Financial Remedies Update November 2020

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The new rules are contained in Family Procedure (Amendment) Rules 2020 SI

2020 No 135 (L.7). They came into force on 6th July 2020.

Two key areas of change:

• The provision of information as to costs

• The duty to make open proposals

COSTS INFORMATION:

The old FPR r.9.27 has been replaced.

What has not changed?

New r.27(1) remains the same i.e. at every hearing each party must produce an estimate of

costs incurred to that point (i.e. akin to the old Form H)

New r.9.27(2) remains the same [but is renumbered as r.9.27(4)]– i.e. not less than 14 days

before the final hearing each party had to produce an estimate of costs of incurred and

expected to be incurred]

The new r.9.27 provides:

that new information is required in addition:

i. r.9.27(2) - First Appointments - *added requirement to estimate costs to FDR*

ii. r. 9.27(3) - At FDRs - *added requirement to estimate costs to cost to Final Hearing as well*

We are reminded that statements of truth are to be included (PD9A has been amended to include new PD9A §3.2A-C. §3.2(A)) PD 9A§3.2 (C) sets out the wording for solicitors thus:

"I confirm that:

(a) to the best of my knowledge and belief, the contents of this [estimate of costs/ these particulars of costs] are true and accurate;

(b) I have discussed the contents of [this estimate of costs/ these particulars of costs] with my client (the [applicant/ respondent] in these proceedings);

(c) [this estimate of costs/ these particulars of costs] will be filed with the court and served on each other party, in accordance with rule 9.27 of the Family Procedure Rules 2010."

r.9.27(5) – the costs estimates must include confirmation

- That the have been served on the other party;
- That they have been discussed with one's own client.

r. 9.27(6) - Must bring the estimate to court

r.9.27(7) - The figures from the estimates must be recorded in the order from the relevant hearing

[9.27(7)(a]) i.e. the FA and FDR order or any interlocutory other order and the final order [9.27(7)(b)]

r.9.27(8) – Sanctions for failure:

• Failure to comply with the above must be recorded in the recital to the order

• If not provided the court must direct that the estimate be filed and served within 3

days of the hearing, or such other period as directed. (PD9A §3.1A - This means 3

clear business days (see FPR §2.9(2) and §2.9(3), r.2.3(1)).

Consequences:

• r.17.6 “False Statements”: Proceedings for contempt of court may be brought against

someone who makes (or causes to be made – meaning arguably the partner with conduct who does not sign the statement themselves but checks or overtly omits to check it/requests it be drawn up by a more junior solicitor under their supervision), without an “honest belief in its truth”.

MCA 1973 s.22ZA applications require estimate of costs to be produced. You will want this to be consistent with any forward estimate produced at the First appointment or FDR or else a forensic point will be taken in the 22ZA application (i.e. your 22ZA estimate is higher than the Form H estimate for the same work).

In short, MUCH closer attention has to be paid to the Form H!

OPEN OFFERS:

The new obligation introduced in r.9.27(3) is only [!] that post an unsuccessful FDR :

“each party must file with the court and serve on each other party an open proposal for

settlement”

When must that be done?

If there has been an FDR :

By such date as the court directs [r.9.27A(1)(a)] at the FDR,

Or failing such a direction being made within 21 days of the FDR. [r.9.27A(1)(b)]

Where no FDR takes place:

By such date as the court directs;

Or in the absence of a direction, 42 days before the date fixed for trial.

So, if there has been a private FDR ["PFDR"] but no court FDR ["CFDR"] what actually applies? This is very far from clear, and has not been seemingly contemplated by the draughtsman and Rules Committee. Seeking an order at the First Appointment for making open offers avoids this issue.

Tactical Considerations and View of the Court?

per FPR 28.3(7) "In deciding what order (if any) to make under paragraph (6) [costs due to conduct of a part in relation proceedings] the court must have regard to ….

(b) any open offer to settle made by a party.

The effect of the rules is de facto to give greater weight to this provision.

The rule change needs to also be taken in the context of the changes to PD28A in 2019; and increased judicial readiness to focus on costs, and the role of open offers generally.

§4.4 of PD.28A was amended to include, with effect from 27 May 2019, 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."

As to the change to PD28A, the Family Procedure Rule Committee Costs Working Group, at para.5 of their on the change paper says:

"The FPRC is concerned that insufficient emphasis is given to encouraging parties to engage reasonably and responsibly in negotiations. In particular, there is concern that little positive guidance was given in PD.28A to assist the parties to understand the likely costs consequences of failing to litigate sensibly and 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"

The effect of these rules will be two-fold:

• make the frequency of costs orders at trial greater than has occurred hitherto; and

• make the fear of a costs order at trial loom greater in the parties' minds.

The court will be much more likely to take account of mandatory open offers in case management generally, not just on costs points alone. For example: If a judge sees one side

being unrealistic or in their open proposals, that party can hardly expect to get the benefit of the judicial doubt on other interim matters e.g. directions, disclosure, MPS, s.22ZA.

For S.22ZA this is especially so given the express terms of s.22ZB(1) require account of

(c) the subject matter of the proceedings, including the matters in issue in them

(e) any steps taken by the applicant to avoid all or part of the proceedings, whether by proposing or considering mediation or otherwise,

(f) the applicant's conduct in relation to the proceedings,

Failure to make a commercial and realistic settlement proposal will:

Risk your client looking like the unreasonable one, both at trial; and at any other interlocutory hearing at which you may seek the court's indulgence or assistance; and

Loss of a degree of costs protection; and

Increased risk of a costs order going against you (heightened if the other side are making a sensibly pitched offer); and

Make you more vulnerable in negotiations to the other side leveraging an open offer that is not effective.

Lose the opportunity to put costs pressure on the other side.

Even before the new rules the courts were trying to remove some of the fear one has when making open offers that the court will treat that as indicating a particular outcome a trial is correct:

e.g. MAP v MFP [2016] 1 FLR 60 at §87:

“Now that we no longer have Calderbank offers, litigants must be encouraged to make open proposals as early as possible that are designed to encourage settlement. If the other party spurns such an offer, the court is entitled to ignore it completely and decide the case entirely on the merits.

FB v PS [2016] 2 FLR 697 §64:

“At trial, she argued for [more than she sought in her open offer]. She is perfectly entitled to do this. Now that Calderbank offers no longer feature in most financial remedy applications, the only way to be fair to litigants, whilst encouraging them to settle their litigation, is to be prepared to make awards in excess of a party's open offer where it is right and appropriate to do so.”

MB v EB (No 2) [2019] EWHC 3676 (fam) Cohen J dealt with a case involving open offers made by one (the reasonable) party, there the paying wife:

11. Notwithstanding the wife's primary case, she has made two open offers. First, in June 2018, … There was no response from the husband to that open offer. In September 2019, the wife increased her offer …

13. The offer from the wife, once again, provoked no reply from the husband until last week [December 2019]. …

14. This case should have been a very easy case to settle… It seems to me that if the husband had come back with any form of constructive offer, it is highly likely that this case would have settled..

35. I therefore, cap her liability to his costs at £150,000…. that figure is almost identical to what his costs were when the wife made her open offer in June 2018. Whilst I have found that the offer was not enough, I have no doubt it would have got the negotiations to open and to come to a successful conclusion…

36. …. It will, of course, leave the husband in debt to his solicitors with a substantial sum owing to them [£230,000 owed, his sole asset, his home was worth £300,000 gross]. That is a

matter between him and them. But, in my judgment, it is not for the wife to bankroll this litigation…

Similarly, Francis J in WG v HG [2018] EWHC 84:

"As difficult as the proceedings must have been for the wife, people could not litigate on the basis that they were bound to be reimbursed for their costs. Her legal representation had, at all times, been of the highest quality, but no one entered litigation simply expecting a blank cheque. The court faced the invidious position of seeing its order undermined by the extent of litigation loan or costs liability. If no provision was made for the wife's costs or litigation loan, then half the Duxbury fund would be wiped out and she would be left with insufficient money to manage. Recognising that the wife's costs were excessive, that she had presented an unreasonable case in the financial remedy proceedings but also that her Duxbury fund could not be completely undermined and that the husband's offer had been too low, the court would add to the lump sum an additional £400,000, less than half the total sum still due. The wife would, therefore, have to find some £500,000 in order to fund the remaining costs. This would deplete her Duxbury fund. Although the court had assessed the wife's needs at a given figure, and was now leaving with a lower sum which, by definition, would not meet her needs, people who engaged in litigation needed to know that it had a cost.

(With thanks to Harry Oliver QC)

PENSIONS

W v H (divorce financial remedies) [2020] EWFC B10 (24.02.20)

Background:

W 50 and H 48

17-year relationship including cohabitation

3 children aged 18, 16 and 10

W and the children remained in the former family home – W = primary carer

W = modest earning capacity (c£14k pa gross)

H = the greater earner (£144k pa gross plus bonuses)

Main assets in the case:

FMH valued at c£730k with net equity of c£240k

H's defined benefit ('DB') pension fund with ('CE') of c.£2.1m

Both parties had notable debts including litigation costs

Parties agreed that it was a PP case

Judge concluded that:

Reasonable requirement for W to remain in the FMH until the end of the existing interest-only mortgage (November 2024)

H's housing needs could be met until then via renting

Thereafter H had a reasonable need to purchase his own property

Starting point after a long marriage “it is useful to observe that fairness and equality usually ride hand in hand”. Save when an asset can properly be regarded as non-matrimonial

property “the court should be slow to go down the road of identifying and analysing and weighing different contributions made to the marriage”. Referred to White v White [2000] UKHL 54, Miller v Miller; McFarlane v McFarlane [2006] UKHL 24 and JL v SL [2015] EWHC 360

The evidence satisfied HHJ Hess that both parties had made full contributions to this long marriage, albeit in their different ways. W’s argument that her greater cash contribution to the parties’ first family home justified her having 100% of the net equity in FMH ignored the fact that the husband contributed more in substantial earnings over many years of marriage; and W’s initial contributions were very much mingled over time into the jointly owned family home - which is undoubtedly a matrimonial asset - S v S [2006] EWHC 2793

Judge did not accept H’s argument that his pre-cohabitation pension accrual should be excluded in the division of pensions. If there was any reason for departing from equality of capital it was not based on contributions. The issue of needs far outweighs any significance arising from the different contributions respectively made.

On the issue of global orders, whilst AB v CD [2017] EWHC 3164 provides 'strong support' for the making of such an order, but it is worth bearing in mind that “The existence of a global order carries with it the complication of knowing how to proceed in future if, for example, circumstances change … if a disaggregated order can be made fairly then it is often the better approach…”

When looking at pensions:

“A useful starting point here is to remind myself of the principle set out above, i.e. the proposition that fairness and equality usually ride hand in hand and that this applies to the division of pensions as much as it applies to other assets.”

Identified 3 key issues:

1. The first issue is whether it is right for the court, in dividing pensions with a view to promoting equality, to target capital equality (i.e. equal CE or other definitions of capital value) or to target the promotion of equal incomes.
2. The second issue is whether it is right for the court, in dividing pensions with a view to promoting equality, to exclude a portion of the member spouse's pension if it was earned prior to the marriage (or seamless pre-marital cohabitation).
3. The third issue is the extent to which the court should disaggregate the pensions in the case and promote a discrete and equal division of the pensions as opposed to attempting to execute an offset against other assets.

The Judge then gave consideration to the opinions on these issues set out in some detail in "A Guide to the Treatment of Pensions on Divorce: The Pension Advisory Group Report" (July 2019) [4] (to be found online at www.nuffieldfoundation.org/pensions-divorce-interdisciplinary-working-group). The Pension Advisory Group (PAG) report, although produced by an independent interdisciplinary working group of lawyers, judges, academics and Pensions on Divorce Experts (PODEs), has the support of the Family Justice Council and the President of the Family Division and should, in my view, be treated as being prima facie persuasive in the areas it has analysed, although of course susceptible to judicial oversight and criticism.

On equality of capital v equality of income:

"There is no 'one size fits all' answer to this question. There are undoubtedly scenarios where the fair solution is probably to divide pensions by CE value. For example, where the CEs are relatively small in themselves or as a portion of the assets overall. For example, where the parties are relatively young and any projections about the future income-producing qualities of the pensions are likely to be speculative or unreliable. For example, where all the pensions are simple defined contribution funds so that the CE values can be regarded as reasonably reliable and simple predictor of future income streams. For example, where the sole pension involved is a non-uniformed public sector defined benefit scheme offering internal transfers only."

A simple division of CEs may not represent a fair solution e.g. where the pensions are medium or large, both in themselves and as a portion of the assets overall, but needs issues still arise.

Particularly where one or more of the pensions involved is a defined benefit scheme (and income from within the scheme per £ of CE is likely to be higher than annuity income outside the scheme per £ of CE on an external transfer).

Particularly the case where the parties are no longer young and retirement issues are on the horizon.

On excluding pension if it was earned prior to the marriage (or seamless pre-marital cohabitation):

"There has undoubtedly been an established practice in some courts considering the divisions of pension, regardless of needs issues, to make a straight line deduction from the CE of a relevant pension fund by reference to a fraction where the numerator is the number of years of the marriage (including seamless pre-marital cohabitation) and the denominator is the number of years over which the pension fund in question was accrued, and to include in its calculations and deliberations only the reduced amount of the CE. … In my view this approach carries with it significant risks of unfairness as the mathematics of the present case undoubtedly illustrate."

Refs to the judgment of Thorpe J (as he then was) in H v H [1993] 2 FLR 335, and analyses on the basis that the emphasis was on the comparison between pension rights earned during the cohabitation and future pension rights: "I think that in deciding what weight to attach to pension rights it is more important in this case to look to the value of what has been earned during cohabitation than to look to the prospective value of what may be earned over the course of the 25 or 30 years between separation and retirement age". This seems to me a

very different point of reference. Notes that in (Harris v Harris [2001] 1 FCR 68) Thorpe LJ (as he had become) appeared to eschew this approach when he said, albeit in a slightly different context: “I do not myself find the argument on proportionality to the pension earned during the marriage to be an attractive one”.

“It is perhaps also surprising that the judgment in H v H (supra) is thought now, nearly thirty years later, to be authoritative on this issue, especially if one reflects on the fact that at the time it was delivered pension sharing did not exist, White v White (supra) had not been decided and the use of CEs in these cases was not widespread.”

On whether the exclusion of the pre-marital portion of the pension is just the identification of non-matrimonial property: Accepts that where the pension was wholly accrued prior to the marriage then it is easy to identify it as non-matrimonial property: see, for example, King J (as she then was) in GS v L [2013] 1 FLR 300 and Mostyn J in WM v HM [2017] EWFC 25.

In a sharing case the exclusion of the pre-marital portion of a pension might well be a legitimate exercise in principle, although, as identified in M v M [2015] EWFC B63, the court might retain an element of discretion as to the level of sharing.

In a needs case, the approach needs to be treated with more caution. Where the pensions concerned represent the sole or main mechanism for meeting the post-retirement income needs of both parties, and where the income produced by the pension funds after division falls short of producing a surplus over needs, then it is difficult to see that excluding any portion of the pension has justification. In the words of Lord Nicholls in White v White [2000] UKHL 54: “in the ordinary course, this factor”..i.e. the factor that the property concerned is non-matrimonial…“can be expected to carry little weight, if any, in a case where the claimant's financial needs cannot be met without recourse to this property”.

The straight-line methodology of calculation, though simpler and easier to apply in practice, conceals an unfairness in that the value of a defined benefit pension scheme based on final

salary does not accrue on a straight line basis, especially if the member spouse concerned starts work as a lowly paid junior employee and rises to a highly paid director level many years later. The pension will accrue much more value in its later years when the member spouse has reached the high salary level and this is likely to be, as it is in the present case, firmly during the marriage. Thus, where an apportionment is to be made, the straight line methodology of apportionment may well not be fair and some caution needs to be exercised before using it if other fairer methodologies are available. Other methodologies include inviting the PODE to make a notional calculation of the current CE on the basis that the member spouse's earnings rose only with inflation in the post-marriage period - I note the PODE was not invited to make these calculations in the present case.

On the question of offsetting:

The orthodox view, encouraged by Thorpe LJ in Martin-Dye v Martin-Dye [2006] 2 FLR 901, is that pensions should be dealt with separately and discretely from other capital assets and with a view to their post-retirement income producing qualities. The PAG report offers a similar view: "try, if possible, to deal with each asset class in isolation and avoid offsetting…a discrete solution which equalises pensions by pension sharing orders and which equalises non-pension assets by lump sum or property adjustment orders" (page 35).

It is undoubtedly the case, however, that many litigants choose to blur the difference between the categories and engage, to a greater or lesser extent, in an offsetting exercise. It needs to be borne in mind, however, that mixing categories of assets runs the risk of unfairness in that valuation issues become very difficult and, absent agreement, it may be unfair anyway to burden one party with non-realisable assets while the other party has access to realisable assets.

Judge reached the conclusion that he should divide the pensions with a view to making pension sharing orders which have the effect of providing for the parties equal incomes at a specified time in the future.

KM v CV (Pension Apportionment: Needs) [2020] EWFC B22 (25.02.20)

An appeal before HHJ Richard Robinson at Medway Family Court

W in person. H = McKenzie Friend

24-year relationship including cohabitation, separated in 2011

One son aged 12

H remained in FMH

Cross-petitions – W's application for decree absolute was not granted, because she was not the petitioner

Before a DDJ in December 2017, parties agreed FMH would be sold, W's mother would be paid £20,000 from the sale proceeds, and remaining equity divided equally

Matter listed for final hearing in June 2018

H did not attend – his application for a PSO was struck out

The strike out decision set aside in August 2018

Further final hearing in February 2019

W represented by counsel and H by McKenzie friend at that hearing

DJ considered the agreement made in relation to the home and refused to vary it

Accordingly, the only issue before the court was whether or not to make a PSO

W = a serving police officer since 2004 with income of £35,058pa net

W = police pension scheme worth £131,500 at December 2017

DJ held that, on the evidence, only half of W's pension had accrued whilst they had been living together

First instance judge decided the appropriate method of valuing the pension would be use the value in 2011 when the parties had separated

On a straightforward equality sharing principle, that would entitle the husband to a share which equated to £21,500

DJ accepted W's position that H should not be awarded even that sum because she had initially made the payments towards the mortgage and H had let the mortgage account fall into arrears

H appealed the final order

Issues on appeal:

1. Whether H had, in fact, made contributions to the mortgage of about £11,000 in cash to W's account – shown by bank statements before the court, but had not been considered - and whether that would make any difference;
2. Whether the DJ had used the right approach to the valuation of W's pension, and whether it would have made any difference in the light of the parties' respective needs and contributions;

Issue 1: Found to be unmeritorious. H unable to point to any bank statements which had not been considered or to show any material which differed from DJ's findings that he had not made any payments towards the mortgage.

Issue 2: W's case on Issue 2 was that the marital element only 7 out of 15 years. Any post-separation increase was quite different to 'passive growth' and her contributions far outweighed H's interest in the pension fund. At separation, her pension was worth £43,000, half of which would be £21,500. Her greater contributions during the marriage should be

set against that share, so H should get £0.

H's case on Issue 2 was that W's pension was a matrimonial asset which was in place at

the time of the marriage. The up to date CEV should be used. The parties lived together for 24 years and had a son. He had contributed equally if differently emotionally, physically and financially over 24 years. He had been the main bread winner and had supported W

when working in low paid jobs and studying, which had led to her obtaining a police job. He would lose the right he had therefore ‘earned’ to benefit from W’s pension.

Appeal court referred to the PAG report which post-dated the DJ’s order.

As a general rule, courts assumed that contribution-based arguments were of less weight when needs took precedence.

There was a danger that too much concentration on principles derived from big money sharing cases could confuse the fair results in smaller needs cases.

Applying settled law, the relevant date for assessing pension to be valued was clearly the date of the trial. This was a needs case: H was on benefits and, on the evidence, vulnerable.

W also claimed needs – no secure housing, debts and mental health issues, although they did not prevent her from working.

While contributions had to be considered, the judge appeared to have discounted all other factors in the s.25 MCA 1973 exercise in favour of the contributions point.

Seamless' relationship moving from cohabitation to marriage: W had joined the police and acquired part of pension during cohabitation.

Lack of pension sharing report made the case tricky to decide: PAG report recommended that, where there were public sector pensions with a value of over £100,000, a pension sharing report should be obtained.

Police pensions were particularly affected as the length of service and benefits were generous and the issue would be what pension was likely to be generated on retirement.

Difficulty in estimating future needs when H was - and would continue to be - in receipt of state benefits and eligibility for means tested benefits may be affected.

The correct approach is to conduct a comparative analysis of the parties' respective income and needs in retirement, taking into account all the s.25 criteria, including health, needs and contributions and the extent to which W's pension should be apportioned. Only then could a fair decision be reached.

Outcome: Appeal allowed in part and remitted for re-hearing to that extent (pensions).

Zoë Saunders

St John's Chambers

10th November 2020