International FAMILY LAW GROUP LLP

The Scandal of Costs in Financial Remedy Proceedings in English Family Law

Executive summary

Over the past few years and increasing in intensity, High Court and Court of Appeal judges have strongly condemned very high and/or disproportionate legal costs in financial remedy claims. This is troubling and not good for the reputation of English family law and family lawyers including with their clients. This persistent judicial criticism has seen a flow of shocking court judgements being handed down with stark judicial language. So, changes of some form seem necessary and inevitable. But it is wider, a significance for the English common law process of highly discretionary resolution of financial claims. Unless costs can quickly become proportionate and reasonable, the call for wholesale reform seems impossible to oppose. Therefore, what practical and realistic changes are now needed to bring proportionality between costs and claims?

The problem of proportionality

As long ago as the late 1990s, the Supreme Court, as it now is, in the case of *Piglowska*[1] criticised the disproportionality of the amount of the costs compared to the amount in issue, albeit the amounts were incredibly mild compared to recent instances, barely into six figures[2]. But the warning was given. It was hoped it was, and indeed was then, a moderately rare occurrence. However, in more recent years, the problem has escalated and with it the frequency of judicial complaint, wringing of hands and criticism. Moderate changes such as recording at each hearing the level of costs to date and thereafter[3] seem to have had little effect. As judges have become increasingly busier, there has been insufficient time given at First Appointments for appropriate and strong directions and indications to be given about the case[4].

There is generally the high level of fees in bringing some cases to trial, irrespective of the amount

in issue. More crucially and obviously there are the fees proportionate, in reality disproportionate and unreasonable, to the amount in issue. Into this equation is the perceived failure to negotiate in order to settle without a final hearing with those, end of case, significant costs.

The level of fees goes directly to the law and its application. Why are such high level of fees being incurred by one or both parties[5] in the resolution of financial claims? Is this a criticism of the law and/or the process or of lawyers and/or the parties?

By and large, there are two distinctive aspects in bringing a claim to adjudication or settlement: obtaining and giving disclosure and then settling. I suggest that there can be no proper consideration of necessary, substantial changes to overcome disproportionate costs without a careful analysis of whether they arise in the former or the latter or both. If in the cases in which there has been distinctive judicial criticism the significant part of the costs have been in the disclosure process, as many lawyers might anecdotally perceive to be the case, then reform must be directed to a better, quicker, more efficient, perhaps more judicially inquisitorial process of getting to satisfactory disclosure. Because outside the high conflict dispute cases, once there was satisfactory and sufficient disclosure it is believed many solicitors have a reasonable expectation of settling, particularly with the assistance of specialist in court or private FDR.

If nevertheless the analysis is that the greater part of the very high, disproportionate costs are being incurred in reaching a settlement irrespective of the disclosure process then this asks dramatic questions either of the process of settlement or of the uncertainty, unpredictability and unsatisfactory nature of our judge made law. Whilst there are colossal benefits in the judicial discretionary approach, if it nevertheless leads to such uncertainty of the law and consequently directly to greater difficulty in settling with very high legal costs, then it might well be that the time has finally come for statutory reform. If it is the process of settlement, notwithstanding England being one of the most settlement orientated family law jurisdictions in the world, then measures must be directed to that process and costs orders made where that pre-final hearing settlement process does not occur including failure to negotiate appropriately.

Accordingly, there should now be careful analysis of the reported decisions and reflection within the professions about whether these costs issues are disclosure or settlement process itself or settlement difficulties due to uncertainty of the law.

Case law

Set out in the schedule are just some of the primary cases, specifically elements of the criticism in the judgements, of the costs.

What can and cannot be achieved

1. There cannot be any proscription of solicitors' rates; this has been suggested by Mostyn J in recent cases[6]. Rates derive mostly from commercial market forces, rental, salaries, IT, insurances etc., Moreover although much family law is undertaken in either specialist family law practices or in GP firms where there is some degree of control in respect of the family law rates, some family law work including some of the bigger money cases which genuinely need substantial resources to bring appropriately to trial are undertaken in larger corporate firms where family lawyers are on the same charging rates as their corporate colleagues. Certainly, there should be judicial comment in a summary assessment of costs where a party has instructed a law firm at rates inappropriate for that particular case, but there should be no proscription between the solicitor and the client in private matters.
2. The high levels of fees include counsels' charges yet over the past decades a few judges, when at the bar, were responsible with their clerks for significant[7]
3. One of the best elements of the English family law system is legal services orders, rarely found abroad. The opportunity to level up and give equal representation. Yet, these orders are not made often. Parties struggle on, unable to instruct lawyers fully and comprehensively, sometimes acting in person or taking out litigation loans at ridiculous rates. Cases either do not then settle as they should alternatively inappropriate courses of action are pursued. Any review of the processes should encourage the making of more arrangements for legal services orders, for the sharing out of available resources of proper legal funding and power for interim sales of assets to realise funding. In a few cases it may mean more costs are thereby incurred. In fact, quite probably in the greater number of cases, the matter should settle more quickly.

4. The Leadbetter jurisprudence[8] [redacted]
5. Too often in the perception of many family lawyers what happens in a few high conflict big money cases changes the way of working for everyone else in the profession in an unnecessary, sometimes quite burdensome, fashion. On any review, it must be very clearly understood that the significant majority of family law solicitors and barristers in the vast number of cases going through the family courts are conducting them with proportionality of costs to the amount in issue and indeed with staggeringly modest levels of costs as seen from the perception of a few colossal cost's cases. Such lawyers look on with amazement at costs in some of the reported decisions, acknowledging this is a wholly different world of professional practice. Any reforms must make sure it does not increase the burdens on the majority of practitioners for whom these disproportionate and/or high costs issues are rarely relevant.
6. Alongside the shocking costs decisions are other cases with equally strongly worded judgements criticising one party for gross failures in giving disclosure, conducting their personal affairs to make disclosure immensely difficult or in many other ways thwarting opportunity to understand the overall finances and then settle. These cases rightly require work from the highest paid professionals with many lawyers in the team to follow many leads, often here and abroad. These cases have inevitably high costs because it is hard and long work to get to the truth and proper understanding. England rightly has a reputation for quite often finding out the financial background in cases when multitude of obstacles are put in the way. Review of reforms must take account of the immensely difficult balance for lawyers of knowing which of the cases are justifiably requiring high costs in this sort of process, receiving huge praise and vindication in the ultimate judgement, and which cases may result in high costs being disproportionate. It is one of the hardest aspects of the work of lawyers in this area.
7. We must recognise there is absolutely no public sympathy with the legal profession on this issue. Even the party incurring substantial costs in pursuing necessary disclosure for sharing or appropriate needs resents paying them and many are dissatisfied after the conclusion. Each party naturally blames the lawyers of the other party but in reality, some are often unhappy themselves at their own level of costs, even though content with the representation.

Neither Parliament nor public opinion will have any sympathy or support.

8. The profession has not helped itself. When the initial costs criticism reported decisions were coming through, it might have been expected that the profession would have made it clear that there was no support for excessive or disproportionate costs. For the public looking in, it is far too easy to consider the profession is simply looking after itself and has a vested interest in not being self-critical or self-reforming. Indeed, it might be thought the profession has so far been lucky in that there hasn't been public attention to any extent to this issue. It can surely only be a matter of time before it does appear in public debate, in the more populist media, and to the detriment of reputation of all those working hard to resolve cases with reasonable, modest levels of costs.
9. It is also so misrepresentative of the profession. The theme for many lawyers is settling at the earliest opportunity including referring matters to ADR wherever appropriate. Most lawyers settle most cases at or well before the FDR. The reputational risk is great compared to what is really happening.
10. The relatively recent amendment in May 2019 to the rules[9] [redacted]
11. Too often costs can be in adjunct in the closing submissions. It's not yet known which way the judge will go on the arguments and therefore pressing costs too much may seem counter productive. Producing detailed assessments after a long case can be very expensive, a cost to the client completely wasted if the judgement goes against and no costs application as

possible. Of course, judges need an approximation of the costs incurred. But there should be a review of how costs can best be dealt with in the final judgement and outcome. Yet the discussions about *Calderbank* showed how difficult it is for judges coming to a view on appropriate sharing and needs then to have to factor in analysis of costs. I suggest this is still an area where we do not yet have wholly satisfactory practice.

Needs and sharing

There is an important difference between these respective outcomes when the court looks at costs.

In a sharing case, where shared assets meet needs, whether 50% or according to provenance, each party is, as a matter of present law, liable for their own costs. They have no basis in law for asking for any other provision for their costs to be met as a matter of needs. If one party has substantially greater costs, perhaps through lawyers with substantially higher charging rate, then that is a matter for them. Nevertheless, dissatisfaction with this apparent simplicity prompts inter parties' costs claims. This is found within the arena of failures to give early, open and transparent disclosure or excessive demands on disclosure. A party asserts that they would have had more by way of sharing if they had not had to incur unnecessary and excessive costs, hence costs claim. I suggest this is a legitimate argument and should result in appropriate costs orders. But this does not require wholesale changes in procedure and can largely be dealt with under existing law or some modifications.

Into this arena comes the apparent unwillingness of one party to engage in negotiation, making and responding to reasonable offers and similar. Again, this will quite probably lead to discrete costs orders. Any change in the rules should make this more explicit. The culture must change of even far greater settlement orientation and this requires costs orders where there has been clear culpability and failure. There have recently been several cases where parties have been criticised for a failure to negotiate reasonably and responsibly, within the terms of paragraph 4.4 of FPR PD28A; some included in the schedule.

It is in needs-based cases where major problems arise in my assessment. Pursuing extensive disclosure to show a level of assets that can meet, justify, what the disclosing party might regard as a possibly artificially inflated needs-based claim. Resisting disproportionate or excessive lines of enquiry which will add little or nothing to the ultimate needs analysis and provision. Both give rise to significant costs in the disclosure process.

Sadly, in some needs cases, and the heart of the problem in too many cases, what might initially have been available in the overall assets to meet the needs of both parties, including the applicant if the financially weaker spouse, is simply not then available after the legal costs have been deducted or taken into account. One party then finds their needs cannot now be met because of the costs incurred. In these circumstances, needs then includes liabilities which are legal costs, sometimes very high legal costs. It is at this point that the family court is in a real dilemma in law. It has a statutory duty to look at needs including liabilities. But if these are primarily or wholly the costs of the needs claimant party, what should the court do? The liability might be a litigation loan or other commercial debt, soft borrowing from family or monies directly owed to the lawyers. If these costs liabilities are not provided in the needs provision thereby leaving with the liability, the party will not have their real, judicially assessed needs met e.g., for accommodation. Therefore, the statutory exercise of the court will have been unfulfilled and frustrated. Yet understandably the paying party argues that in making this needs provision to include costs incurred, they are in effect being ordered to pay the costs of the applicant, without summary assessment and perhaps at a disproportionate or excessive level. By providing for costs as part of needs and liabilities, the court is in effect ordering payment of inter partes costs without any proper consideration of quantum of the costs incurred by one party with their lawyer. Arguably, a costs order by the back door in circumstances where the default is that each party pays their own.

The Court of Appeal recently entered into this area in *Azarmi-Movafagh v Bassiri-Dezfouli*[11] by explicitly saying that needs include liabilities for family law and other legal costs. This was a controversial decision, clear policymaking at judicial level without perhaps considering the wider implications for a significant number of cases. Not least, by requiring in the financial settlement payment for the other side's still outstanding costs incurred in already concluded children proceedings but in which there had been no order as to costs, the Court of Appeal was sanctioning the overturning of the no order as to cost in the children proceedings by ordering one party, the paying party, to pay those costs under the guise of financial needs. This interference with a previous order made by a family court was surely not intended. The impression given was that needs trumps costs however incurred and whatever the amount. It risks going back to the pre-*White* case law of reasonable requirements of the applicant.

Yet at High Court level, other decisions[12] were making it clear that in appropriate cases, costs orders would be made which caused parties to dip below their needs provision. In other words, they had less than their needs because of the liability to meet some of their costs or that of the other party. This remains narrowly used. It cannot be. It must be used far more. It should be

embraced in any reform provisions. Otherwise, there is an encouragement to litigate by the needs claimant, confident that whatever level of costs are incurred, they will be met so that their needs are provided for. Of course, a judge as part of the s25 exercise must carry out an analysis of whether the costs incurred by the needs based claimant are reasonable; in as far as they are not, then liability for those costs would not or should not be included in the needs provision. Yet this is rarely or never part of the final adjudication in court process. It arises in costs arguments at the conclusion, and after judgement. It is here that the muddle between unreasonably, excessively incurred costs and the needs-based claim for liability for those costs comes together. I suggest that there cannot be any proper reform and headway in this distinctive set of circumstances without deciding the fair approach and then how that process will work during trial.

Moreover, high legal costs perversely discourage settlement, the primary object for family law dispute resolution. A time arrives during the course of the case where costs reach a certain level when each party wants, must, go on to trial to get a costs order against the other side. One obvious reason why many cases, possibly increasingly more cases, are going to trial is the level of costs of one or both parties make a fair negotiated settlement extremely hard or downright impossible. The object of any reform must be to find a way for more matters to settle at the FDR stage at the latest.

A most recent case[13] in the long saga of judicial criticism most keenly highlighted the problem. Despite outrageous conduct by the applicant spouse, the wife, costing the husband tens of millions of pounds through various lost opportunities in share dealings, she nevertheless received, after an immensely short marital relationship, a generous need-based provision on top of existing assets. Then, furthermore, was only ordered to make a contribution of £100,000 towards his costs which were predictably substantially more. Here was surely, hopefully, the high watermark of needs effectively trumping, overwhelming, substantial judicial criticism, in outcome and in costs, as a warning to other spouses not to interfere in commercial dealings of the other party. This is one of the primary decisions now compelling the need for a substantial review and reform of practice and procedure. Without this reform and without the reform then having significant practical change, reform of the entire law itself will be unarguable.

Reform of substantive law

The necessity of substantial and effective changes to avoid the ongoing scandal of excessive and disproportionate costs is key in the face of increasing demands for reform through statute of the law of financial remedies on divorce. *White* in 2000 was brilliant in changing the entire direction of

financial remedy law, to one which was in keeping with the expectation of married couples, was not gender discriminatory and which maintained the English priority of provision for needs based on marital commitment. Subsequent decisions have reinforced the flexibility of the English common-law approach to reflect societal expectations. However, in so doing, multiplicity of case reports have also increased uncertainty, unpredictability and thereby the risk and/or benefit of litigation. If the discretionary approach, the opportunity for tailor-made justice, upholding fairness and supportive of contributions and sacrifices made to the marital relationship is shipwrecked on the rocks of disproportionate and excessive costs, then it may be time to rebuild the ship and take another course and direction.

Unless there can be a real change in law, practice and culture in the shorter medium-term in respect of these excessive and disproportionate costs issues, then the argument for statutory reform will become unanswerable. If judges by their articulation of the law over the past two decades coupled with procedural costs provisions cannot prevent frequent scandals regarding costs, then Parliament must step in, possibly dismantling the many excellent elements in our present law operating very fairly in the vast majority of cases. A few badly conducted but high-profile cases would spoil the good process for the vast majority of parties. This is the challenge presenting the profession.

Schedule of some costs criticism judgements

- *KSO v MJO*[14] Total marital assets were £818K, total costs incurred to FDR were £553K leaving £217,530. Munby J quoted his earlier decision of *A v A*[15] *"Costs in too many so-called 'big money' cases – in modern conditions many such cases do not in truth involve 'big' money at all – are, as here, grossly disproportionate to either the amounts or the issues at stake. I have had occasion before to deplore the expenditure – one is tempted to say the waste – of money in such cases … .A very recent example is provided by Wood v Rost*[16]*, where, speaking of a case which had been conducted at "vast expense," the Deputy Judge lamented that the late Mr Charles Dickens was no longer alive to write a 21st century sequel to Bleak House. The simile, if I may say so, is all too apt. The accusatory finger which in the 19th century was appropriately pointed at the High Court of*

Chancery is, in the modern world, more appropriately pointed at the Family Division."

- *J v J*[17]– Mostyn J. Total £2.885m, Total costs by final hearing £920K. Observed: "[13] *In my judgment the time has come when the lawmakers in this country, whether they are legislators or judges, must stop saying something must be done and actually do something"*

- *WG v HG*[18] Francis J, Total assets c £12.25m, needs claim assessed at £3.65m. W's total costs (including children) £925K. *'...people cannot litigate on the basis that they are bound to be reimbursed for their costs.....no one enters litigation simply expecting a blank cheque.' "Parties cannot spend £1 million on their representation without being prepared to face the consequences of their decision to incur that level of expenditure"*

- *OG v AG*[19] [redacted]

- *LM v DM*

- *WG v HG*[21]– Francis J. [93] "*People who engage in litigation need to know that it has a cost …. She will have to make the sort of decisions about budget managing that other people have to make day in day out…. People who adopt unreasonable positions in litigation cannot simply do so confident that there will be an indemnity for the costs of the litigation behaviour, however unreasonable it may have been.*"

- *R v B Capita Trustees*

- [23]

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[redacted]

- *FF v KF* [redacted]

- [redacted]

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- *Xanthopoulos v Rakshina*[

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[1] [1999] 2 FLR 763

[2] Total costs of £128,000 of both sides up to the Supreme Court including a total of 5 discrete hearings versus net assets of about £127,000

[3] FPR 9.27

[4] compounded as a consequence of the lockdown experience by many First Appointments being on paper, including by consent, with much reduced judicial opportunity to reflect on the future direction of the case and the costs thereby being incurred, however beneficial these are sometimes for remote hearings

[5] at this juncture it must be said there is probably a large regional variation. Some might consider disproportionate costs is primarily a London centric problem. Across the country in medium asset and modest asset cases, solicitors and barristers are undertaking incredible service for their clients at relatively modest costs consistent with the available resources and ability to pay. The same is true of very many London lawyers. As below, it is fundamental that necessary changes in law and practice do not add extra burdens or restrictions across-the-board on those lawyers, the significant majority in the profession, for whom this is not a material issue or criticism

[6] For example *Xanthopoulos v Rakshina* [2022] EWFC 30

at 14

[7] Not incremental or inflation linked but large increases from time to time in the rates being charged at the top level

[8] [1985] FLR 785

[9] PD28A 4.4

[10] R28.3.6.2

[11] [2021] EWCA 1184, paying party ordered to pay £425,000 for accommodation but also £200,000 of a cost's liability of £257,000 in respect of the financial remedy proceedings, children proceedings and some criminal proceedings on the basis that the recipient would only be responsible for a small level of debt

[12] To include *VV v VV* [2022] EWFC 46; *TT v CDS* [2019] EWHC 3572 (Fam); *R v B and Capita Trustees* [2017] EWFC 33

[13] *VV v VV* [2022] EWFC 41

[14] [2008] EWHC 3031

[15] [2007] EWHC 1810

[16] [2007] EWHC 1511

[17] [2014] EWHC 3654

[18] [2018] EWFC 84

[19] [2020] EWFC 52

[20] [2021] EWFC 28

[21] [2018] EWFC 84

[22] [2017] EWFC 33

[23] [2021] EWFC 28

[24] [2017] EWHC 1093

[25] [2021] EWFC 63

[26] [2022] EWFC 75

[27] [2022] EWFC 30

[28] [2021] EWFC 88

[29] [2021] EWFC 72