This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Neutral Citation Number: [2023] EWFC 216

Case No: ZZ20D46323

IN THE FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 December 2023

Before :

MR JUSTICE PEEL

- -

Between :

HO	**Applicant**
- and -	
TL	**Respondent**

- -
- -

Duncan Brooks KC (instructed by **Harbottle & Lewis LLP**) for the **Applicant**
Patrick Chamberlayne KC (instructed by **Payne Hicks Beach**) for the **Respondent**

Hearing date: 29 November 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 1 December 2023 by circulation to the parties or their representatives by e-mail.

.....

MR JUSTICE PEEL

Mr Justice Peel :

1. I shall continue to refer to the parties as W (wife) and H (husband).

2. Consequential upon my judgment in this case, each party invites me to make costs orders against the other.

Legal principles

3. In **WC v HC [2022] EWFC 40** I attempted to summarise the applicable legal principles as follows:

"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".

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".

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."

Decision

4. I have made an order for £7.75m in W's favour based on her needs. That is a net figure in her hands after payment of all her debts. It follows that in reality H was footing the litigation bill for both parties.

5. In my judgment there are three particularly relevant considerations.

6. First, I found H to be "somewhat evasive and legalistic about his trust interests", a central issue in the case. I do not think that he truly accepted the accessibility of trust assets, nor the extent of his notional allocation, nor the impact of his mother's death on his interests. A significant amount of time and expense was spent on this important issue, although I have not been given any figures relating solely to this aspect. Ordinarily, this would justify an order for costs against him.

7. Second, W did not formally pursue conduct, but included in her documents personal criticisms of H. This practice of making pejorative comments about the other party which have absolutely no relevance to the outcome of the financial remedy proceedings and are probably hurtful, must cease. Apart from anything else, it is unfair to the party who has refrained from making personal criticism to be met with a litany of complaints about their own personal behaviour. The court's function is not to pick over the bones of the marriage and attribute moral blame. I doubt this in fact added significantly to the costs, but it is not appropriate to make unnecessary allegations, and ordinarily this too might justify a costs order.

8. Third, W, in my judgment, did not negotiate reasonably until late in the day. In December 2022 she sought what amounted to £17.2m. She was sufficiently well informed about the resources in the case, including the business (which by then had been valued) and trust interests, to know that such a figure was unsustainable. It was not until September 2023 that she reduced her offer to £12.3m, and then to £10.9m in October 2023. H's first offer of £6.5m in December 2022 was closer to the mark although the time for payment, over 6 years, was ambitious.

9. In my judgment, certainly until September 2023, W maintained an unrealistic and speculative approach. She did not modify her position for months. This was not "reasonable open negotiation". It was unreasonable.

10. Parties must understand that to run an untenable case risks adverse costs orders being made.

11. Perhaps more importantly, lawyers must advise their clients accordingly. Of course, they act on instructions, but it is, in my view, incumbent on the legal team to explain clearly that a failure to negotiate reasonably on an open basis carries costs risks. If the party persists in in an unreasonable stance, they can have no complaints if they are on the receiving end of a costs order.

12. Litigation is expensive and personally demanding for lay clients. I see no reason why the court should not visit a costs order if one party makes unreasonable open offers. The authorities make plain that a costs order may be made even if it reduces the needs as found by the court. These comments apply particularly to big money cases, although I take the view that in smaller value cases the court should also be willing, in the right case, to make an award for costs, even if only in a modest amount, to register condemnation of the party whose open proposals are far removed from the eventual outcome. The message must get across that although the starting point is no order as to costs, the courts are increasingly willing to depart from that so as to do justice to the party who has been put to unnecessary costs by the other party's overstated proposals.

13. Weighing all the matters in the round, I determine that W should pay £100,000 towards H's costs, such sum to be deducted from her award. The second lump sum payable by H will be reduced accordingly.