Barristers' Chambers

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The Cost of a Failure to Openly Negotiate – an Analysis of Mostyn J's Judgment in OG v AG [2020] EWFC 52

Facts:

H and W had made cross financial remedy applications upon divorce and these proceedings had been ongoing for almost 2 years. The marriage had lasted 25 years and there were two children (25 &10) who remained living at the UK Fmh with W. The parties had operated a ducting business X worth almost £14m with each taking active roles therein 9 (and as joint shareholders). The parties had also built up a property portfolio both in the UK and abroad and under the name of X received rentals.

At the end of 2018, H had resigned from X and a few months later (January 2019) his elderly father (for whom H held a power of attorney) and two friends set up another ducting company AB, which was loaned substantial monies (c £900k) from a Dubai based company TT which H had lent the same amounts out of monies received from the sales of matrimonial property in Dubai. W continued to manage X and, despite his initial reluctance, H did not at the hearing oppose her taking over the company.

Issues arose as to the adverse impact on X's overseas sales of both Covid-19 and Brexit in the event of a no deal outcome by December 2020.

W's Claim:

i) W's case was that by reason of such impact a 10% discount should be applied against the trading value of X (c£4m) and X's surplus assets value (c£10m). The SJE valuer instructed confirmed some discount should be applied.

ii) In addition, W's case was that there should be a further discount applied of 40% as a result of H setting up a rival business. The SJE also supported a discount of between 20>40% for this factor akin to that applied where an owner selling a business refused to sign a non-compete clause.

iii) Finally, it was W's case that the resulting net values be divided 2/3rds 1/3rd in her favour on the basis of his above conduct by H and also his non- disclosure and fraudulent alteration of relevant emails.

Judgement:

With the £900k "loans" to AB added back, Mostyn J considered the contributions of each party to the business "incommensurable" and as entirely matrimonial property was engaged that there should be equality of division between the parties of the resulting appropriate net values of the non-business/non pension assets (£3.68m).

In relation to the business assets, His Lordship considered that the value of X should be discounted by the 10% asked for by W due to the actual and potential Covid-19/Brexit factors and by another 30% in respect, as found, of H's setting up of AB but that such discounts should only be applied to X's trading value and not its surplus assets value (the H's suggestion otherwise having no logical basis on the evidence provided).

In relation to the conduct issues arising, Mostyn J analysed the four areas where conduct under **s 25** can be relevant in financial remedy proceedings. These were:-

> i). **Gross and obvious personal conduct**: meted out by one spouse against the other either in or after the marriage has ended but which would only rarely be taken account of and only where there is a resulting financial impact;
>
> ii) **Add back**: only again accounted for in the rare case where "wanton and reckless" dissipation is clear and obvious;
>
> iii) **Litigation misconduct:** which may severely penalise the offending spouse in costs but is rarely applied as against the substantial division.
>
> iv) **Non-disclosure:** but only where the court can draw appropriate inferences as to the computation "*of the approximate scale of the non-visible assets*".

His Lordship concluded that W's case as to a 2/3rds /1/3rd division in her favour on the basis of H's conduct as found was both disproportionate and simply untenable.

Instead, having rejected the contention that H had squirreled away other as yet undisclosed monies, the 30% discount (ie c £1.18m) for the setting up of AB would be applied solely against H's 50% share of the parties' net business value held. Any further reduction in H's overall share, subject to a costs order, would amount to an impermissible morality discount, whereas the Court should only apply a discount where the conduct is financially measurable.

> "*It is unprincipled for the court to stick a finger in the air and arbitrarily to fine a party for what it regards as immoral conduct.*"

As to the appropriate costs order, the parties had combined costs of c £1m mainly as Mostyn J found due to H's litigation conduct. However, the Court also considered W had failed to negotiate openly and in a reasonable way after the financial positions of the parties had become broadly apparent, contrary to the recent amendments to **PD 28A** at **para 4.4**

In this respect, His Lordship stated:

> "*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.*"

In consequence, Mostyn J addressed W's costs as two periods, being :-

(i) just after the PTR (£412k) and

(ii) her costs between PTR and final hearing.

His Lordship rejected the argument for W that but for the H's litigation misconduct the case would have settled and a final hearing would not have taken place.

Addressing the costs at period i) above, His Lordship reduced W's costs first by £100k, leaving a balance of costs for that period which he estimated would have been expected for

such a case (see **Part 28. 3 (5)**). He then further reduced W's costs by another £40k for the estimate of the costs thrown away by her first initiating (despite already controlling the majority of the parties' asset value) nd then not pursuing a **s 37** application in respect of the Dubai assets (having been advised re non reciprocation of enforcement). Finally, W's costs were reduced by another £10k for her own non-disclosure conduct. Subject to such reductions, Mostyn J then ordered H to pay 90% of W's reduced costs on an indemnity basis (ie £235,626).

As to period ii) His Lordship considered the usual "*no costs* "rule at **FPR r.28.3(5)** should not apply as H's conduct in period i) had cross contaminated this second period and H had also continued to be dishonest about his dealings with AB in an attempt to avoid the discount issue in respect thereof. Accordingly, for period ii), H was ordered to pay 90% of half of the W's costs on an indemnity basis. However, this was subject to a reduction of £50,000 from such costs in light of what His Lordship found had been W's unreasonable and untenable open negotiation stance during this period.

In what otherwise would have been an equal division case, the resulting adjustments, as above, meant that H eventually recovered c£7.3m. Thus, H's half share had eventually been reduced by £869,741 -which represented his conduct in relation to the setting up of the rival company and his litigation misconduct.

Commentary:

Of particular interest for practitioners in this decision is the approach of Mostyn J to the issue of the W's failure to negotiate openly before the final hearing and her pursuit of an untenable claim, in His Lordship's assessment, before and at that hearing.

In particular, Mostyn J stated:-

"*29. Although the wife has been more sinned against than sinning, she is not above criticism herself. Since the pre-trial review before me on 12 June 2020 (at the very latest) the financial landscape has been sufficiently clear, and the wife has been in a position to negotiate*

reasonably. Yet her stance has been unreasonable. She proposes a division of the (heavily discounted) assets two-thirds to her and one-third to the husband. She says that this would be a just outcome having regard to the husband's conduct. The departure from equality would amount to a sanction on the husband of nearly £1.9 million. In effect, the wife seeks that the husband should suffer a triple jeopardy by reference to his conduct. First, she seeks heavily to discount the value of X (including its surplus assets) because the husband has set up the competitor business, AB. Second, she says that the heavily discounted assets should be divided so that she receives twice as much value as the husband. Third, she says that the husband should pay 93% of her costs totalling £617,127. This is untenable.

30. *The revised para 4.4 of FPR PD28A is extremely important. It requires the parties to negotiate openly in a reasonable way. To take advantage of the husband's delinquency to justify such an unequal division is not a reasonable way of conducting litigation. And so, the wife will herself suffer a penalty in costs for adopting such an unreasonable approach."*

And

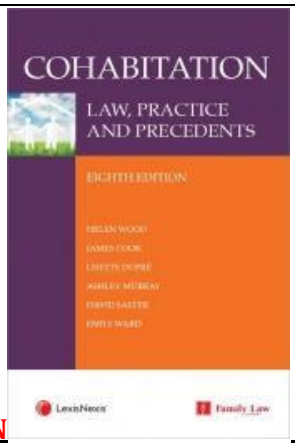
"93. *As I have stated above, it was from 12 June 2020 that the wife was able openly to, indeed expected to, negotiate reasonably. The fact that the husband was maintaining an untrue position in relation to the ownership of AB did not absolve her from that obligation. However, her stance since then has been penal. As explained above, her open proposal has been that the husband should be heavily sanctioned over and above the competitor discount and the costs penalty. This is not reasonable and in my judgment* ***PD 28A paragraph 4.4*** *clearly applies. In my judgment the figure of £328,020 should be reduced by £50,000 to reflect the wife's unreasonable and untenable open negotiation stance. 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."*

The amendment to the **FPR PD 28A** to include this costs evaluation at **para 4.4** has an importance which to date has largely gone widely unnoticed in local practice in the conduct of financial remedy cases. Since **WG v HG** (2018) EWFC 84. (Francis J), the Court's evaluation of the readiness of a spouse to openly enter into reasonable negotiation and to

adopt a reasonable stance within financial remedy proceedings has rightly become a focal exercise.

The escalation of costs in standard "*no costs order*" financial remedy proceedings had previously been substantially unbridled with the demise of the Calderbank procedure, whereas the introduction of this Court power now exposes the spouse who simply ploughs on with excessively high claims and/or without entering into realistic open negotiation to the real risk of costs censure at the conclusion.

The existence of this power should be uppermost in the approach to adopted by both parties in a financial remedy application and Mostyn J rightly emphasises that those who continue to ignore the same will face the appropriate financial consequences.



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