Neutral Citation Number: [2022] EWFC 40

Case No: BV20D00292

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 May 2022

Before :

MR JUSTICE PEEL

- -

Between :

WC

Applicant

- and -

HC

Respondent

- -
- -

Charles Howard QC and Joshua Viney (instructed by Hughes Fowler Carruthers) for the **Applicant**
James Ewins QC and Janine McGuigan (instructed by Stewarts Law) for the **Respondent**

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Approved Judgment

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MR JUSTICE PEEL

Mr Justice Peel :

1. By my judgment in substantive financial remedy proceedings, I determined that W should, on a needs based award, exit the marriage with a total of £7.45m.

2. H makes an application for costs assessed in the sum of £310,000. W initially proposed to H that there be no order as to costs. H rejected that proposal, and she now seeks no order as to costs save that H should pay her costs of two interlocutory hearings together with her costs incurred in addressing the agreement arguments. The sum sought by W is £264,010.

3. The total costs are about £1.6m (W £917,000 and H £709,000). The difference is mainly accounted for by H not being liable to VAT. Of these sums, H paid about £360,000 towards W's costs up to June 2021.

4. The starting point for costs in financial remedy proceedings is that each party should bear their own costs. By FPR 2010 28.3(6) the court may depart from the starting point and make a costs order against one, or other, or both parties. Factors to be taken into account are listed at 28.3(7) and include:

   "(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."

5. Rule 4.4 of Practice Direction 28A states that:

   "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".

6. The two interlocutory applications in respect of which W seeks her costs do not fall within the category of cases to which the no order principle applies. There is a "clean sheet" for such applications.

7. In **Rothschild v de Souza** [**2020] EWCA 1215** the Court of Appeal held it was not unfair for the party who is guilty of misconduct to receive ultimately a sum less than his/her needs would otherwise demand. Examples of first instance decisions where the judge made costs order notwithstanding that such order would cause the payee to dip into (and thereby reduce) the needs based award include Sir Jonathan Cohen in **Traherne v Limb [2022] EWFC 27** and Francis J in **WG v HG [2018] EWFC 70**.

8. 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. As Mostyn J said in **OG v AG [2020] EWFC 52**; "if, once the financial landscape is clear, you do not openly negotiate reasonably, then you will likely suffer a penalty in costs".

9. I propose to look at all the relevant factors in the round. I ignore the non-compliance with practice guidance about which I made critical comments but which do not (in this case) justify a costs penalty against either party, although it impeded the efficient conduct of the trial.

10. Neither party behaved flexibly in their open negotiations. H did not move from a position which sought to implement the terms of the unsigned Post Marital Agreement. W consistently sought £10m or more and, far from moderating her position, increased her claims; by the time of trial her open position was for not less than £10.6m However, the fact is that H's open offers have been far closer to my eventual award than those of W. His first open offer exceeded, in net effect terms, the decision which I arrived at. By the time of final hearing the net effect of his proposal was less (because of the incidence of costs and interim expenditure), amounting to £7.15m, approximately £300,000 less than my award. W fell well short of her ambitious claims, by some £3 million. I am not persuaded that I should notionally add to my award of £7.45m the sums paid by H under maintenance pending suit orders, and other incidentals, which W invites me to do so as to assert that the total sums received by her exceed £8m (which is still about £2.5m less than the award). To do so might suggest that it is in the payee's interests to attempt to secure interim maintenance during proceedings (by voluntary payments or court order) so as to assist in later costs arguments by totting up everything spent on him/her during the proceedings.

11. I accept that aspects of H's litigation conduct were less than satisfactory. On balance, W was largely successful in her maintenance pending suit application (for which costs were reserved), and H was unsuccessful at a case management hearing in seeking to persuade me to direct a redaction of any references to the fact and timing of without prejudice negotiations (it having been agreed that the content should not be revealed to the court). I also take the view that H approached the Post Marital Agreement on the basis that it was decisive and should not under any circumstances be departed from, even though W had not signed it. That was the gravamen of his open offers. It was explicitly stated in his Form E that there should be an abbreviated **Crossley v Crossley [2007] EWCA Civ 1491** hearing. In narrative evidence, H expressly stated that an order should be made in the terms of the unsigned Post Marital Agreement. It was only in closing submissions that his counsel tempered that stance, saying that the Post Marital Agreement was highly influential rather than determinative.

12. Then again, there were aspects of W's case which are not beyond reproach. She did not succeed in persuading me that the Post Marital Agreement should be cast aside and ignored because of H's alleged exercise of undue pressure on her. She did not persuade me that H was colluding with his father to conceal the likely receipt from him of vast sums immediately after conclusion of the proceedings. In a case driven by needs, she did not satisfy me that she should be entitled to a sum to purchase a second home in Switzerland, which was the main difference between the parties' cases on

needs, although she did establish a greater income need than H was prepared to accept.

13. There is a risk in needs based awards, such as the one I have made, of requiring the payer to act as the ultimate insurer of the payee's costs with little or no incentive on the payee to negotiate reasonably. An applicant for a financial remedies award can, and frequently does, seek a sum which, inter alia, clears all indebtedness including costs. Thus, however high the level of costs incurred by the payee, he/she will frequently seek what amounts to an indemnity for any costs outstanding so as to be able to exit the marriage debt free. Similarly, if and insofar as the payee has already spent large sums on legal fees which have been provided by the payer (either voluntarily or by way of a court imposed legal services funding order), he/she will argue that to be required to reimburse the payer will lead him/her into debt. 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.

14. In this case, although H is to be criticised for aspects of his litigation conduct, W must bear, in my judgment, greater responsibility in the light of her disproportionate needs claim. The most influential factor to my mind is the negotiating stances of the parties. W missed the mark by a wide margin whereas H was proximate to my decision. The combined costs amount, depressingly, to 13% of the total assets. I shall order W to pay £150,000 by way of costs, which takes into account the competing arguments on each side. For the avoidance of doubt, I am looking at the costs aspect holistically, and this decision takes into account the interlocutory hearings and the arguments pursued at trial. Strictly speaking, my costs decision reduces W's overall award below the total needs based calculation which I have alighted upon although:

    a. Out of a total award to W of £7.45m, £150,000 is a modest sum.
    b. The needs award included a "round up" by me from £7.319m to £7.45m for unforeseen contingencies, a sum of £131,000 which is not referable to housing or income needs.
    c. The authorities make it clear that the fact of an award being based on needs does not prevent the court from making a costs award which reduces the claimant below the level of assessed needs. 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.

15. I note that the net effect on the parties' costs liabilities may be viewed as follows:

    a. Husband
    £709,000 own costs
    £360,000 to W's costs during proceedings
    -£150,000 payable by W to him by my costs decision
    £919,000 total costs paid

    b. Wife
    917,000
    -£360,000 received by H for costs during the proceedings
    £150,000 payable to H by my costs decision
    £707,000 total costs paid

    Accordingly, H has borne more of the total overall costs.

16. The costs award of £150,000 shall be set off against the substantive award.