Family Procedure Rules 2010

Consultation in relation to the treatment of Calderbank offers when determining issues relating to costs

Introduction

1. The Family Procedure Rule Committee (FPRC) established a judicially-led working group (the Costs Working Group) in November 2018 to undertake a review, and to engage in 'blue sky thinking' in relation to the functioning of the current costs regime in financial remedies cases, and, where appropriate, to make recommendations for reform of the Family Procedure Rules 2010 (FPR 2010).

2. One key area concerned encouraging parties to engage reasonably and responsibly in settlement negotiations. As part of this, the FPRC is considering whether the FPR 2010 should be amended to enable any the offers which are made "without prejudice save as to costs" (known as *Calderbank* offers) to be taken into account as "conduct" when the court is considering making an order requiring one party to pay the costs of another party. The FPRC would welcome views on this matter.

Current FPR provision in relation to costs in financial remedy proceedings

3. The current costs regime applicable in financial remedy proceedings is primarily set out in Part 28 FPR 2010, in particular r.28.3(5) (the general rule), r.28.3(6) (costs orders having regard to conduct), r.28.3(7) (matters to be taken into account), r.28.3(8) (inadmissibility of offers that are not open offers except at the FDR), subject to the guidance set out in Practice Direction 28A (PD 28A) supplementing the FPR 2010 (in particular paragraphs 4.3 and 4.4).

4. So far as it relevant to the issues raised in this consultation, the current costs regime in relation to financial remedy proceedings provides, in summary, as follows:

    a. at every hearing, each party must produce a 'full and accurate' estimate of the total costs incurred up to the date of that hearing to include details of any sums already paid (FPR 2010 r.9.27(1) and PD9A paragraphs 3.1 and 3.2); in addition, not less than 14 days before the final hearing, unless the court otherwise directs, each party must file and serve on the other party a statement giving full particulars of all costs incurred and expected to be incurred (FPR 2010 r.9.27(2));

    b. the applicant must file with the court and serve on the respondent, not less than 14 days before the final hearing, unless the court otherwise directs, a statement setting out concise details including the amounts of the orders sought (i.e. an open offer) (FPR 2010 r.9.28(1)), to which the respondent must then reply not more than 7 days later (FPR 2010 r.9.28(2));

c. the general rule in financial remedy proceeding is that 'the court will not make an order requiring one party to pay the costs of another party' (FPR 2010 r.28.3(5));

d. however, the court may make an order requiring one party to pay the costs of another party at any stage in the proceedings when it is 'appropriate' to do so having regard to the 'conduct of the party in relation to the proceedings' (FPR 2010 r.28.3(6));

e. the list of factors set out in the FPR 2010 to which the court is required to have regard when considering whether to make an order requiring one party to pay the costs of another party in light of a party's conduct is: (a) any failure to comply with the rules, any order or a practice direction, (b) any open offer to settle, (c) whether it was reasonable for a party to raise, pursue or contest any issue, (d) the manner in which a party has pursued or responded to the application or a particular allegation or issue (e) any other relevant aspect of a party's conduct in relation to the proceedings which the court considers relevant; and (f) the financial effect on the parties of any costs order (FPR 2010 r.28.3(7));

f. in considering 'conduct' the court must also have regard to (a) the obligation on both parties to assist the court to further the overriding objective, (b) the nature, importance and complexity of the issues (which may be of particular importance in variation/interim variation applications, in which costs may be disproportionate to the matters in issue) (PD28A, paragraph 4.4). A refusal openly to negotiate reasonably and responsibly will amount to conduct in respect of which the court will consider making an order for costs (PD28A paragraph 4.4, as amended with effect from 27 May 2019: see below);

g. no offer to settle which is not an open offer (i.e. no offer which is made wholly or partly 'without prejudice' or 'without prejudice save as to costs' i.e. a *Calderbank* offer) is admissible at any stage of the proceedings (except at an FDR) and so cannot be taken into account when considering whether to make an order requiring one party to pay the costs of another party (FPR 2010 r.28.3(8)).

Recent amendment to PD28A

5. The FPRC is concerned that insufficient emphasis is given to encouraging parties to engage reasonably and responsibly in negotiations. In particular, there was concern that little positive guidance was given in PD28A to assist the parties to understand the likely cost consequences of failing to litigate sensibly and of failing to engage in sensible negotiations and/or of making an open proposal which is significantly higher or lower than the award ultimately made by the court. It was the view that this was already the position, but the PD required amending to make this clearer. As such, paragraph 4.4 of PD28A was amended with effect from 27 May 2019 to include new text as follows:

   "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.".

Calderbank offers: history

6. The FPRC is now considering the question of if/how offers made "without prejudice save as to costs" (i.e. *Calderbank* offers) might be taken into account when the court is deciding whether to make an order for one party to pay, or contribute towards, the costs of another.

7. The provisions now contained in FPR 2010 r.28.3 were first introduced in the Family Proceedings Rules 1991 ('FPR 1991') in 2006 (FPR 1991, r 2.71, inserted by SI 2006/352 from 3 April 2006). The introduction of the general 'no order' rule followed widespread concern about the operation of the previous costs rules, in particular in relation to offers made 'without prejudice except as to costs' (i.e. *Calderbank* offers).

8. Specific provision for such offers was first made in the 1991 Rules by the addition of FPR 1991, r 2.69 with effect from October 1992. The rules were subsequently amended in June 2000 (by SI 1999/3491) to introduce provisions designed to give greater effect to *Calderbank* offers. As they stood in 2005, the FPR 1991 provided something of a "cliff edge" – where a judgment or order was more advantageous to a party than an offer made without prejudice except as to costs by the other party, FPR 1991 r.2.69B(2) provided that "*the court must, unless it considers unjust to do so, order that other party to pay any costs incurred after the date beginning 28 days after the offer was made*".

9. Those provisions gave rise to further difficulties and increased calls for reform. A detailed history of the procedural changes and ensuing difficulties was set out by the Court of Appeal in *Norris v Norris, Haskins v Haskins* [2003] EWCA Civ 1084 (see particularly the judgment of Thorpe LJ at [63]-[64]).

10. The changes suggested in *Norris* were considered by the (then) Ancillary Relief Advisory Committee of the Family Justice Council. Following extensive discussion and consultation, the group recommended that *Calderbank* offers should be excluded from consideration in determining whether the conduct of a party justified the making of a costs order under the new rules.

11. Under the current provision in the FPR 2010, although offers made partly or wholly 'without prejudice' or 'without prejudice save as to costs' may (indeed must) be referred to at an FDR, no offer to settle which is not an <u>open</u> offer to settle is otherwise currently admissible at any stage of the proceedings (FPR 2010 r.28.3(8)), and accordingly *Calderbank* offers do not currently fall to be considered as 'conduct' when the court considers whether or not to make an orders for costs under FPR 2010 r.28.3(6) and (7).

Calderbank offers: FPRC considerations and consultation questions

12. The FPRC recognises that views may differ within the wider financial remedies community as to whether *Calderbank* offers should be reintroduced and, if so, how they should be

taken into account in deciding whether to make orders for costs in relation to financial remedy proceedings:

a. on the one hand, it might be suggested that the criticism voiced by Thorpe LJ in *Norris* still holds good, in that far too much weight was previously attached to whether one party (usually the respondent) had '*won'* or '*lost'* regardless of the other matters of 'conduct' to which reference is now made in FPR 2010 r.28.3(7)

b. however, on the other hand, it might be legitimately suggested that the reforms introduced in 2006 have failed to meet their objective, to the extent that parties are still far more reluctant to negotiate 'openly', as opposed to on a 'without prejudice' basis, than was expected and intended;

c. in particular, it could be that open offers are often either unduly inflated or deflated, because parties are reluctant to put in an open offer which is not their 'best hope' of the possible outcome without being completely unreasonable, often having little or no regard to the content of any previous 'without prejudice' offers or the stage at which their negotiations failed;

d. so too, under the current rules, there is no sanction for unreasonably rejecting a 'without prejudice' offer, resulting in one party being prepared to 'take the risk' of going to a contested final hearing, whilst the other party is obliged to incur additional costs with little or no prospect of obtaining any recompense. [1]

13. Taking all these factors into consideration, the FPRC is now seeking views on whether the FPR 2010 should be amended so that offers made "without prejudice save as to costs" should be admissible in considering "conduct" of a party for the purposes of FPR 2010 r.28.3. (It should be noted that this would not be reinstating the "cliff edge" position as it was in the FPR 1991 immediately before the 2006 reforms.)

14. Any such new provision would be made on the basis that the general 'no order' rule set out in FPR 2010 r.28.3(5) should remain. In this way, excessive weight ought not to be attached only to whether one party has 'won' or 'lost' but proper account could be taken of whether either party has acted reasonably or unreasonably in the course of their negotiations (including those undertaken "without prejudice save as to costs") having regard to all of the matters to which the court is required to have regard under FPR 2010 r.28.3(7) when deciding whether it is 'appropriate' to make an order requiring one party to pay the costs of another party having regard to 'conduct of the party in relation to the proceedings' under FPR 2010 r.28.3(6).

15. For completeness, consultees should be aware that the FPRC's Costs Working Group unanimously rejected the introduction of any procedure equivalent to CPR 1998 Part 36 (*Offers to Settle*) on the basis this would be unduly complex and restrictive, and would be likely to give rise to unnecessary satellite litigation. It was considered that any such procedure would be inappropriate (and so largely unworkable) in financial remedies cases, in which the concept of whether one party has 'won' or 'lost' is often much less

[1] This can be a particular problem when one party is not legally represented because they may think they have nothing to lose because they will not incur any legal costs themselves.

clear than in conventional civil litigation given the range of possible orders and outcomes available to the court.

16. The FPRC appreciates that if this change were to go ahead, then other consequential amendments would be required (e.g. FPR 2010 r.9.17(4) which preserves the inadmissibility of any without prejudice offer produced at the FDR, r.28.3(7)(b) which allows the court only to take account of an open offer to settle when deciding what (if any) order to make in relation to costs, and FPR 2010 PD28A generally).

Question

Do you consider that offers made "without prejudice save as to costs" should be admissible in considering the "conduct" of a party for the purposes of FPR r28.3?

Please say "Yes" or "No" and give full reasons and examples to support your answer. If you are unable to answer this question, please say "Don't know".

Please send your comments to Simon Qasim at the address below by 5pm on Thursday 31 October 2019.

Simon Qasim
Family Justice Policy
Post Point 7.17
Ministry of Justice
102 Petty France
London
SW1H 9AJ
FPRCSecretariat@justice.gsi.gov