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"NEEDS" – No Hiding Place on Costs for Exaggerated Claims

- an analysis of Peel J in WC v HC (2022) EWFC 40

Introduction:

In the Ashley Murray Chambers Case Update No 100 ('**TIME OUT- ABIDE BY THE RULES - OR ELSE! - analysis of WC v HC [2022] EWFC 22')** the substantive decision of Peel J in this matter was fully analysed. The Court determined W on a "*needs*" based approach should recover value of £7.45m. Subsequently, the parties addressed the consequential costs arguments. The combined costs amounted to £1.6m (W £917k and H £709k - the main difference in amounts being that H was not liable for vat).

H sought costs from W of £310k and W sought costs of £264k from H, being her costs of two interlocutory hearings (mps and directions) and in meeting H's arguments as to the application of an unsigned post marital agreement.

Costs Judgment:

Peel J started the assessment by addressing **FPR 2010 Part 28.3(6)**, which enables the Court to depart from each party meeting their own costs of financial remedy proceedings by taking account of the factors set out at **25.3(7),** including:-

> *"(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."*

In addition, His Lordship relied upon **PD 28A 4.4:-**

"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".

As to the interlocutory costs these were not covered by the "*no costs*" rule and, therefore, Peel J noted that the starting point for costs consideration was on the basis of "*a clean sheet*".

Further, Peel J reminded himself that the Court of Appeal in **Rothchild v de Souza** (2020) EWCA 1215 had stated that it was not unfair for a party guilty of misconduct should receive less than his/her needs. An outcome which had been the result of costs orders in both **Traherne v Lamb** (2022) EWFC 27 (Cohen J) and **WG v HG** (2018) EWFC 20 (Francis J).

His Lordship recorded that sensible attempts to settle the case, or unreasonable failure to make such attempts, will ordinarily be a powerful factor one way or the other when considering costs. repeated Mostyn J's warning in **OG v AG [2020] EWFC 52**:-

"*if, once the financial landscape is clear, you do not openly negotiate reasonably, then <u>you will likely to</u> suffer a penalty in costs*" (author's emphasis).

Peel J stated he would look at all relevant factors "in the round" - although he determined on this occasion to ignore the non-compliance with the practice guidance by both parties he had highlighted in his substantive Judgment.

The points Peel J emphasised were:-

- neither had been flexible in negotiations - H in not moving his position concerning the non-signed (by W) post nuptial agreement and W in consistently claiming £10m or more (£10.6m at trial); whereas the final award was c £3m less. Contrasted with W's high claim position, H's net effect offer had been £7.15m and, therefore, just c £300k less than the final award.
- H's approach on the unsigned PNA had been that the Court Order should be mandated by terms of the agreement, albeit unsigned and, indeed, H had in his Form E asserted there should be an abbreviated **Crossley v Crossley** (2007) EWCA 1491 '*magnetic factor*' hearing approach. Indeed, H only moderated his stance during counsel's final submissions to one that the agreement should be highly influential as opposed to determinative.

- W's approach too was subject to some criticism in that she did not persuade the Court to ignore the PNA on the basis of her allegation that H had placed her under duress nor did she persuade the Court as to her allegation that H had colluded with his father to hide his likely large receipt of monies after the hearing. Further, in a case of "needs" she had failed to persuade the Court she needed a second home in Switzerland and, indeed, that aspect was the real reason for the excess included in her position before the Court - albeit, she did establish a higher income "*need*" than H was prepared to acknowledge.

Peel J emphasised that in "*needs*" based awards there could be a risk that the same requires the payer to act as an "*insurer*" of the payee's costs, since the payee's claim is not infrequently that his/her indebtedness and costs should also be cleared within the level of the award of "needs" made - so as to be debt free - irrespective of the costs amount incurred by the payee. This provided the payee with what amounted to an indemnity and little incentive to act reasonably. Indeed, the payee on costs would submit that to order costs against him/her thereafter would simply return them to debt.

His Lordship stated:-

"*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.*" (author's emphasis)

Viewing the issue of costs "*holistically*", although H was to be criticised for his litigation conduct, "*W must bear, in my judgment, greater responsibility in the light of her disproportionate needs claim*". This, in His Lordship's view, was the most influential factor at play in the negotiation and, whereas H's offer was proximate to the final award - W's had missed by "*a wide margin*". Hence, the cost to be awarded to H payable from W's substantive award was to be £150,000.

Peel J added:-

"*If that were not the case, no court could ever make a costs award in a needs case (and needs cases account for the vast bulk of litigation in this field). That cannot be right. Otherwise, the payer runs the risk of, directly or indirectly, being responsible for all costs on each side even if the payee has litigated unreasonably.*"

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Commentary:

The recent "*change of gear*" in the judicial approach on costs since the **OG v AG** decision above shows that parties will now need to adopt a more realistic view to the level of claims they advance in their mandated open offers.

The former applicable Calderbank process directed the client's minds to the level of the final award and by guesstimate to engage in the lottery of getting, at least, within touching distance of the final award so as to be able to advance a claim in costs after the hearing against the party coming second in that award prediction race.

The current interpretation of **Part 28 4.4** ("*reasonable and responsible*"), as exemplified in this decision, now holds the parties' feet to the fire post hearing on the distance away from the final award of the respective open offers made. "*Proximate*" offers are safe - but anything further away or an open offer with "*a wide margin*" of difference runs the real risk of costs, as here, (ie £7.45m awarded as opposed to £10.6m claimed ie a 30% over claim by W) by reason of that difference having prevented meaningful negotiations to a settlement.

Arguably the time has come when our society can no longer afford to have bespoke judge led settlements on divorce anyway - so requiring, at least, an express statutory presumption of equality of division in all cases with express costs consequences where challenged unsuccessfully. The financial stakes are high for clients in a field of litigation which has hardly been seeded with clarity by the High Court and the Court of Appeal whose judges continue to produce highly academic distinctions in the application of the recognised principles in particular cases. Encouraged by these arguments to see reasons for avoiding equal sharing, the hapless divorcing spouses then reach the end of the process only to be criticised for taking unrealistic postures.

Mostyn J recently complained "financial remedy applications seem to be fast heading for Ritz hotel status- so expensive that it is only accessibly by the very rich." and His Lordship urged the Lord Chancellor or the Rules Committee to act to avoid the ever rising costs spiral. Of course, bearing in mind His Lordship's own practice as counsel that may be seen as a somewhat belated observation!.

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