) Assume a single joint expert is instructed to value real property. One side does not accept the joint valuation and instructs a new valuer of their own. If ultimately the single joint valuer's evidence is preferred the money that was wasted on unnecessary expert evidence can be notionally added back as an asset and not treated as a liability of the party who instructed the expert.

### **The decision to apply for costs**

- Prior to the hearing any party who is making an application for costs should make this clear in open correspondence or in skeleton arguments prepared in advance. If summary assessment of costs under subparagraph (4) (b) of the new rules is sought, a claiming party is under an obligation to file a statement of costs in CPR, Form N620. It is insufficient for reliance to be placed for this purpose on Form H1, which does not contain the appropriate level of detail.
- At the end of an unsuccessful FDR meeting, it may be wise for special directions to be given to pin down and particularise what is being said on costs issues, what costs are being claimed and a chance for a response.
- The advocate must be able to quantify and justify the costs incurred and any particular action, approach or manner of dealing with the case. Time recording should be available at the final hearing.

### **The Judge's options on making an order for costs**

- Simply treat the costs incurred by each side as liabilities that have been paid or will be paid by each side;
- Make adjustments to the distribution of the assets in the award to reflect costs issues;
- Make an order for costs using individual discretion.

## The forms

- The forms are designed to give the court a fully comprehensive view on the costs liabilities of the parties. FPR, r. 2.61F (2) requires “*full particulars of all costs in respect of the proceedings which he has incurred or expects to incur.*” The reference to “the proceedings” means the ancillary relief application but the court should have information about any other liabilities which a party has, including other liabilities for legal costs e.g. those incurred in Children Act proceedings. The place for information on these other legal costs is in Form E.

## FORM H

- The revised Form H is to be completed for every interim appointment. This provides an estimate of costs for the forthcoming interim hearing, as well as details of the costs incurred prior to the issue of the Form A, and those incurred after the Form A.

## FORM H1

- This is a detailed statement of costs for the final hearing which has to be filed 14 days before the final hearing unless the court overrules this (Resolution argued that Form H1 ought to be filed 7 days prior to the hearing to give a more realistic summary of the costs incurred before a final hearing but this did not find its way into the Rules).
- The Form H1 should set out details of their fee earners and their rates, and particulars of costs incurred and expected to be incurred. This form will inform the court of a party’s entire costs position during stages of the case; pre Form A, Form A up to an including the FDR, from FDR to the date when the form H1 is prepared, from Form H1 to the end of the hearing, and the estimated costs of implementation.

- Form H1 is not designed to go to the trouble and expense of a full statement required for a summary assessment, rather it serves to strike a balance between providing the information necessary to enable the court to have a realistic view of the parties' costs without going to the trouble and expense of the full statement required for summary assessment.

### **Open offers and negotiation**

- Open offers and counter offers will be very important, not only in terms of quantum but timing. A party who does not enter into the negotiation arena at an appropriate stage will run the risk of being penalised in the final award. The judge still has the widest discretion and will know what open offers have been made and by whom, at what stage and crucially which offers have been rejected or have had no response.

### **Ultimate result of the new rules?**

- Open offers should theoretically promote earlier settlement as the actual differences between the parties, sometimes previously hidden behind *Calderbank* letters will be transparent.
- However those cases that fight will in all likelihood take longer as costs must be dealt with in the substantive hearing and not afterwards. Sufficient time should be scheduled within a final hearing to deal with an assessment of whether the costs of each party are reasonable by reference to Form H1 and whether an *inter partes* costs order should be made.
- It is not difficult to foresee that there may well be a tactical shift in the conduct of ancillary relief proceedings with initial defensive open offers with more realistic offers being made at the FDR. These would be on a without prejudice basis leading to improved open positions as the final hearing approaches.

- There will in all likelihood be more orders for costs and many more costs arguments on a wider range of circumstances, initially at least. The new rules are likely to mean more costs orders incurred on unique issues.

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