Neutral Citation Number: [2024] EWFC 114

Case No: BV20D01752

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 May 2024

Before:

THE HONOURABLE MR JUSTICE MACDONALD

- -

Between :

DH	**Applicant**
- and -	
RH	**Respondent**

- -
- -

Application for costs dealt with on written submissions

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 24 May 2024 by circulation to the parties or their representatives by e-mail.

MR JUSTICE MACDONALD

This judgment was delivered in private. The Judge has given permission for this anonymised version of the judgment (and any of the facts and matters contained in it) to be published on condition always that the names and the addresses of the parties and the children must not be published. For the avoidance of doubt, the strict prohibition on publishing the names and addresses of the parties and the children will continue to apply where that information has been obtained by using the contents of this judgment to discover information already in the public domain. All persons, including representatives of the media, must ensure that these conditions are strictly complied with. Failure to do so will be a contempt of court.

Mr Justice MacDonald:

1. On 18 April 2024, I handed down judgment in this matter following a final hearing of financial remedy proceedings between DH (hereafter 'the wife'), who was represented at the final hearing by Mr Brent Molyneux KC and respondent husband, RH (hereafter 'the husband'), who was represented by Ms Alexis Campbell KC and Ms Sassa-Ann Amaouche. The court now needs to deal with the issue of costs. The combined costs in this case amount to what I have already described as the monumental sum of £2.9M, or approximately 23% of the assets. The husbands costs were £987,000 at the date of the final hearing and are now £1M. The wife's costs amount to £1.9M.

2. The court has provided the parties with the opportunity to make written submissions as to costs. The court initially directed submissions as to costs to be lodged by 4pm on 3 May 2024. The husband provided his written submissions on that date through Ms Amaouche. The wife did not do so. The wife has emailed the court on multiple occasions contending that she has no funds to instruct lawyers and stating that she will not be in a position to make representations as to costs, nor as to the terms of the final order, until the court places her in funds.

3. To this end, the wife issued an application to enforce the order for maintenance pending suit, alleging that the husband had missed MPS payments in April and May 2024, subsequent to the handing down of judgment on 18 April 2024. The court made clear to the wife that it required submissions as to costs, that those submissions could be submitted notwithstanding that she is now acting in person and extended the deadline for submissions as to costs to 14 May 2024. The position remains that the wife has not provided written submissions on the question of costs. In circumstances where the court extended time for the filing of written submissions by 10 days but has still not received submissions from the wife, I am satisfied it is appropriate for the court to proceed to determine the issue of costs on the information it has. I have borne in mind, and taken into account, the fact that the wife is likely to object strongly to paying any portion of the husband's costs.

4. The long history of the proceedings and the evidence on which the court made its decision is set out in detail in the judgment. During the course of the proceedings, the court had cause on a number of occasions to express concerns about the manner in which the wife was conducting the litigation and the extent of the costs she was incurring. For example, on 5 July 2023, the court noted as follows in its judgment determining the wife's application for a legal services payment order at [50]:

> "[50] However, the court cannot but be concerned by the fact that the wife has to date already incurred some £1.3M in legal costs, including a substantial debt at a punitive rate of interest, as compared to the circa £600,000 costs incurred by the husband. Whilst this is not the occasion to make findings in relation to the wife's litigation conduct, and I make clear I do not do so, it would appear that a significant part of those costs have been incurred in the wife's desire to prove her contention that the husband is hiding assets, including holdings in cryptocurrency. Notwithstanding this, and whilst some of the husbands actions will have fed into the wife's concerns, the wife has to date failed to itemise with particularity any deficiencies in disclosure, even though directed to do so by the court."

5. At a hearing on 7 September 2023, the wife made an application for an order under s.37 of the Matrimonial Causes Act 1973 or s37 of the Senior Courts Act 1981 to prevent the husband from taking steps to transfer, dispose of or in any way deal with any cryptocurrency assets and a Penn Mutual life policy. That application was made without notice notwithstanding that the husband had given notice, by a letter dated 30 August 2023, of his desire to liquidate a Penn Mutual policy in order to meet ongoing obligations under the LSPO and MPS orders and in circumstances where the wife herself had specifically targeted the policy for that very purpose in June 2023. The husband's costs referable to that application are £30,654.50.

6. At the final hearing, ahead of the computation exercise, the key issue for the court to determine was whether, as alleged by the wife, the husband had failed to disclose vast hidden assets, which the wife contended amounted to between £170M and £210M. Having considered the evidence and the submissions of leading counsel, and having noted the absence of cogent evidence of, and the difficulties with the wife's case in respect of, non-disclosure, I rejected the wife's case on non-disclosure for the detailed reasons set out in the judgment. I concluded on the balance of probabilities that the matrimonial assets available for distribution were as set out in the ES2 provided for the final hearing by the husband (the wife did not provide an ES2 for the final hearing).

7. Having computed the matrimonial assets, I thereafter decided it was appropriate to add back a sum to account for what I was satisfied, for the reasons set out in the judgment, was an obvious cases of reckless expenditure on legal costs by the wife, being satisfied that an order for costs would not provide a just remedy for the wife's reckless approach because such an order will not remedy the effect of there being less wealth to be distributed between the parties. Having regard to the evidence, I was satisfied that the sum to be added back was £800,000. This conclusion was reached in the context of the following finding at paragraph 83 of the judgment:

> "Despite repeated warnings, the wife frustrated attempts by the court to deal with her concerns with respect of non-disclosure by serially failing to comply with directions whilst also running up legal costs double those incurred by the husband in pursuing her own agenda, to no coherent outcome."

8. With respect to distribution, for the detailed reasons set out in the judgment, I concluded that the distribution of the matrimonial assets detailed in the judgment, comprising an overall division of 52% to the wife and 48% to the husband, represented the proper outcome in the case on the basis of a clean break between the parties. I was satisfied that that sharing award was sufficient to meet the wife's future needs. This award reflected broadly the outcome proposed by the husband in his open offer (of a broadly equal division of the matrimonial assets, leaving the parties with sufficient funds to meet their respective housing needs) rather than the outcome proposed, only at the final hearing, by the wife (that she should receive the totality of the disclosed assets). As I noted in the judgment, the wife advanced no alternative case in the event that the court were to reject her case that up to £210M in assets remained undisclosed by the husband.

9. The husband asserted at the final hearing that, beyond what he contended had been the wife's wanton and reckless dissipation of assets, the wife had been guilty of

egregious litigation conduct through her serial failure to comply with court orders and her failure to engage in any serious attempt to settle the proceedings. In this context, at the final hearing, the husband made wider allegations of litigation misconduct that he sought to rely on to support his claim for an add back. On this issue, I observed as follows at paragraph 104 of the judgment:

> "With respect to the wider alleged litigation conduct of the wife (comprising her serial failure to comply with orders, her alleged misrepresentation of her intentions as to accommodation at the MPS hearing and the availability to her of legal advice, her undertaking no cross-examination or submissions having spent significant sums disputing the husband's position on pensions and tax, the costs incurred by the husband arising out of the 'Imerman' exercise consequent on the wife's unlawful accessing of the husband's confidential information, the costs of the ex parte application made by the wife on 6 September 2023, the existing costs orders and her failure to negotiate during the proceedings), I am satisfied that these matters are most appropriately dealt with when the court comes to determine the question of costs."

10. In support of his contention that the wife's conduct justifies a costs order in his favour, the husband now relies on the following matters within the context of the terms of FPR 2010 r.28:

i) The wife stole confidential financial information belonging to the husband, resulting in a breach of confidentiality and the need for an 'Imerman' exercise incurring costs for the husband of £25,000.

ii) The wife failed to comply with the rules of court and Practice Directions. The wife's failure to provide an open offer pursuant to FPR 2010 r.9.27A following the FDR and ahead of the final hearing pursuant to FPR 2010 r 9.28, and her failure to negotiate made a contested hearing inevitable. These breaches were exacerbated by the failure of the wife, as noted in the judgment, to provide the court with any assistance regarding the computation and division of assets should her contentions with respect of non-disclosure be rejected in whole or in part.

iii) The wife failed to comply with multiple case management orders of the court. In particular, the wife breached multiple court orders as set out in the Schedule prepared on behalf of the husband and appended to leading and junior counsels' written closing submissions, which details the wife failing to comply with at least fifty individual case management orders designed to progress the proceedings. This included failing to comply with 7 orders to agree the tax position, leaving the court without any expert evidence of the tax consequences of the parties' competing positions and putting the husband to further expense in order to try and adduce reliable evidence to assist the court.

iv) The wife in this case was given fair warning at interlocutory hearings that she needed to particularise her case as to non-disclosure and division of assets but did not do so. The wife engaged in a zealous and unremitting search for assets she believed to be undisclosed by the husband and, in the face of judicial warnings at interlocutory hearings, sought to pursue an unmeritorious case in a

disproportionate manner. This was unreasonable and the wife's inability to show any restraint significantly increased the costs.

v) The instruction and finalisation of the expert report on cryptocurrency holdings became a protracted exercise by reason of the wife's failure to comply with case management orders, to co-operate with proposed meetings, her unilaterally contacting the expert and her failure to agree the letter of instruction, ultimately requiring the court to approve the terms of the same.

vi) The wife misled the court during the course of her application for MPS in circumstances where she moved to Wyoming shortly after informing this court in June 2023 that she intended to return to rented accommodation in central London and this court having made an order for MPS on that basis.

vii) At the hearing in September 2023 the wife made an application for an order under s.37 of the Matrimonial Causes Act 1973 or s.37 of the Senior Courts Act 1981 to prevent the husband from taking steps to transfer, dispose of or in any way deal with any cryptocurrency assets and the Penn Mutual life policy after the husband had given notice, by a letter dated 30 August 2023, of his wish to liquidate that asset in order to meet ongoing obligations under the LSPO and MPS orders *and* where the wife had specifically targeted the policy for that purpose in June 2023.

viii) The wife failed to comply with multiple orders to disclose the whereabouts of watches and, as recorded in the judgment, only addressed that question when compelled to do so under cross-examination in the witness box, at which time she confirmed she had pawned a considerable number of the watches over which the husband claims ownership.

ix) The wife failed to engage with basic pre-trial case management and preparation, presenting no ES1, ES2, chronology or statement of issues in advance of the final hearing and failing to respond to the husband's proposals in respect of those documents.

x) The wife's s.25 statement was filed on the second day of the final hearing styled as a document authored by the wife notwithstanding she had representation and in a form that required submissions regarding the admissibility of certain parts of the statements and exhibits, including an attempt to introduce expert evidence for which the wife had no permission, in breach of the Efficient Conduct guidance.

xi) The wife's behaviour during the hearing was disruptive and caused considerable delay to the conclusion of the final hearing, resulting in increased costs. Following the hearing, the wife attempted to contact the judge and proceeded, without permission, to email large amounts of material to the court without making applications to re-open the evidence and to adduce additional evidence.

xii) The wife's litigation misconduct is at the extreme end of the scale and merits a costs sanction.

11. With respect to the financial effect of any costs order, Ms Amaouche submits that the wife's needs are met by the terms of the final order made by the court such that any costs order will not undermine the wife's ability to meet her ongoing needs. The cumulative finding of the court was that the wife's needs are met on an award of £5M and the wife will be receiving £6.2M after the add back is taken into account. In this context, Ms Amaouche submits that were the wife to seek to rely on a statutory protection to defeat a costs order (which, absent the provision of any written submissions, she has not), this would have to be set against her wholesale failure to lead any case as to need at the final hearing in the event that the court were to reject her case that up to £210M in assets remained undisclosed by the husband.

12. The legal provisions and principles applicable to the determination of costs in financial remedy proceedings are well settled.

13. As will be seen, the wife made no open offer in this case and her position as to the proper outcome of the final hearing only became known at the final hearing. FPR 2010 r.9.27A contains the duty to make open proposals following the FDR appointment or where there has been no FDR appointment:

> "**9.27A Duty to make open proposals open proposals after a FDR appointment or where there has been no FDR appointment**
>
> (1) Where at a FDR appointment the court does not make an appropriate consent order or direct a further FDR appointment, each party must file with the court and serve on each other party an open proposal for settlement —
>
> (a) by such date as the court directs; or
>
> (b) where no direction is given under sub-paragraph (a), within 21 days after
>
> the date of the FDR appointment.
>
> (2) Where no FDR appointment takes place, each party must file with the court and serve on each other party an open proposal for settlement—
>
> (a) by such date as the court directs; or
>
> (b) where no direction is given under sub-paragraph (a), not less than 42 days before the date fixed for the final hearing."

14. The duty to make open proposals also applies prior to the final hearing of financial remedy proceedings, which duty the wife also failed to discharge, FPR 2010 r. 9.28 providing as follows:

> "**Duty to make open proposals before a final hearing**
>
> (1) Not less than 14 days before the date fixed for the final hearing of an application for a financial remedy, the applicant must (unless the court directs otherwise) file with the court and serve on the respondent an open

> statement which sets out concise details, including the amounts involved, of the orders which the applicant proposes to ask the court to make.
>
> (2) Not more than 7 days after service of a statement under paragraph (1), the respondent must file with the court and serve on the applicant an open statement which sets out concise details, including the amounts involved, of the orders which the respondent proposes to ask the court to make."

15. The importance of parties making clear their open positions, with a view to engaging in reasonable and responsible negotiation of the proceedings is further emphasised by FPR PD 28A, the importance of which was made clear by Mostyn J in *OG v AG* [2020] EWFC 52. Paragraph 4.4 of PD28A provides as follows as to the potential cost consequences of not engaging in open negotiations:

> "In considering the conduct of the parties for the purposes of rule 28.3(6) and (7) (including any open offers to settle), the court will have regard to the obligation of the parties to help the court to further the overriding objective (see rules 1.1 and 1.3) and will take into account the nature, importance and complexity of the issues in the case. This may be of particular significance in applications for variation orders and interim variation orders or other cases where there is a risk of the costs becoming disproportionate to the amounts in dispute. 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."

16. Within the foregoing context, and in so far as is relevant, FPR 2010 r.28.3 provides as follows with respect to the general rule as to costs in financial remedy proceedings, and the exceptions to that general rule:

> "**Costs in financial remedy proceedings**
>
> …/
>
> (5) Subject to paragraph (6), the general rule in financial remedy proceedings is that the court will not make an order requiring one party to pay the costs of another party.
>
> (6) The court may make an order requiring one party to pay the costs of another party 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).
>
> (7) In deciding what order (if any) to make under paragraph (6), 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 proceedings which the court considers relevant; and
>
> (f) the financial effect on the parties of any costs order."

17. Finally, with respect to the orders for costs it is open to a court to make in financial remedy proceedings, whilst FPR 28.3(2) disapplies CPR 44.2(1), (4) and (5), FPR 28.3(3) mandates that CPR 44.2 (6) to (8) continue to apply. CPR 44(6) states that the orders as to costs that it is open to the court to make are that a party must pay:

    i) A proportion of the other party's costs;

    ii) A stated amount in respect of the other party's costs;

    iii) Costs from or until a certain date only;

    iv) Costs incurred before proceedings have begun;

    v) Costs relating to particular steps taken in the proceedings;

    vi) Costs relating only to a distinct part of the proceedings; and

    vii) Interest on costs from or until a certain date, including a date before judgment.

18. As noted above, in this case the court decided it was appropriate to add back a sum of £800,000 to account for what the court determined was an obvious cases of reckless expenditure on legal costs by the wife, being satisfied that an order for costs would not provide a just remedy for the wife's reckless approach because such an order would not remedy the effect of there being less wealth to be distributed between the parties.

19. As I noted in the judgment, the fact that the court has added back assets dissipated by a party through an obsessive approach to litigation will not necessarily prevent a costs order also being made. In *M v M (Financial Provision: Party Incurring Excessive Costs)* [1995] 3 FCR 321, in addition to adding back assets dissipated by a husband through his obsessive approach to litigation, Thorpe J (as he then was) also ordered that the husband pay the wife's costs in circumstances where it had been open to the husband to seek to make an offer to settle proceedings, which he had failed to do. In in *WC v HC* [2022] EWFC 40, in making an order for costs Peel J concluded that it is not unfair for the party who is guilty of misconduct to receive a sum less than her needs would otherwise demand in circumstances where a failure to make sensible

attempts to settle a case, or an unreasonable failure to make such an attempt, would ordinarily be a powerful factor in considering costs having regard to FPR 2010 r.28.3 and PD 28A paragraph 4.4. In the later decision of *HD v WB* [2023] EWFC 2, in holding it was reasonable and proportionate to invade a needs based award the court had made, Peel J noted that a party cannot be insulated from the costs of litigation.

20. Within the foregoing context, I propose to look at the relevant factors in the round. I bear in mind that the ordinary rule in financial remedy proceedings, pursuant to FPR 2010 r.28.3(5) is that the court will not make an order requiring one party to pay the costs of another party. However, pursuant to FPR r.28.3(6) the court retains a discretion to make an order requiring one party to pay the costs of another party 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 those proceedings.

21. I am satisfied that each of the matters of conduct set out at paragraph 10 above are established on the evidence before the court. As is apparent from those matters, and the more detailed exposition of the course of these proceedings set out in the judgments given by the court (namely *DH v RH (LSPO and MPS Applications)* [2023] EWFC 111, *DH v RH (No2)(Variation of Interim Arrangements)* [2023] EWFC 210 and the final judgment to be published), this is a case involving *very* serious litigation misconduct on the part of the wife. I am satisfied that this litigation conduct materially increased the costs the husband was required to spend above and beyond the costs ordinarily consequent on the litigation. In her submissions as to costs Ms Amaouche asks, rhetorically, if this wife's litigation misconduct is not sanctioned in this case, then what degree of litigation misconduct ever would be?

22. Within the foregoing context, the husband's costs are £987,000 to final hearing, and have now reached £1,000,018. Of those costs, £134,197 were incurred from the date of his open offer, which as I have noted was not reciprocated by an open offer from the wife nor responded to by her in any event.

23. I acknowledge that, in this case, the court has added back the sum of £800,000 to the wife's side of the balance sheet to account for an obvious cases of reckless expenditure on legal costs by the wife, being satisfied that an order for costs would not provide a just remedy for the wife's reckless approach. In the circumstances, the court has already accounted for what the court was satisfied was the wife's reckless expenditure on legal costs in pursuance of her unremitting search for assets she believed to be undisclosed by the husband.

24. However, the authorities make clear that the foregoing circumstances do not preclude the court from also making a costs order in an appropriate case. I am satisfied in this case that the additional and extensive examples of litigation misconduct by the wife, as summarised above, must be marked by an order for costs. Having regard to the size of the award made to the wife, a costs order will not undermine the wife's ability to meet her ongoing needs. In any event, the wife's conduct is at the upper level of such behaviour and the wife cannot, in the circumstances, expect to be insulated from the costs of litigation either on the basis of the general rule as to costs or on the grounds that an order for costs will reduce the monies available to her.

25. In all the circumstances, and having regard to what I am satisfied is has been the particularly egregious and persistent litigation conduct of the wife in this case, I propose to make an order that the wife pay to the husband a proportion of his costs in the sum of £200,000.

26. In addition, I am satisfied that the wife should pay to the husband the costs referrable to the Immerman exercise consequent on the wife accessing the husband's confidential documents were £25,000. I am further satisfied that the wife must also pay the costs referable to the without notice application in September 2023 for an order to prevent the husband from taking steps to transfer, dispose of or in any way deal with the Penn Mutual life policy notwithstanding that the husband had given notice of his wish to liquidate that asset and where the wife had specifically targeted the policy for that purpose in June 2023, of £30,654.50.

27. In the circumstances, I propose to make an order that the wife pay to the husband a proportion of his costs in the sum of £200,000, that the wife pay the husband's costs of the Immerman exercise in the sum of £25,000 and that the wife pay the husband's costs of the without notice application in September 2023 in the sum of £30,654.50.