

FAREWELL CALDERBANKS, HELLO OPEN OFFERS: THE NEW COSTS RULES

David Hodson

On 3rd April 2006, new rules will bring about probably the most dramatic change in costs in family law finance proceedings that many of us have witnessed in a lifetime of practice. The rules are, for the most part, simple, self-explanatory and clear to understand. However for solicitors, legal advisers, advocates and judges, it is likely to make a big difference in the way we approach our cases, the tactics we use and the key element that costs has in a case, both as to the client's payment of our costs and the client's recovery of costs against the other party. For clients, it may reduce the puzzlement and the bewilderment of the present costs law but it may also lead to an unwelcome shift in the balance of power between the parties as cases head towards a final hearing.

The headlines

- Applies only to ancillary relief proceedings, not TOLATA, Sch 1 CA or Part III MFPA
- Calderbanks are abolished
- Open offers will become the norm.
- Starting point of no order for costs
- Court may make costs orders because of the conduct of a party in relation to the proceedings
- Factors in making costs orders include failure to comply with orders and rules, open offers, manner of dealing with a case, relevant conduct, whether reasonable to raise or contest an allegation and the financial effect of any costs orders
- New form H at all hearings and new Form H1 at the final hearing to allow court to take costs liabilities into account.
- Applies only to new applications issued on and after 3rd April.
- But no power for interim lump sums for costs introduced at the same time.

Brief history

In civil litigation, costs follow the event. In family law with its emphasis on settlement, the event became the offer. Although the court had very wide discretion, in many cases costs in financial proceedings were on the basis of which party made the offer closest to the final outcome. The offers were named after a case in which they were used, Calderbank, although ironically the case itself was mainly about contact. Case law developed, primarily Gojkovic (No 2). Calderbanks had a justice about them in cases where one party had not made reasonable offers or fully engaged in the negotiation process. However with such a wide range of outcomes being within the ambit of legitimate discretion, the correct pitching of one's Calderbank offer sometimes had more luck than legal expertise. Moreover, for the judge, it was a demoralising process when the whole edifice of a carefully constructed outcome after a contested final hearing was demolished when Calderbanks were opened up.

The Family Proceedings Rules 1991 R 2.69 endeavoured to codify the Calderbank law. Not the finest piece of drafting, some parts were simply daft, ignored by sensible practitioners and quickly repealed. Others presented more problems in practice. In particular, the requirement to make a costs order if a Calderbank offer was not beaten ignored what happened if neither party's offer hit the mark of the final order. Too often, the applicant got her costs even though her offer was higher than the judge had ordered but simply because the respondent's offer was lower than the judge's outcome. This and other problems with the costs rules were highlighted in the judgement of Nicholas Mostyn QC sitting as a deputy High Court judge in GW v RW. His judgment garnered support and praise across the country but his approach was roundly condemned by the then President in the Court of Appeal in Norris. Instead the court accepted that an urgent review was needed, stating an increasingly held view that the starting point should be no order as to costs. This prevails in most children cases and is consistent with

a collaborative search for a fair outcome, as we now rightly consider our work.

The new rules are the result of this review. However reaching them has been a traumatic journey with many disagreements on the drafting committees and the final rules being very different to those in August, which the DCA had thought were agreed! Mostly the rules are clear but in several places they show signs of drafting compromises which obscures the more sensible meaning.

Perhaps this is one reason for the President issuing a Practice Direction “Ancillary Relief: Costs” dated 20 February 2006 just in case the rules left any one in any doubt what they meant!

The new law

It is the Family Proceedings (Amendment) Rules 2006 (No 352). There is a new Rule 2.71 FPR. Rules 2.69, 2.69 B and 2.69 D are defunct when the new costs rules apply.

New Rule 2.71 starts as follows: “*CPR rule 44.3 (1) to (5) shall not apply to ancillary relief proceedings*” (R 2.71 (1)). This could perhaps have been clearer! Whilst most solicitors try to use language our clients understand and often refer to “*financial provision*”, ancillary relief is strictly only relief ancillary to a suit such as divorce, nullity, js. Accordingly the new rules do not cover TOLATA, Schedule 1 Children Act or Part III MFPA claims after an overseas divorce. In practice, it is highly likely that the new rules will become the norm for all family cases so practitioners will ignore them in non AR cases at their peril.

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) (a)). In shorter terms, no order as to costs becomes the norm. This is not the same as costs coming from the estate, the common pot, as often found in disputed probate and inheritance cases. Each party in AR cases will have to take responsibility for the level of their own unpaid fees.

Beware subparagraphs of regulations which end on a “but”! Having presented the norm, the rules then go on to provide that the court may make a costs order: “... *at any stage of the proceedings where it considers it appropriate to do so because of the conduct of a party in relation to the proceedings (whether before or during them)*” (R2.71 (4) (b)). Previous drafts of the rules referred to misconduct, unreasonable conduct and a much higher threshold of proof before a costs order could be made. Good sense in drafting has now prevailed. This is conduct in relation to the proceedings, not marital conduct. It is not the “inequitable to disregard” test of s25(2)(g) MCA. This is conduct in the widest sense of actions, approach (as in the SFLA/Resolution Code and Law Society Protocol), attitude and accedence to orders and rules. It incorporates conduct before proceedings, to include premature issuing without giving a reasonable chance to settle, and attempts to defeat claims, dissipate assets or otherwise frustrate the powers of the court.

It is a low threshold and will often not form any real hurdle at all. Courts will simply and quickly go direct to the factors which must be taken into account before any costs orders are made.

The new rules also make clear that at a First Appointment, “(e) *in considering whether to make a costs order under rule 2.71(4), [the court] must have particular regard to the extent to which each party has complied with the requirement to send documents with Form E;*” new R2.61 D (2)(e). This costs order can be made at the FA and probably will be made much more often especially with the better Form E in use since 5 December 2005.

Factors for consideration on making any costs orders

Presuming the court has deftly stepped over the low threshold of conduct in the proceedings of R2.71 (4)(b) (above), it has to decide what, if any, costs orders to make. The guidance is clear and broad.

In deciding what order (if any) to make under paragraph (4)(b), the court must have regard to—

- (a) any failure by a party to comply with these Rules, any order of the court or any practice direction which the court considers relevant;
- (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 the proceedings which the court considers relevant; and
- (f) the financial effect on the parties of any costs order. (R 2.71 (5))

The court can make an order for costs if either party (or both parties) have failed to comply with:

- the rules, the Family Proceedings Rules 1991 as amended,
- orders of the court both specific to the case and general orders for directions which some local courts make and
- any practice direction,

as long as the court considers the failure to comply is relevant, (a) above.

This will be relevant where the failure has increased costs of the other party, delayed the proceedings, added to court time or caused other costs. It will incorporate failures to give disclosure such as failure to set out the full and complete facts in the new Form E. It will therefore include costs of extra questionnaires or investigations to overcome deficiencies in initial disclosure. The present case law on costs orders is that failure to give disclosure and then update appropriately can be met by costs orders, sometimes on an indemnity basis. I see no reason for there to be any change under these new rules in (a) above. It is now explicit. This final version is much wider than previous drafts and the DCA have clearly listened to representations made. This factor (a) will greatly help the party faced with a spouse who rides roughshod over the procedural and disclosure requirements. Now costs orders should follow.

The court will consider open offers, factor (b) above. This is likely to be the primary basis of whole-case costs orders (as distinct from costs orders on discrete issues); open offers replacing Calderbanks. It is dealt with below.

One criticism has been that the family courts have obsessed over offers and not looked at the reality of the success, or lack of success, the reasonableness, of raising, pursuing or contesting particular issues or allegations, whether at the final hearing or at a discreet interlocutory application. This has changed, factor (c) above. The court will now look at *whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue*. Reasonable is wider than merely succeeding or losing. I believe this factor is less likely to be in relation to the whole application. It is more likely on discrete aspects of the case.

Examples include

- the level claimed for spousal support,
- allegations of non-disclosure,
- genuineness of soft debts,
- excessive income or capital claims,
- raising marital conduct,
- true ownership or control of companies or other entities.

Given that most cases with sensible, experienced family lawyers do not need to have a final hearing, then any final hearings should (!) only take place because there is one or more disputed issues or allegations. In these sorts of cases, where the court makes a finding on the issues in dispute, it is not difficult for the court also to make costs orders based on whether it was reasonable to pursue or contest the issue. This is better, fairer and more open than the court being only permitted to see secret Calderbank offers after the dispute is adjudicated.

It highlights for practitioners the need for care in drafting the pre First Appointment Statement of Issues. Why should an issue raised in that document which then fails at the final hearing not result in a costs order on that discrete aspect? Skeleton arguments are invaluable but will need care as to what they put in issue, and so need tighter drafting. A scatter gun firing off a whole host of issues may produce costs orders later in the case. This factor (c) encourages principled bargaining and discourages positional bargaining. Getting to Yes may also mean getting more costs orders. This factor should result in some spurious arguments not even being run!

Well over twenty years ago, John Cornwell and a few other leading solicitors formed the Solicitors Family Law Association (SFLA) and then produced its Code of Conduct which has had huge global, beneficial impact. But over those years, all of us involved in redrafting the Code and endeavouring to operate in accordance with the Code at court in the face of aggressive, non settlement-orientated approaches have had a huge frustration. It had no teeth, no direct enforcement and consequences in law for non compliance. We had some helpful comments by supportive judges that cases should be conducted according to the Code. The Law Society Protocol helped. But too often we and our clients felt a lack of support. Now the courts are mandated to consider not only the steps taken in proceedings but the manner. The court must have regard to *the manner in which a party has pursued or responded to the application or a particular allegation or issue*", factor (d) above. This is thoroughly within the Law Society Protocol (second edition) and the SFLA (now resolution) Code. This is excellent news and the DCA and the committees are to be entirely applauded by all those committed to good practice in family law.

Constant experience is that the manner in which a case is dealt with has a greater long term effect on the parties than the detail of the outcome, and certainly a much greater impact on the wider family members including children. Lawyers should refer to the Protocol, the Code and the various Good Practice Guidances for appropriate manner of the conduct of family law cases. Factor (d) helps to maintain the culture of practice of English family law, almost certainly the most conciliatory and settlement orientated regime in the world. But we must never be complacent. Factor (d) will keep us all on our professional toes and hopefully improve the standards even more.

The most controversial factor in which the court can make a costs order is *any other aspect of a party's conduct in relation to the proceedings which the court considers relevant*, factor (e) above. This is not marital conduct but conduct in the proceedings. Unlike previous drafts of the rules, it is not defined and seems now more of a catch-all clause. No doubt, in time, particular aspects of conduct will be often included and perhaps some local courts will let it be known that particular local (mis)conduct will find its way to costs orders under this clause.

Everyone committed to good practice and a conciliatory, constructive approach to the resolution of matters will support condemnation in costs for bad conduct in respect of the proceedings. Too often good progress in a case is hijacked, delayed and/or frustrated by one party's actions. However I hope that, at least initially, these factor (e) conduct costs will only be utilised in the more serious and blatant cases until the new explicit law beds in. I have an anxiety that they could put the solicitor and client in conflict, particularly where the alleged conduct is a course of action recommended by the solicitor. Naturally solicitor/client privilege means that who recommended and who instructed is not disclosed. This is not wasted costs but conduct costs. In some cases it may be a narrow line.

In any event, feelings invariably run very high by the time a case has reached final hearing. Positions are polarised. Personal animosities find a forum on disputes in the family court. Sometimes the conduct of the case is much worse than the conduct of the break up of the marriage. Added to this, the costs at the final hearing can be a significant element of the overall net assets. I fear a number of cases in which the final hearing is taken up not just with particular allegations on issues in dispute but on in depth allegations about the merits and demerits of courses of action, conduct, adopted in the proceedings on the basis that they become heads of conduct costs. In this way, the lawyer becomes as much a respondent to the application as his client. I anticipate much variation around the country between courts on how this is interpreted. The principle of this new factor is very laudatory. It must be hoped that its application has the desired effect in improving the conduct of cases and not spread the war onto a new battleground.

Finally the court must regard *the financial effect on the parties of any costs order*, (f) above. This was introduced very late in the discussions. It is almost certainly a response to the major problem identified by Charles J in C v C (Costs : Ancillary Relief) 2004 which will affect many cases and many practitioners. How should the incidence of costs be treated in the s25 exercise? As an ordinary debt which has to be paid, so any award would be gross of the costs liability? But this would be the same as ordering one party to pay some of the other side's costs. For example, he said, in a non big money, sub White, case based on needs, an award for lump sum which was just enough to rehouse the wife would prejudice her if she then had to bear her own costs. If all the assets were in the husband's name, will a court order him to provide for the housing needs of his wife and to pay her costs on top? This is consistent with s25 but may not be consistent with the costs rules on the other factors. Fortunately Charles J was on the Rules Committee! This factor (f) now means judges on formulating their final judgement must double check and cross reference the effect of any costs order they are minded to make on the parties' finances, especially in a basic needs case. This factor has rightly been included at the last minute.

Implications for practice of these factors

Time at trial will be longer as costs will be argued during the hearing and not after judgement when they were not part of the time estimate. So time estimates will need to be longer. As costs are sometimes a quite significant percentage of assets in dispute, they will be often argued at some length during the final hearing. After a final hearing of 2 days, costs arguments post judgement can be at least an hour, sometimes more. This should now be incorporated into the time estimate.

Despite the intention of no order as to costs as the norm, I anticipate more costs orders, and certainly many more costs arguments on a wider range of circumstances and bases, than at present and until the new law settles down.

It must be good practice to notify well in advance if costs are being sought at the final hearing, why sought, under which factor and with some particularisation. At the end of an unsuccessful FDRs, 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 President's Practice Direction refers to this: "Parties who intend to seek a costs order against another party in proceedings to which rule 2.71 of the Family Proceedings Rules 1991 applies should ordinarily make this plain in open correspondence or in skeleton arguments before the date of the hearing. In any case where summary assessment of costs awarded under rule 2.71 of the Family Proceedings Rules 1991 would be appropriate parties are under an obligation to file a statement of costs in CPR Form N260 (see CPR Practice Direction supplementing Parts 43 to 48 (Costs), Section 13 and [the matters under Miscellaneous below])."

The judge and parties then know as trial starts what costs are in issue and how much, and how those costs have been arrived at. Nevertheless it will still be incumbent on solicitors to be able to argue, or brief their counsel, how any costs were arrived at. Taking the full time records for the whole case may be wise.

In any event, if matters develop at trial in an unexpected direction, as is one primary risk of final hearings, or if the judge is unhappy with an aspect of the case which fits one of the costs factors, then the advocate will still be expected to be able to argue the costs on a particular issue raised or opposed or the manner of dealing with an aspect of the case etc. Moreover the advocate must be able to quantify the costs incurred on the issue. It is more likely to become part of final hearings. Solicitors may find themselves giving evidence on costs or indeed on a particular action, approach or manner of dealing with the case.

Previously, if the lawyer knew the client would not be seeking costs orders in the case, there was little need to prepare what costs were incurred and at what stage. Now, with the risk that the judge may demand this information to disallow any paid costs or not allow as a debt any unpaid costs, the lawyer must be ready at court to deal with the issue. The time recording and other costs information should be available on the file at the final hearing. It is yet further reason why inadequate representatives from a law firm sitting behind counsel is bad for the client as well as the case, counsel and the judge.

Certain aspects which may give rise to costs orders include: relying on a sole expert who is shown to be unreliable even biased; fruitless, possibly groundless yet exhaustive investigations into alleged non disclosure; instructing a sole expert after a joint expert's report; wrongly alleging marital conduct; proven non disclosure including disclosure known to be misleading; over ambitious income and capital needs; and many more! The court may make costs orders or it may add back costs unreasonably incurred by one party and then not treat as a liability

At present, costs orders tend to be all or nothing: costs of the whole case or none at all. The new rules anticipate more costs orders on discrete issues, such as some of the R 2.71 (5) factors. This will require lawyers on both sides to know, or estimate accurately, what costs had been incurred on the discrete issues.

With a norm of no order as to costs, it is grossly unfair if one party has paid their costs from joint assets and the other still owes her lawyer. In future, it will be essential on Day 1 to resolve what costs are paid out to whom and when from the family shared assets, especially joint assets. Beware more early pre-emptive withdrawals from joint assets for costs payments!

Open offers

Calderbank offers, and indeed any privileged offers, are inadmissible both in open proceedings and specifically on costs. There will be simply no point in writing Calderbank offers any more. Privileged letters will still have their place, and indeed will have a greater role than before, but simple privilege will apply and such letters cannot be referred to on issues of costs. They can be produced at an FDR when the court is entitled to look at privileged material. However they will not have costs implications at a FDR. Mediation and round table meetings will also be only simple privilege.

Instead, open offers have to be made. Only open offers will be considered. *"No offer to settle which is not an open offer to settle shall be admissible at any stage of the proceedings, except as provided by rule 2.61E"* (R 2.71 (6)). (R2.61 E deals with open proposals before final hearings and are dealt with below.) So the new costs rule makes inadmissible on costs an offer which is expressed as being *"without prejudice"* or *"without prejudice save as to costs"*.

Some of the present law in relation to Calderbanks will continue to apply to open offers. The open

offer should be precise, comprehensive, clear and capable of acceptance and of forming the basis of an order. An open offer can be made at any stage, and I believe we will see more offers being made much earlier in the proceedings. But costs risks on the recipient of the offer only arise when there has been disclosure. Only when disclosure is complete or, in practice, materially complete can a recipient of the disclosure reliably make or consider offers (or be at risk on costs). This is another imperative to the giving of early and clear, comprehensive disclosure.

Open offers do not have to be lodged at court when they are made. However the court at the final hearing will want to know not only what is each party's case for the outcome (the requirement for open proposals before the final hearing remains, see below) but also the various offers made throughout the case including as the costs have increased. The judicial habits of a lifetime of making costs orders based on reasonable offers made or rejected will not suddenly die, nor should they. The problem with *Calderbanks* was not the inherent principle that a party whose reasonable offer has been rejected should have their costs but the fact that the judge did not know about this until after the final judgment. Hereafter the judge will know what open offers have been made and by whom and at which stage and, just as crucially, which offers have been rejected or have had no response. There will be a bundle of offers. Despite the starting point of no order as to costs, I am sure many cases will continue to have whole-case costs orders made where it is clear from open offers that one party has taken a reasonable stance in endeavouring to settle and the other party has not.

Negotiating only behind privilege (therefore unknown to the court at any stage) will give the court the impression of an unreasonable party. Not making open offers, even after disclosure, and not entering into attempts openly to narrow the issues in dispute in offers is likely to result in costs orders. The negotiation process will now be transparent and many more costs orders are likely to flow or (more worryingly for party's lawyers) have an impact in the outcome of the judgement.

The major difference for practitioners is that we were willing in *Calderbank* offers to make proposals which were literally prejudicial to our client's open position at court. We cannot therefore simply recast our previous *Calderbank* offers as open offers. Over the coming months, I am sure there will be much debate within practices and amongst groups of local family lawyers about what is, and what is not, prejudicial to include in an open offer. There will be some clients, and perhaps quite a few lawyers, who will be (over) cautious and protect their offers by simple privilege. However many specialist family court judges are robust, pragmatic and sensible and will not often allow a party to be prejudiced if they see that they have moved at trial from a stance in an earlier offer. Perhaps a bolder, less cautious and more open approach may now prevail.

Treatment of costs

What will happen to the client's costs liability at trial? The Leadbetter style of approach of adding back paid costs did not find favour with many solicitors, although was more preferred by the Bar, and was criticised in Wells (2002). However surely it must reappear. The amount that each party has paid towards their legal costs should be added back into their assets and their total costs shown as their liability.

This also has the advantage of highlighting any significant discrepancy between the level of costs incurred. Of course some parties do have genuinely higher costs due to the work involved e.g. a substantial amount of investigation into complex disclosure. However there are too many cases (and some scandalous cases on any basis) in which there is a huge difference in costs. One party instructs a lawyer charging just above legal aid rates and does a lot of the work herself to save costs and pays costs up to date, then sees her husband instruct a lawyer with an hourly rate of several hundred pounds more and incur many tens of thousands of pounds more in costs, but then sees the judge make no real condemnation of the costs differential and even sometimes allows each enough to pay their own costs! In this sort of case, the no order as to costs principle is a significant benefit as the party that has

unreasonably incurred much higher costs will not have the comfort that their costs will come out of the pot before division. Nor will the costs frugal party be, or feel, penalised.

In summary a judge can:

- treat each party's unpaid costs as a simple debt,
- ignore them from the debts column altogether,
- add the paid costs back in as if part of each of their assets,
- make adjustments to the capital outcome in the final judgement to reflect either costs liabilities or costs incurred or, finally,
- make a costs order as part of the final judgement; or
- a combination of these!

What judges will not do is hear costs arguments and make costs orders after the final judgement. It will be part of the judgement itself.

Commencement date of the new rules

(1) *The 1991 Rules shall apply to*
(a) an application for ancillary relief made in a petition or answer before these Rules come into force;
(b) an application for ancillary relief made in Form A before these Rules come into force (no such application having been made in the petition or answer); or
(c) an application under section 10(2) of the Matrimonial Causes Act 1973 or an application under section 48(2) of the Civil Partnership Act 2004 made in Form B before these Rules come into force, as if these Rules had not been made. (R2.71 (10)(1))

(2) *The 1991 Rules shall also apply to an application of a kind mentioned in paragraph (1) which is made after these Rules come into force but is heard by the court at the same time as an application to which paragraph (1) applies, as if these Rules had not been made.*

This must take the prize for the most convoluted piece of drafting in the rules. Why have a positive statement if a double negative can be found?!

The previous draft rules referred only to Forms A issued after a certain date. The inclusion of reference to prayers in the petition, which is in any event now an almost purely historical anachronism, only confuses. I understand from the DCA that the concern was that as some parties may have already issued petitions with full AR prayers expecting the old costs rules to apply, they should not now find the new costs rules applying to their case if they issue Form A after commencement. Given these rules have been discussed for many months, I do not consider this is a valid concern in contrast to the confusions it will cause and the number of old rules cases it will create. The answer was instead to give longer between the publication of the rules and commencement date so any one with an already issued petition with prayers and wanting old rules could apply on Form A before commencement.

I attach a grid showing the various, most likely scenarios of petitions, answers and Forms A and whether it is old or new rules which apply.

So a Form A post 3 April based on a pre 3 April petition with AR prayers will not qualify under the new rules but in a case with a pre 3 April petition with no prayers, a Form A post 3 April by a respondent without an answer (or with an answer without AR prayers) will qualify under new rules. This is just silly, especially as it is often totally arbitrary which party applies. Judges dealing with final AR hearings in 18 months time will have to look at the pleadings in the divorce suit to decide if it is new or old rules costs which apply. Can't we do better than these confusions?

Where there are cross Form A applications where one is old rules and one is new rules, the old rules apply, R 2.71 (10) (2) above.

As it can take sometimes 18 months, occasionally even longer, from issue of a Form A (and much longer from the time of the divorce petition) to a final trial, there will be many cases under the old rules for a couple of years to come. Whilst judges must apply pre 3rd April law to pre 3rd April applications, experience of such changes in the law is that many judges apply the principles of the new law to the older cases. Of course Calderbanks will still be permissible in pre - 3rd April application cases but it may be wise to accompany those Calderbanks with open offers. The court has a wide CPR discretion on costs under the pre 3rd April, law and can certainly be expected to apply the principles in the new rules.

APPLICATION OF OLD AND NEW COSTS RULES FOR PETITIONS/ANSWERS AND FORMS A

	Petition	AR prayers	Answer	AR prayers	Pre 3 April Form A	Post 3 April Form A	Old/New rules
1	pre 3 April	y			y		Old
2	pre 3 April	y				y	Old
3	pre 3 April	x			y		Old
4	pre 3 April	x				y	New
5	pre 3 April	x	pre 3 April	y	y		Old
6	pre 3 April	x	pre 3 April	y		y	Old
7	pre 3 April	x	pre 3 April	x	y		Old
8	pre 3 April	x	pre 3 April	x		y	New
9	pre 3 April	x			y	y, by Resp	Old
10	pre 3 April	x	post 3 April	y	y		Old
11	pre 3 April	x	post 3 April	x	y		Old
12	pre 3 April	x	post 3 April	y		y	New
13	post 3 April	y				y	New
14	post 3 April	x				y	New

Grid © February 2006

Form H

Rule 2.61 F is amended and there is a new Form H attached to the new rules which must be used. "Subject to paragraph (2), at every hearing or appointment each party must produce to the court an estimate in Form H of the costs incurred by him up to the date of that hearing or appointment". (R 2.61F (1)). The Form separates out costs before and after issue of Form A, any previous solicitors costs, disbursements and counsel's fees and must state what has been paid to date by the client in order to show what is outstanding.

Moreover "not less than 14 days before the date fixed for the final hearing of an application for ancillary relief, each party must (unless the court directs otherwise) file with the court and serve on each other party a statement in Form H1 giving full particulars of all costs in respect of the proceedings which he has incurred or expects to incur, to enable the court to take account of the parties' liabilities for costs when deciding what order (if any) for ancillary relief to make" (New Rule 2.61F(2)) This will be an important document on costs. It has the same information as Form H but in addition, separates out costs after issue of Form A and up to and including FDR, costs after FDR and until preparation of the Form H1 and then costs from the preparation of the Form H1 until the expected end of the final hearing and then costs estimated to be incurred in implementing the proposed order. It sets out the fee earners who have dealt with the case, their status and hourly rate charged.

A lot more time and information will be needed by the solicitor in preparation of this form. Estimating

costs of post trial work will be difficult, including pension sharing implementation and costs of real property transfers. The Form will give courts masses more information about how the costs have developed during the case. It will almost certainly highlight the iceberg effect of costs where such a high proportion of the costs of a case are in the weeks before the final trial and the final hearing itself. All counsel's fees for the final hearing must be shown as incurred after the preparation of the Form H1, presumably even if the brief fee has to be delivered more than 2 weeks before trial.

The President's Practice Direction helpfully adds: "The purpose of this form is to enable the court to take account of the impact of each party's costs liability on their financial situations. Parties should ensure that the information contained in these forms is as full and accurate as possible and that any sums already paid in respect of a party's ancillary relief costs are clearly set out. Where relevant, any liability arising from the costs of other proceedings between the parties should continue to be referred to in the appropriate section of a party's Form E; any such costs should not be included in Forms H or H1."

Open Proposals

Rule 2.69 E, open proposals before final hearing, remains in force. Indeed it has greater force now as it will be the culmination of the open offers made throughout the case without the games played hitherto of pitching the open offer just below/above the Calderbank. The art was to lure the judge with the bait of the attractive open offer. But in case the judge only got close to the bait but did not bite, the Calderbank net just outside the bait then scooped him up. Was it any wonder judges so disliked the Calderbank experience? Now all offers will be open, at least for costs implications.

Interim lump sums for costs?

Australia has a similar "no costs" law to England. In my recent experience in two years in New South Wales, there was an expectation that each party would be responsible for their own costs. This may occur here.

However one fundamental difference between England and Australia is their power to order interim lump sums for costs. I believe that England's continued failure to introduce this power has worked much injustice in many cases over the years but will work even greater injustice with these new costs rules.

Presuming each party manages to stay just on the right side of litigation conduct and manner of approach etc and given the vagaries of making offers in the context of the wide discretion constantly triumphed by the higher courts, then the party with the more substantial funds is put in an incredibly better position to litigate than the other party, often the applicant, who may have no or minimal liquid funds to afford to litigate. The wealthy party can engage in substantial trial by correspondence knowing that every letter received by their spouse, with consequential legal action, deprives them of much-needed funds for the final hearing. Every interlocutory application made, which avoids a costs order, uses up yet more funds. In this way, in a war of attrition which alas is what final hearings become, the wealthier party has a very substantial advantage in being able, over time, to deprive the other party of the funds to go on. In the past, there has been a significant risk factor of such a course of action in Calderbanks. If the fact of having to make open offers means that there may be less risk, perhaps because some privileged proposals cannot be made openly for fear of prejudice at trial or if the no order as to costs really does become the norm, then the applicant may be severely disadvantaged. I saw such tactics used frequently during my time in Sydney. Frankly, it is a legitimate tactic. The response is not to condemn the tactic but to condemn the lack of power to overcome it.

The answer where resources permit is the power for the court to grant interim lump sums. It funds the case as it goes along. It distributes available capital as lump sums to the parties in equal measure or according to their legal needs as determined by the court. Parliament has agreed that such a measure is appropriate in the Family Law Act 1996 when inserting a new s22A (4) to the MCA. It was for totally

separate policy reasons that the Act (and new s22A (4)) was never implemented. A short judicial attempt in Barry to introduce interim lump sums for costs failed in the Court of Appeal in Wicks. However that court then expected the Family Law Act to be imminently implemented, so understandably preferred statutory law to case law. That has not happened. I understand the DCA supports the introduction of the power but seems not to have done anything about it yet. We urgently need that power. We have needed it before. We desperately need it now with the expectation that each party will be responsible for their own legal costs.

There is no prejudice by interim lump sums where ultimately each party will meet their own costs because the pot is reduced en route to the final hearing rather than being shown as liabilities at the final hearing. It will dramatically overcome the significant power imbalance that too often exists when the economically weaker applicant has to take on the financially stronger respondent who may be reluctant to give disclosure, may make matters very difficult for the applicant but not ultimately have costs orders made against them.

The President's Practice Direction makes clear that mps is still available to include provision for legal costs, referring to the well known case law. It says: "An order for maintenance pending suit which includes an element to allow a party to deal with legal fees (see A v A (maintenance pending suit: provision for legal fees); G v G (maintenance pending suit: costs); McFarlane v McFarlane, Parlour v Parlour; Moses-Taiga v Taiga is an order made pursuant to section 22 of the Matrimonial Causes Act 1973, and is not a "costs order" within the meaning of rule 2.71 of the Family Proceedings Rules 1991."

But this only shows the big money mentality which too often pervades. Very few can afford to fund costs out of income. Most do so out of savings, sales of shares or policies etc. Many more need interim lump sums for costs than can ever afford costs from income on a mps application.

Some judges in the higher courts constantly praise the broad discretion available in our law to suit individual cases. I believe that is not the biggest issue facing solicitors across the country in daily practice. Instead it is one of imbalance, of discrepancy of economic clout to afford full or equivalent legal help, of vulnerability in negotiating and in representation to obtain a fair outcome for a client. Bullying does not stop on the breakdown of the relationship. It continues too often throughout the proceedings but in a way that will never be litigation conduct. We see it but often the courts do not. Too many outcomes are determined not by poor quality of representation or the lack of fairnesses in the law but simply due to inequalities of funding representation.

This can be significantly overcome by the power to have interim lump sum for costs. This affects keenly the solicitor and client relationship. It is we solicitors who take the brunt of our client's inability to go on and decide to accept what we know is a settlement forced on them by the financially stronger party. It should be urgently introduced.

Civil Proceedings Rules on costs

The provisions in CPR rule 44.3 (6) – (9) still apply. Moreover the CPR, statute and case law general provisions on costs still apply including

- Duties to keep clients informed about costs, to be read in conjunction with the Law Society requirements and also the Law Society Protocol
- The separate bases of standard and indemnity costs and the case law of when they are appropriate and the relevant procedure of claiming each
- Summary and detailed assessment of costs
- The assessment process (happily no longer know as taxations!)
- Periods for payments dependant on stage of proceedings and statutory interest

As stated above, “CPR rule 44.3 (1) to (5) shall not apply to ancillary relief proceedings” (R 2.71 (1))

Miscellaneous

The President’s Practice Direction states as follows. *“The President’s Direction: Civil Procedure Rules 1998: Allocation of Cases: Costs dated 22nd April 1999 (as supplemented by the President’s Direction: Costs: Civil Procedure Rules 1998 dated 24th July 2000) makes provision in relation to the application of the (Civil Procedure) Practice Direction about costs (Supplementing Parts 43 to 48 of the Civil Procedure Rules) to family proceedings to which the Family Proceedings Rules 1991 apply. Those President’s Directions will apply to a costs order made under new rule 2.71 of the Family Proceedings Rules 1991 as though the reference to the (Civil Procedure) Practice Direction was a reference to that direction excluding Section 6, Paragraphs 8.1 to 8.4 and Sections 15 and 16.”*

Conclusion

The anachronism which was the process of secret Calderbank offers is ending. No longer will we have cases in which a fair outcome is sunk by the secret negotiations and offers and counter-offers which are unknown to the judge who has just made the final order. But the justice of sensible offers determining costs still prevails, although lawyers will need great care and wisdom in deciding what aspects of an offer are too prejudicial to be set out openly. Conduct costs and manner of approach costs may be a most useful weapon by the courts in their attempt to case manage and to encourage a culture of better conduct of cases, provided final hearings do not become hijacked by investigations not of the merits but on what happened during the proceedings and we do not have inglorious disputes between solicitor and client, both ostensibly on the same side, about conduct allegations. The discrepancy between the level of legal costs of each party may in future rightly penalise the party who has incurred (or allowed) excessive costs. However the omission of a power to grant interim lump sums for costs will be even more keenly felt under the new regime than under the present law, and must be rectified quickly. Most of all it is a new culture of practice under these new rules which gives us an opportunity as a profession to improve the conduct of the litigation, to have lesser cases with ridiculously high costs and for more, and earlier, open offers of settlement to be made.

David Hodson is a English and Australian solicitor and mediator, an English family law arbitrator and a deputy District Judge of the PRFD, London. He can be contacted on dh@davidhodson.com. © February 2006