Principle of Costs:

- The rule which is set out in Family Procedure Rule 2010 (FPR) 28.3, supplemented by Practice Direction (PD) 28A.

- The "no order as to costs" rule applies in financial remedy proceedings [Rule 28.3 (5)] which says:

- *"(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*

Why no order as to costs?

- Hard to establish who is the winner or loser?
- Breakdown of marriage is a misfortune falling on both parties rather than the fault of either of them
- Costs subsequent to the main order often distorted the intention of the main financial order.

BUT.. FPR 2010 rule 28.3(6)

- “(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).” Ie litigation misconduct.
- “litigation misconduct” rule.

FPR 2010, paragraph 4.4 of PD 28A:

- “4.4
- “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.”

FPR 2010 rule 28.3(7)

- (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.
- (8) No offer to settle which is not an open offer to settle is admissible at any stage of the proceedings, except as provided by rule 9.17

FPR 9.27-9.28:

“Estimates of Costs

- not less than one day before every hearing or appointment, each party must file with the court and serve on each other party an estimate of the costs incurred by that party up to the date of that hearing or appointment.
- *Not less than one day before the first appointment, each party must file with the court and serve on each other party an estimate of the costs that party expects to incur up to the FDR appointment if a settlement is not reached.*
- *Not less than one day before the FDR appointment, each party must file with the court and serve on each other party an estimate of the costs that party expects to incur up to the final hearing if a settlement is not reached*

- *Not less than 14 days before the date fixed for the final hearing of an application for a financial remedy, each party (“the filing party”) must (unless the court directs otherwise) file with the court and serve on each other party a statement giving full particulars of all costs in respect of the proceedings which the filing party 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) to make for a financial remedy.*

9.27A
open proposals:

- *within 21 days after the date of the FDR appointment.*
- *where no direction is given under sub-paragraph (a), not less than 42 days before the date fixed for the final hearing.*
- *Not less than 14 days before the date filed for the final hearing of an application for a financial remedy setting out concise details, including the amounts involved, of the orders which the applicant proposes to ask the court to make.*
- *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."*

What are financial remedy proceedings?
FPR 28.3(4)

- *(b) ‘financial remedy proceedings’ means proceedings for –*
- *(i) a financial order except an order for maintenance pending suit, an order for maintenance pending outcome of proceedings, an interim periodical payments order, an order for payment in respect of legal services or any other form of interim order for the purposes of rule 9.7(1)(a), (b), (c) and (e);*

Where the general costs rule does NOT apply:

- Applications for/under/in relation to:
- MPS/Interim maintenance
- LSPO
- Any other interim order (for example on a preliminary issues, Part 25 applications, disclosure applications etc)
- Applications to strike out
- Set aside a financial remedy order or arbitral award

- Notice to Show Cause
- Financial remedy appeal
- Costs of third party joined to the proceedings
- Costs of civil proceedings heard together with financial remedy proceedings
- enforcement applications

“Clean sheet” cases.

- These cases are known, in costs terms, as ‘clean sheet cases’[Baker v Rowe [2009] EWCA Civ 1162] because neither the general rule in financial remedy proceedings, nor the general rule in civil proceedings that the ‘unsuccessful party will be ordered to pay the costs of the successful party’.
- starting from a clean sheet
- the court has to consider the conduct of the parties; whether a party has been successful in whole or in part; and any admissible offers made by the parties (which include Calderbank offers where the general rule doesn’t apply).

Open Offers- and costs consequences.

- Only **open offers** (letters showing the position of the party to the court in the course of the proceedings) can be shown to the court during a costs argument in which the general rule applies. Calderbank and Without Prejudice offers cannot.
- **Calderbank offers** still provide costs protection in all of the types of cases where the general rule does not apply.
- **Without prejudice** offers can only be shown to the court at FDRs. They offer no costs protection at all.

(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;

- *T v T (Application for Financial Relief After an Overseas Divorce) [2020] EWHC 555 (Fam).*
- The substantive final hearing of the former wife's application under Part III of the Matrimonial and Family Proceedings Act 1984 for financial relief.
- The wife and two children lived in England and had dual Russian and British citizenship. The husband was Russian, had kept a second family in Moscow, and had obtained a Russian divorce without the wife's knowledge.
- He had not participated in these proceedings. He had made no disclosure and had not paid a penny following an interim order for maintenance and legal costs funding.
- Holman J ordered the husband to pay or cause to be paid a lump sum to the wife of £2,250,000, and to pay her costs on the indemnity basis.

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

- **MB v EB (No.2) [2019] EWHC 3676 (Fam)**
- The parties (a struggling penniless artist and wife worth £50 million) were married in 2000 and separated in 2004, but remain married and “emotionally entangled”. H issued divorce and financial proceedings in 2017.
- legal costs he had generated, labelling them 'wholly disproportionate to what has been in issue'.
- attempts by H to argue that the marriage had a 17-year duration; that he had made a full contribution to the marriage as a homemaker; that he had a sharing claim; that there was a marital acquest; and that the separation agreement has no relevance and had been entered into under undue influence or duress. Cohen J made clear that 'every one of those proposals was misplaced and wrong.'

- Cohen J took account of FPR 28.3(7) and the relatively newly inserted paragraph 4.4. of PD 28A,
- Cohen J regarded W's open offer as rather 'light', he considered H's proposal to be 'as far wide of the mark as can be imagined… massively overcooked.'
- He also noted that in his view, had H countered W's proposals with any form of constructive offer, negotiations could have progressed and it was highly likely that the case would have settled. Instead, he had chosen to continue the litigation in a manner that Cohen J regarded as 'irresponsible and unreasonable.'

Duty to negotiate reasonably
OG v AG [2020] EWFC 52).

- OG ("H", aged 51) and AG ("W", aged 53) had made cross-applications for financial remedies.
- After a 25 year marriage, the parties separated
- they did acquire a domestic and international property portfolio which produced a rental income. This portfolio consisted of five flats in London, three in Gibraltar, and eight in Dubai.
- H's disclosure in relation to the Dubai properties, and other matters, had been made in a piecemeal fashion
- Mostyn J considered that H's conduct, inter alia, in concealing a number of the Dubai transactions and loans made to TT was '*not only dishonest but futile and frankly inexplicable*' [27].

- His non-disclosure meant that there had never been an effective FDR and that the parties had run up costs exceeding £1 million, a large amount of which '*must be referable to the husband's conduct*' [27]

- Mostyn J inferred H's conduct was due to '*pure bloody-mindedness engendered by the toxic aftermath of the breakdown of the marriage and the confrontational personalities of each of the husband and wife*' [27] !!

- H's litigation misconduct had even extended to altering an email to try to suggest that W had agreed to sell X, when she was saying quite the opposite.

- Applying PD 28 para 4.4, Mostyn J declared: '*It is important that I enunciate this principle loud and clear: if, once the financial landscape is clear, you do not openly negotiate reasonably, then you will likely suffer a penalty in costs. This applies whether the case is big or small, or whether it is being decided by reference to needs or sharing*' [31].

(*JB v DB [2020] EWHC 2301*)- *Court orders?*

- There should be some sanction to reflect the court's disapproval that the husband has paid such cavalier regard to his obligations as incorporated in my order, but the idea that all of the costs would have been saved down to the last penny had that meeting taken place is completely fanciful.
- the obligation to engage properly in negotiations to see if there was a way round what had now emerged as a very significant impediment should have been taken very seriously indeed, and that in the circumstances where the husband has wilfully refused to do so he must face a sanction in costs which I assess in the sum of £15,000.

(*LM v DM (Costs Ruling) [2021] EWFC 28*).- an MPS Case

- The wife in this case had been successful in her applications for maintenance pending suit, interim periodical payments for the parties' children and a legal services payment order. She applied for an order that the husband pay her legal costs of bringing the applications. Mostyn J considered that the *'no-order-for-costs'* general rule, as per FPR 28.3(5), did not apply to the wife's interim applications, as they are instead governed by a soft costs-follow-the-event principle and the court may make such an order as it sees just, as per FPR 28.1.
- Although the wife did not achieve as much in quantum as she had requested, Mostyn J considered that the outcome of her application was much closer to her position than the husband's

- The wife also succeeded on issues of principle and there were aspects of the husband’s case that were unreasonable. Hence Mostyn J’s starting point of awarding the wife her standard costs of her application.
- He held that the wife had made no serious attempt to negotiate openly and reasonably beyond setting out her in-court forensic position in her witness statements.
- Mostyn J’s impression of the wife was that she had chosen to litigate the applications, regardless of the potential outcomes. On this basis, the wife was penalised, and Mostyn J reduced by 50% the costs order that he had made in the wife’s favour.

AA v AB [2021] EWFC B16

- This is a first instance decision of a Recorder, but it contains a useful summary of the costs authorities to date.
- The W was found to have been unreasonable in her litigation conduct, and had failed to engage in a realistic negotiation. She had pursued a ridiculous claim in relation to the parties' pets. The costs were described as "ruinous" and the parties' net capital position was -£60,000.
- Although W was left in debt by the award, the court imposed a £10,000 costs order against her, to be paid in instalments

Policy Logic

- Structure WP offers to be realistic.
- Risks with not giving reasonable open offers or open offers at all.
- In effect, the new rules penalise a failure to be realistic and negotiate as much as they penalise a failure to be honest or to comply with court orders.
- When to make an open offer? Remember what Mostyn J says, “as soon as the financial landscape is clear”. That does not mean once you have a fully agreed schedule with every penny identified, it means when you understand the broad parameters of the assets. If there is an area of ambiguity in the assets, then include an area of ambiguity in the offer to provide “wriggle room”.

- Conclusion – make it as early as possible.
- Options – an order can be time limited (but this will restrict the level of costs protection it might provide), it can be on the basis of no order as to costs within 28 days, but not thereafter, it can stipulate that the provision it seeks may increase over time (i.e. seeking “a lump sum to cover my debts which currently stand at £30,000 but which will increase as my legal fees increase”

- When to make a without prejudice offer? We now have to think hard about what the purpose of a WP offer actually is. It may still be worthwhile where the parties would be happy with an outcome that the court probably would not order, eg W keeps 100% capital and H keeps 100% of his pension.
- It gives no costs protection at all, even in “clean sheet” cases
- It sets the bar for negotiations at the FDR, so it can influence the court’s indication.
- They don’t allow the court to see you negotiating and engaging openly.

- The authorities show that the courts are more willing to make costs orders which do not meet needs, if there has been an unreasonable costs spend.

So where from here?

- Make the open offer, be sure to include a provision on costs in it.
- Serve Form H at least 24 hours before the hearing.
- Include Form H in the bundle where you are seeking costs to be paid to show the increase from FDA- FDR.

- Check the drafting of orders on costs- Where the no order as to costs rule does not apply and an order does not mention costs, the general rule is that no party is entitled to their costs.
- If you seek costs state it in open correspondence or in skeleton arguments before the date of the hearing
- advise your client on costs consequences where he/she runs litigation that may be seen as “unreasonable” (particularly if it is a “needs” case).
- If it’s an issue based costs order (re conduct arguments or trust matters) record separately the time you spend on that issue.