IN THE CENTRAL FAMILY COURT

BV19D14014
Neutral Citation Number: [2022] EWFC 158

B E T W E E N

P v P (Treatment of costs in sharing cases)

Reserved Written Judgment of Deputy District Judge David Hodson
14 November 2022

Daniel Mutton (instructed by Penningtons) appeared on behalf of the applicant former wife

The Respondent former husband was in person

Introduction

1. This discrete judgement solely concerns several issues of legal costs in a wholly sharing case. It does not concern costs in the needs scenario.

2. As I explain further below, it is not the comprehensive judgement in the two-day final financial remedy case which judgement was given orally on the afternoon of the 2nd day, 20 October 2022 with the draft order approved by me on 14 November. As I said in that oral judgement, it was a case which should never have got to Form A, let alone a final hearing, yet total costs in excess of £150,000 had been incurred when the asset base gross of legal costs was less than £1 million and notwithstanding that the respondent was in person from sometime before the FDR. The respondent did not himself raise issues regarding costs but I felt that I had a judicial duty to do so, and I refer to this element more below. A good part of the time in closing submissions with the barrister for the applicant was on the question of the various treatments of costs. Having given oral judgement, with the invariable modicum of time to prepare and with no ability to do a comprehensive analysis of the case law, he asked for a written judgement on this aspect and I agreed. Nothing in this judgement detracts from the oral judgement and is solely limited to that costs aspect. Permission to appeal on this aspect was extended until handing down. I refer to some background aspects for context

3. There 3 costs aspects namely
   a. How should costs owing by either party to their lawyers at the final hearing in the sharing exercise be treated if they are materially different in any way
   b. How should the costs incurred by either party and already taken, advanced, from marital assets being shared equally be treated in the sharing exercise if they are materially different
   c. How should costs orders between the parties be treated in a wholly sharing case?

4. Of course, I am bound by precedent. Nevertheless as we examined the authorities, it didn't seem to me these issues were clearly set out or at least in these particular circumstances which I suggest are not unusual for solicitors, barristers, arbitrators and mediators daily resolving cases around the country.

The summary elements of the case itself

5. This was a long marriage, 1978 until separation March 2019, 40 years. The former wife is 69 and the former husband 70. In other words, this marriage was their adult lifetime. They each have still a very modest income as well as modest pensions in payment and quite rightly it was agreed this was a clean break case. They have 2 children, aged 42 and 40, both independent of course. Apart from the question of family gold and wedding jewellery, in the distinctive culture of families with connections with India, all of the assets were entirely marital. Net of legal costs already paid, total existing assets were somewhere between £800,000 and £900,000. It was acknowledged and agreed that apart from a couple of aspects this was an entirely sharing case and moreover on an equal basis. Anyone therefore reading this judgement with a knowledge of where our case law has gone since the Supreme Court, as it now is, in White in the year 2000 will know the obvious and immediate answer. All of the assets will be divided equally, in a way hopefully agreed between the parties alternatively ordered by a court, and that is the simple end of it. Their needs are met and in this sort of case it's hard to see how needs can be too different. Having been practising in family law since the days of my training contract in the 2nd part of the 1970s, it is a position in law far simpler and clearer than previously. Very many cases settle quite rightly without going anywhere close to a court office on this basis. And so it should have done here.

6. The respondent husband had acted in person for a time before the FDR and subsequently. His prerogative. But equally as I said in my oral judgement, this does not give a party impunity, carte blanche, to run arguments which have minimal or no prospect of success without a direct cost. What were they? In summary and only as background

7. In about 2009, the former wife's father had died. Yet the estate was still being disputed between siblings, with extensive litigation in India. Apparently the Will itself is still being disputed. One of the siblings has died and their spouse has taken possession of a property. And so on. Sadly those of us practising in the English family courts with some experience of cases involving litigation in India are keenly aware that sometimes it can take a very long time with many procedural elements without any reliable apparent final end date and then sometimes disputed enforceability. This is the position here apparently. More than a decade after the death, there is no end in sight. But even when or if any inheritance is received, it might be no more than about £35,000, very small in the totality of this case. Clearly nonmarital. Clearly not yet received. Clearly some significant doubt about whether it would be received. Clearly if received it would be well after the date of separation and now the date of the final outcome. In these circumstances, and especially based on clear case law, this would not be shared or brought into account in the sharing exercise. It should not have delayed a settlement under any circumstances. The respondent former husband had been thoroughly wrong to have pursued this in countless questionnaires and correspondence

8. Secondly, gold and family wedding jewellery. This was held by the former wife until the wedding of their daughter in 2016 when she gave the bulk away to her as

a wedding gift. The former husband asserted he had not been aware this was happening. The former wife said he was. Following oral evidence, I was satisfied the former husband did not know until the start of this dispute albeit that was sometime ago. He should have been told. I found the wife had misled him, at best, in her replies in this regard. Nevertheless I was satisfied that what had been given to the daughter came wholly or mostly from gifts to the former wife either before her own wedding, at the wedding itself or subsequently and came from her family, particularly her own mother, with the intention of being passed on down the generations, as has happened. I'm satisfied that apart from a few items of insignificant value on the information available to me, there was nothing left. It had all gone to the daughter and apparently will go to her own daughter and so on down the generations. This was either nonmarital or reasonable gifts by the former wife during the marriage which it would be inappropriate to bring into account. I understand the former husband feels genuinely aggrieved and unhappy. This should be directed to the failure by his now former wife to tell him at the time. I don't know what was the state of the marriage at the time of the wedding of their daughter; he said it wasn't good. This might be the explanation. Too often family lawyers find that various events, including perhaps wrong and inappropriate action and conduct by one spouse during the marriage, can reverberate loudly in the context of any subsequent family proceedings. It can then be difficult to extricate the unhappiness by a spouse of what wrongly or inappropriately occurred within the marriage with the fairness of the financial outcome looked at objectively. I believe this is what happened here. The former husband was rightly aggrieved and genuinely didn't know about the gift and disposal until the family dispute started. But that was not a reason for the matter to take so long through court. Moreover with good advice I would have expected he would have been told this. So I had little choice but to dismiss this element of the case. It was no good reason to alter the equal sharing

9. And those were the 2 issues. And they had brought about £150,000 of costs out of a pot, gross of those costs, of perhaps a little less than £1 million. In a case of equal sharing. A tragic situation. But for the family courts and for family lawyers an easy case, if I may say respectfully, where the principles of law are very clear - and that is rarely said!

10. The conclusion, apart from the question of costs, was that there would be a totting up and an amount would be paid by the former husband to the former wife on the basis that he retained certain assets. The finalisation of marital partnership accounts in the traditional fashion.

11. But this still left the unhappy and uncertain position of costs in 3 categories

Costs amounts

12. Let me set out the respective positions and amounts.

13. The former husband had lawyers from the beginning, which was a fairly substantial voluntary disclosure exercise, continuing after Form A until a couple of months before the FDR. I don't know the firm and as far as I can tell, the charging rate was quite modest. At the end of the trial, he owed them £7905 and

he had paid earlier in the proceedings £16,500 from marital resources. In other words, a total of about £24,500 costs. Itself quite high.

14. The former wife had instructed well regarded central London lawyers. At the end of the trial, she owed them £28,407.54 but had costs already paid from marital resources of £100,549.29. In other words, only £1000 short of £130,000. Moreover this was notwithstanding that, from a date in mid spring after the February FDR and until late August 2022 preparation for final hearing, they came off the record when there was little work to be done in order rightly to save unnecessary costs. This was a large level of costs, as I expressed at the hearing, which I felt I couldn't ignore especially in the context where those costs had come out of the marital pot and thereby specifically diminished what would otherwise be shared equally. This was the heart of my concerns about costs for the outcome in the fairness exercise

15. I was given a better breakdown of her charges. The FDR was on 7 February 2022. At that time, recorded in that order, she had incurred charges of about £83,000. On 25 February 2022, her lawyers wrote an excellent open offer which was very close to the terms of the final settlement and I found should have been accepted by the former husband. They gave 14 days for acceptance i.e. 11 March 2022. Thereafter, from 11 March 2022 until the end of trial they declared she incurred costs of £35,878, about £36,000. This needed to be unpacked

16. If her total costs were £129,000, and £36,000 was incurred from 14 days from the date of the offer of 25th February 2022 until the end of trial, then the amount of costs incurred until that date was £93,000. At the FDR she had incurred costs of about £83,000. Therefore there had been £10,000 work from the end of the FDR on 7 February 2022 until 11 March 2022 i.e. 14 days after the making of the offer of 25 February 2022. I felt that was high but certainly not well out of the realm of work in central London.

17. At the first appointment on 7 July 2021, 7 months before the FDR, the former wife declared she had already incurred costs of about £38,000. In other words, the work between the end of the first appointment and the end of the FDR was approximately £45,000. I'm bound to say that seems quite a lot in a case where the issues were so relatively straightforward.

18. Moreover costs of £38,000 to a first appointment also seem high. However I was told there had been a lot of pre-issue voluntary disclosure which had taken up time and costs; voluntary Forms E and a couple of rounds of questionnaires. This might explain the figure. Voluntary disclosure is great if it works quickly and efficiently but if not, it's often better to run through the court-based process

19. So, in summary £38,000 to the first appointment inclusive of some voluntary disclosure, another £45,000 to the FDR, another £10,000 to a date about a month later being 14 days after an open offer had been sent and then another £36,000 to the end of the final hearing. In total about £130,000.

20. Probably more in parenthesis, I have throughout most of my career worked in central London as a solicitor and have sat as a deputy only in London (PRFD and

CFC) since 1995. But 18 months ago, I started sitting in the Exeter Family Court in parallel with sitting still in the CFC. One of the biggest differences, and I suspect it is generally outside of London rather than specifically Exeter, is the level of costs. I have had final two-day hearings, well prepared and represented, where the costs of each have been £38,000, which only shows the huge chasm existing in the practice of family law around England and Wales at the present time.

21. When I queried this quantum, I was told that the respondent former husband had in correspondence complained about the conduct of the case by his former wife's solicitors and either did or threatened to copy in the senior partner and moreover either did or threatened to refer to the Law Society, SRA and the ombudsman. Consequently, it was felt by the partner in charge that she should take a greater involvement than otherwise and I was sympathetic. The stated threat of complaints within or without the firm from a dissatisfied litigant must warrant a higher level of involvement. As I said at the oral judgement and as a general comment, if these threats are made the party making them must expect the costs will be higher and this may be a consequence in a costs order.

22. That was a partial satisfactory explanation but even so it still seemed high. I reminded myself this was not a case of hidden assets, offshore assets, assets held in the name of 3rd parties, assets held through corporations and trusts and the various other normal complexities which daily arise in central London family law finance litigation. If there was no review of the costs already paid by the wife to her lawyers from the marital pot (and that would be a very difficult exercise), the husband in person would in effect be paying one half of them.

23. Therefore in fairness according to law and in circumstances where the costs were high in the totality of the marital pot and the amounts in issue, how was I to deal with the 3 elements namely the outstanding costs liability of each in the sharing exercise especially that of the former wife, the costs each had disproportionately taken out of the marital pot and the costs order I was inevitably going to make against the husband because of the conduct of the case

Should I intervene at all?

24. I deal first with this element in this judgement. For the simple reason that the former wife will feel disgruntled and unhappy that I myself raised the issues. Because the former husband didn't at all. I don't think he had any awareness of the simple mathematics namely that having taken out a large amount of the marital pot for costs by the wife, the amount left for sharing of which he got one half was consequently much reduced. He might but didn't show it. I don't think he even put his mind to the differential of the amounts they each owed to their lawyers about which again he would lose out if it was fully brought into the sharing equation. When I made the costs order, I tried to explain in simple language but I fear some was beyond him. As I said, funds were there for him to pay a lawyer but he was in person

25. So what should a family court judge do? One easy answer is that if an aspect isn't already raised, don't raise it! Deal with the issues raised in submissions and arguments and give an adjudication on the facts and a decision on law and a fair

outcome accordingly. Judges are already busy enough. It's a matter for litigants if they act in person when, as here, there were funds for legal representation for both. The traditional adversarial approach of our common law system. An obvious unfairness of which our friends practising in the civil law continually remind us and of which root and branch law reformers castigate us. How much does the duty of fairness imposed on family court judges take us beyond the adversarial and into the inquisitorial?

26. This is not easy for the party that has chosen to have legal representation and paid a substantial amount for that undoubted benefit. There are criticisms that some judges in some cases go too far in helping the litigant in person when the other party is sitting there having paid good money for their own lawyer. It's not an easy balance. It also places a huge burden on the judge in being alert and aware of issues, in law and practice, which might have been raised if the litigant in person had had good representation. It is yet further argument for the importance of having specialist financial remedy judges. It was also transparently obvious to me that although every professional respect and courtesy was shown, the wife and her legal team were not particularly impressed when I raised the issues of costs being dealt with here. In fairness, counsel did a very good job in the closing submissions in addressing me on the points, after I gave him notice of my concerns at the end of the first day.

27. I decided and was satisfied that my duty as a judge of the family court was to produce a fair outcome according to law, both statute and case law, including as appropriate in circumstances in which a party, very probably without representation but possibly with poor representation, simply is not aware or alert to distinctive issues. I explained this in my oral judgement so that the former wife could hear, however unhappy she may be that I went down this course of action. I consider the Family Court of England and Wales has a quasi/hybrid inquisitorial role and status

28. As it happens, after the oral judgement and before finalisation of this written judgement, I saw the decision of Mr Justice Mostyn in *Clarke* (2022) EWHC 2698 at 27 – 30 when he said this

> *27 Curiously, although Sir Jonathan [Cohen] granted the appellant permission to pursue the argument that the judge was in error for not allowing a higher annual amount than £26,000, she has shown little interest in it. This raises the question of how much encouragement the court should give to a litigant-in-person to take the right points and to eschew the wrong ones.*
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> *28. A judge will be criticised as having abandoned impartiality and independence, and of having descended into the arena, if he or she takes a point favouring one party's case which that party has not raised: see Villiers v Villiers [2022] EWCA Civ 772 at [135], [159] and [212] where I was roundly criticised for having raised what I thought was an insuperable jurisdictional obstacle but which point had not been taken on behalf of Mr Villiers. Such criticism would be especially well-merited if (unlike Mrs Villiers) the other party had sought an adjournment to deal with the point, but that had been refused.*

> *29. It could be said that Sir Jonathan has taken two points favouring the appellant's case when he granted leave on two issues not raised by her below. Should it make any difference if the party in receipt of the judge's favourable encouragement is unrepresented? It has been stated time and again, for example in Barton v Wright Hassal LLP [2018] UKSC 12, that no special concessions or assistance should be given to litigants-in-person. In that case at [18] Lord Sumption stated: "Any advantage enjoyed by a litigant-in-person imposes a corresponding disadvantage on the other side, which may be significant if it affects the latter's legal rights "*
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> *30. On the other hand, in a financial remedy case the court exercises a quasi-inquisitorial function. It would be a dereliction of its inquisitorial duty if it allowed a case to be decided under procedural rules and customs which prevented a just decision being rendered on a particular set of facts because a litigant-in-person has, for whatever reason, chosen not to advance the relevant arguments applicable to those facts.*

29. For obvious reasons, naturally I'm humbly delighted he came to the same conclusion as I had in chambers days earlier. Its a concern of and for many family court judges, especially common law, worldwide

<u>First aspect: How to deal with outstanding legal costs in the sharing exercise</u>

30. The amount each owed was quite different, about £8000 of the former husband compared to about £28,500 of the former wife. This was not a needs-based case. Therefore the recent Court of Appeal decision of *Azarmi-Movafagh v Bassiri-Dezfouli* (2021) EWCA 1184 does not directly apply. In that case in broad summary the Court of Appeal said that legal costs outstanding should be or at least could be part of the needs claims of the respective parties and provided for in a needs award to the applicant.

31. But if in the sharing process, working out what is the total available marital pot before equal division, the liability for the outstanding legal costs are brought into account as if they were genuine marital debts of one or rather, I think there is a real risk the court is going down the needs approach in an entirely sharing case. If the differential is minor, then the court is unlikely to be troubled. It was not here. If the outstanding costs are deducted before the marital pot is assessed and then the pot is shared equally, one party is in effect funding or subsidising the costs of the other. That seemed to me to be inconsistent with the expectation that the marital partnership assets, acquired during the marriage, should be divided equally.

32. As it happened in this case, I did include them as part of the sharing partnership. I gave a reason that the applicant would have had to have undertaken more running to get the case into a state of play for settlement than would a respondent. There is something in this. I also record I was aware what I was going to decide on the so-called "advance" element. The feeling of fairness discretion is strong with judges in the family court, however sharp is the dividing line of equal division. I believe that element was within my thinking of the fairness. But it did make me ask vital questions about whether in a case like this, the amount each party owes

for the outstanding legal costs should be brought into the partnership accounts pre division or whether it should be simply their own liability?

33. I believe that if I had not anticipated the "advance" element as below, I would have directed that each party took responsibility for their own outstanding legal costs. After all, what does it mean to have no order as to costs? This is behind much of the thinking and concerns of this judgement. I worry it is part of the blurring of the distinction between each meeting their own costs (no order) and the outstanding costs liabilities on a sharing balance sheet. The former wife might in retrospect consider herself fortunate to have had this outcome here and I'm not sure it should be the outcome in the general scheme when each meets their own outstanding liability for their costs.

34. However it is part and parcel of the far bigger issue on how the legal costs of each party should be dealt with in the sharing exercise, the 3rd element below and the most substantial one

2nd element: Costs orders between the parties in a sharing case

35. I deal with this next for convenience although logically and in judicial thinking it's the 3rd element in the process. When a judge is looking at the outcome, and has an application by one party that the other party should pay costs, how is this dealt with, brought into the outcome. It seems to me there are sometimes mixed messages from case law, and I have endeavoured to find a way through them.

36. In this matter, I was quickly satisfied a costs order was appropriate. Failure to negotiate reasonably, failure to accept a good open offer made shortly after the FDR, failure even to engage with that offer, failure to give understandable disclosure, failure to give updating disclosure 6 weeks before the final hearing where a lot arrived a day or so before the final hearing and even then inadequately, and perhaps mostly pursuing a claim which the court found had no or minimal prospect of success. The criteria for a costs order were fully made out. I ordered costs entirely incurred from the date 14 days after the open offer along with another amount for the costs previously incurred in respect of gold and inheritance as itemised by the former wife's lawyers, coming to a total costs order of £43,000.

37. But was I right to do it this way namely a quantification of a figure? Yes and I would hope this wouldn't be too contentious. It's a straight costs order, summarily assessed and payable fairly quickly. However, there are many reported decisions, including those I was taken to in closing submissions and referred to below, in which the higher courts treat litigation misconduct and other actions which would give rise to a costs order as part of the discretionary outcome. Without giving specific costs figures, the court nudges the percentage outcome or they push up the lump sum or similar exercises. They do not come to a figure on a costs order but as part of the discretionary process, including s25.2 conduct. Should I have done so here and when should there be any differential? I set out some respectful observations

38. It seems to me that where there is a minimal or no discretionary exercise, when the role of the court is to ascertain what should be in the marital sharing pot and

the forensic science approach within the sharp dividing line referred to by the Court of Appeal in *Hart* (2017) EWCA 1306 is in play, then it is not helpful to the parties, and potentially very confusing to understandable justice, then to interfere with the equality division by some sort of discretionary element to reflect litigation misconduct and other circumstances which would ordinarily give rise to a costs order. Instead of dividing equally, to divide perhaps 53% and 47% to take account of litigation misconduct and other such costs-type circumstances. This looks very unfair including for the party who has less than 50% share. So what can be said in this regard?

39. Where it is possible, with judicial awareness of what quantum is appropriate as incurred by the claimant party including on a reliable summary assessment, then I think the assessed costs order route is invariably preferential. A straightforward costs order in a particular quantum payable by a certain date

40. If however producing a quantified figure for costs is immensely difficult, where perhaps the litigation conduct or the criticised approach of the relevant party weaves in and out throughout the case, where producing summary costs assessment on one or two aspects of the case would be incredibly expensive and lead to incredible extra costs in arguing, where a judge can at best make an intuitive, discretionary and experienced assessment of a range of what might be the likely costs unnecessarily or unreasonably incurred, then there is in our common-law system the real benefit of treatment as part of the discretionary outcome. In other words not a fixed quantum costs sum but a constituent part of either the percentage division or the arithmetic outcome. This is naturally far easier, sits better, in the less forensic, more discretionary approach envisaged in Hart.

41. Where the division is a relatively straightforward equal or other agreed percentage of the marital pot, so that it can be established with a fair amount of precision, within the forensic side of the sharp dividing line using the terminology of the Court of Appeal, then I think the court should invariably strive to a quantified costs figure rather than fallback on discretionary outcome, of nudging the percentage or final outcome to take account of what would otherwise be a reflection of the costs unnecessarily incurred.

<u>Third element: Bringing back the "advanced" costs already paid out</u>

42. This is where I believe there is greater uncertainty and where we took most time in closing submissions and I was grateful for the authorities given to me.

43. The point and potential unfairness can be simply put. In a sharing case, where one party has taken significantly more out of the marital pot for their own legal costs than the other party, is it fair to divide up the pot net of those costs already withdrawn predominantly by one party or is it fair only to do the division once those costs have been notionally brought back in? In this case, the former wife had taken almost precisely £84,000 from the marital pot more than the former husband. If that was added back in, he would have an additional £42,000. Is that fair?

44. In working through this, I believe there might have been a confusion in thinking with reference to the default of no order as to costs and what that means or is intended to mean in practice in a sharing case. This was the change made in 2003 and rightly so. It is of course borrowed from the English civil litigation arena. But in those circumstances, each of the litigants are completely separate. In family law they are often working from a combined marital financial pot alternatively a marital pot and each of them having some of their own resources. I don't think there has necessarily been enough consideration to how no order as to costs actually works in the context where one or both parties may have taken their own unilateral steps regarding their own legal funding. It seemed to me this case was one of the most obvious and stark circumstances. One party had taken about £100,000 out of the marital resources and paid to their lawyer for their own legal fees which had already been incurred at the date of trial. The other party had only taken a modest amount, £16,500. He had also incidentally complained that the marital bank accounts had been emptied without his knowledge, thereby putting him at real financial difficulties in paying his own debts. This is the lawlessness, if I use this strong word, when this sort of unilateral action happens during a case.

45. Sadly, family lawyers see this sort of activity too often. The plundering, admittedly also a loaded word, by one party of available resources at the time of separation and subsequently to pay their own lawyer. And why not? If one party, perhaps the applicant and financially weaker spouse, feels they will be at a real disadvantage, without opportunity of legal funding to have equal or necessary representation, and if it will all be divided up anyway, why not take it? An advance. On account. Solicitors are always put in a very difficult professional position when asked by clients if they should do so. They are asked often. It happens quite often. When the other spouse discovers, there is usually an explosion of correspondence and ill feeling and seriously puts back prospects of ADR settlement.

46. English family law, unlike many continental, civil law European jurisdictions, does not have any significant sense in which the marital partnership ends at the date of separation, with sometimes few backward glances at what was the financial position at the date of separation. The assets are as at the date of the settlement, the FDR or final hearing.

47. Accordingly, the terrain is ripe for this sort of unilateral behaviour. English law almost seems to give tacit encouragement to parties to the invasion of marital savings in the relatively confident knowledge that it may well be all glossed over, lost in the wash, by the time of the final settlement or hearing. That cannot be right. It is accepting, through silence, unilateral conduct, perhaps sometimes by the party more willing to contemplate this sort of action. If the FDR or final hearing court doesn't give it much attention, the aggrieved party definitely does because they feel the other party has gained a distinctive advantage by their conduct in respect of the marital finances from separation until settlement

48. Moreover where the rates of litigation loans are high, 18% or more, it makes perfect sense to take from existing resources. Despite campaigning for the measure over several decades, the family court still does not have the power to order the sale of assets at an interim stage to provide for urgent needs particularly

levelling up funding for lawyers. There are relatively few instances of legal services orders. In my assessment there should be far more expectation between lawyers of agreement at an early stage about realisation of assets for the proper funding of each party. In this case for example, it might have been very wise for the property in which the husband has a 50% interest to be sold and the proceeds used equally for legal fees. That did not happen. Instead the wife took £100,000 from marital resources for her fees

49. Indeed, the former husband would have been in huge difficulties if he had wanted the same level of representation, which I happen to think would have been beneficial and have resulted in a settlement without a final hearing, because there was no money left for him in the marital pot, apart from real property. So these sorts of actions taken unilaterally by one spouse are to the direct detriment of the other party in a number of these cases. They give a very bad, adverse feel to the way the case is conducted. It gives very unfair advantage to the spouse who has taken this action if the other spouse does not have corresponding liquid resources

50. But searching through the case law it is very hard to find this issue being addressed including in a way that I believe many lay people would consider fair namely the money each has incurred, taken as a way of advance, for their own legal fees being brought back in. Is it in the category of add back, as I was told by the former wife's barrister in closing submissions, in which case the threshold is very high? Is it within the discretionary exercise? Is it simply money that has gone and cannot be divided up as part of sharing as it is no longer available in the pot? I felt distinctly uncomfortable with these propositions which is why we spent a lot of time and why I addressed in my oral judgement and was asked to address more fully in this written judgement and I now do by reference to the quoted authorities. These are the cases referred to me. There may be others

51. The first was *GW v RW* 2003 2 FLR 108, and by Nicholas Mostyn sitting then as a deputy High Court judge. It is in the immediate aftermath of the introduction of the no order as to costs rules in the 2003 reforms but also had to look back to the Leadbitter regime. He said, clause 85, in terms that in the then recent pre-White era, the wife's claim was for an amount to meet her reasonable requirements. This was similar to civil litigation and costs would follow the event. However this was more difficult post White where the function was to determine shares in a pool of assets which was the fruit of the marital partnership. He said, clause 92, a safer starting point in a big-money case where assets exceed needs, and I comment this case has sufficient money to meet needs and therefore just comes into this category, was no order as to costs. That starting point should be departed where unreasonableness by one or other party was shown. If the starting point was no order as to costs, then Leadbetter should be reconsidered, clause 99. Costs paid should not be added back and costs outstanding should be included as a debt in the schedule of assets. I believe the across-the-board application of no order as to costs risks ignoring, perhaps even encouraging, certain conduct to the advantage of one spouse and which is then irrelevant when no order as to costs is strictly applied. Indeed, the judge was very alert to this, clause 98, saying nothing in his judgement should be taken as giving any encouragement to a party to misbehave in the litigation safe in the knowledge of the starting point of no order as to costs. He goes on to refer in that clause to certain conduct but does not deal with the

specific conduct, actions, in this particular case. In my perception the problem arises when the unilateral action in drawing down from marital resources can't really be characterised as litigation misconduct or otherwise giving rise to a costs order. It doesn't come within his clause 98 description. This is why I think there could be a departure from what is said in that judgement

52. He goes on, clause 93, to say that no order as to costs may reduce the extent of satellite costs assessment litigation which can be protracted and acrimonious and prolong the agony between the parties. Where that is a risk, I fully agree with him of course.

53. As above, in clause 99 he deals head-on with Leadbetter. He says that the logic cannot be gainsaid namely not to add back costs already paid and not to deduct costs outstanding effectively pre-empts the court's decision as to costs. I don't think it does in the sort of scenario in this case before me, the sharing of the marital assets. I think bringing back what has already been paid out simply leaves the marital pot intact for any costs order then to be made if appropriate.

54. He goes on to say it is artificial as the costs paid are gone, paid out already. But there are many instances where, such as in the add back situation, there is a figure on the balance sheet which actually isn't there but is appropriate to be included as an item. One might include the inference cases. So costs having gone is not in itself a reason in my assessment.

55. This judgement was naturally one of the strongest elements on which the former wife argued her case against any form of bringing back in what had been taken by her as a quasi advance from the marital funds

56. I was next referred to *R v R (Financial Remedies: Needs and Practicalities)* (2011) EWHC 3093, a decision of Coleridge J. The facts are totally different. Short marriage. Needs assessment after looking at the marital pot availability. I was taken to clause 32. The husband had argued that the wife's costs were excessive and this should be reflected by adding back a portion of her bill. There had been a lot of argument on this issue which had generated costs in itself. The judge acknowledged, as I did above, that the applicant will probably have more costs because they have to make the running in the case. He went on to say as follows, clause 32.

> *As a matter of principle, I'm driven to say that I would discourage the pursuit of this add back principle or approach so far as it relates to costs. It inevitably leads to a quasi-taxation or assessment of costs during the hearing but without the court having all the material which would be available to, for existence, a cost judge. It also rather flies in the face of the no order starting point and leads to debates about costs by the back door which the new rules were designed to try and reduce or prevent.*

57. Some of this is difficult to comprehend for a first instance Judge in 2022. A cost judge? It is a very long time since I remember a formal assessment of costs which used to be known as taxation of costs. It may well happen including in very substantial cases. But far more often and very frequently, there is a summary

assessment. That is the purpose of the rather complicated form completed by solicitors and filed at the court in advance. I think that in most final hearings, especially at District Judge level, an experienced financial remedy judge will often, certainly not always, have sufficient information to take a view. Summary assessment occurs as part of the final hearing. The material is available. But I do not see this judgement explaining why this process, a very simple mathematical calculation of bringing back onto the marital partnership balance sheet, flies in the face of the no order principle. To the contrary, my concern is that if no order as to costs is taken to mean in anyway that each party always meets their own, then it is highly arbitrary as to when that date occurs. If each party meeting their own costs happens to be the arbitrary date of the final hearing, then it may well be there could be unfairness to the party who had paid money out of their own resources on the day before the hearing to their lawyers to put into funds as distinct from the party who went into the hearing owing their lawyer quite a lot of money for the final hearing. Because this situation does present itself from time to time. No order as to costs in that situation is often grossly unfair dependent upon the way the assets are divided up. The parties feel this keenly in my experience as a solicitor. So on this case, I do not believe an bringing back flies in the face of the no order principle and leads to back door debates about costs.

58. *GS v L (Financial Remedies: Pre-Acquired Assets: Needs)* (2011) EWHC 1759 was transparently about premarital assets and needs, and therefore totally different to this case. The wife felt that the husband, as a consequence of what she thought was his misguided approach to the litigation, ran up unnecessary costs which she wanted to reclaim either by a costs order or an add back, para 9. This is traditional territory of costs orders. I am making a costs order in this particular case. I don't need to follow any add back approach to do so. Part of the problem in that distinctive case was the costs owing were to Spanish lawyers. The judge accepted that to add back costs paid to the Spanish lawyers would require the test of wanton, the now accepted case law test for a traditional add back of past expenditure. The judge refers to these add back cases, clauses 88-90. But she goes on, 91, to look at the dissipation against the backdrop of the overspending party. She referred to the decision above of Coleridge J. But she was looking at more than just expenditure on English family lawyers in respect of the family proceedings. The figure for the overspend was clearly an uncertain calculation, clause 87.3. I do not think the exercise in that case can be comparable to the precise, to the penny, exercise in this particular case. Under no circumstances am I disputing the case law authority on the test for the traditional add back based on expenditure inappropriately undertaken. But I do not think that is the scenario or criteria which presents itself in this particular case.

59. *MF v SF (Financial Remedy: Financial Conduct)* (2015) EWHC 1273 of Moylan J concerned a starting point of equal division of wealth created during the marriage. The court found the wife should have accepted the husband's open offer. The court found it would not be fair to ignore the consequences of that conduct when exercising discretion and accordingly an adjustment was made; one of the cases to which I alluded above where this approach is understandably adopted. Moreover the wife's costs were grossly disproportionate and that disparity reflected the unjustified and disproportionate approach taken by the wife

and the court found a figure of the disproportionate disparity. It made a costs order in favour of the husband.

60. So, standing back, reversing the genders in the case before me, there is no difference in respect of the making of a costs order based on the conduct of one spouse including refusing an open offer. I have dealt with that by a costs order. Just as the court did in the reported case. What doesn't seem to have been directly addressed is the point in this case about the very different taking from marital assets and how this should work in the sharing outcome. Certainly, if it was said that the former wife in the case before me had engaged in litigation misconduct thereby leading to her costs being so high there might be a crossover and similarity. I have indicated my concerns about the level of those costs but they do not come close to being in the category of litigation misconduct; disproportionality, excessive spending or similar.

61. The judge, now of course the senior financial remedies judge in the Court of Appeal, deals with the test of dissipation with a wanton element. But I don't find any here. I'm not adding back under the traditional add back for wanton dissipation. I'm doing so to make sure I have a fair and appropriate amount in the marital pot for equal sharing. That is not the traditional category of add back in my opinion. So I do not seek in any way to go against the remarks of the judge in this case. They simply do not relate to the circumstances of the case before me and similar cases

62. *TT v CDS* (2020) EWCA 1215 includes Moylan J now in the Court of Appeal. Both parties alleged litigation misconduct under s25(g) MCA. It draws out that it would be reflected if appropriate in a quantified costs order but otherwise can be determined as taken into account in deciding the award; my analysis above in relation to the making of the costs order against the former husband in the case before me.

63. It then looks at the interrelationship between litigation misconduct and needs, a very difficult and sensitive area for a judge but one which I did not have to consider in my case because I did not find any litigation misconduct. The £800,000 spent in that reported decision should instead have been a modest fraction if not for the litigation conduct of one spouse. The problem facing me in coming to a decision on this matter was that the very substantial withdrawal from marital funds couldn't be characterised as litigation misconduct; at least as far as present professional understanding is of such behaviour. Certainly unilateral, perhaps taking advantage by quick action, perhaps very tactical. But not necessarily litigation misconduct. This is why I believe the various cases are not addressing the distinctive feature in the case before me. The simple withdrawal, perhaps with notice given immediately thereafter, from marital funds for legitimate legal expenses albeit at a dramatically different level from the other spouse and therefore having a consequence on the sharing outcome. I cannot nor should I attempt to bring that into the categorisation of litigation misconduct.

64. So again I find myself not seeking in any way to demur from the remarks of the Court of Appeal in that reported decision. They just do not address the central issue before me of the costs of the case. Those were the cases given to me

65. It's right however that I should deal with another case, not referred to me but which is important in the recent development of financial remedy law in my opinion namely *E v L* (2021) EWFC 60. On its facts, it is different; a short marriage in a case concerning the entertainment industry with premarital assets and business assets. However the judge, Mostyn J at clauses 71-73, dealt with the point in time when the clock stopped for the purposes of calculating the acquest. In opening in words which many would want to echo, he said that

> *there are already in this field too many uncertainties and subjective variables. The law needs to be transparent, accessible, readily comprehensible and should propound simple and straightforward principles. In my experience convention and tradition dictate that save in cases where there has been undue delay between the separation and the placing of the matter for trial before the court, the end date for the purposes of calculation of the acquest should be the date of trial. This rule of thumb should apply forcefully to assets in place at the point of separation which have shifted in value between then and trial.*

66. He concluded as follows: (para 76):

> *The endpoint should be the present time, the time of trial. There is in my judgment no good reason to depart from the traditional and conventional terminus. Although the parties' relationship came to an end in December 2019 there has been no unjustified delay by the wife in bringing her claim before the court. In that period the greater part of her share of the acquest has been traded with by the husband and put on risk.*

67. I do not see that valuable judgement, looking at the really difficult situation too often presenting itself at first instance hearings in moderate or long periods of separation of different valuations and shifting movement of assets between separation and final settlement/hearing, as saying that monies quasi-advanced from what will be eventually shared should not be brought into account when, as he says, the endpoint is reached namely at the point of settlement what are the assets of the marital pot for equal distribution

A few examples

68. Without being unnecessarily simplistic, I go through a few examples

69. Marital assets are £100, no legal costs incurred by either party

	100
Equal division	50

70. Same situation but each has drawn 6 from the assets for their legal costs

	100
Total deducted already	12
In the pot	88
Each receives	44

Brought into account what each has advanced to themselves, each has 50

71. Same situation one has drawn 6 and the other has drawn 8 for the legal costs

	100
Total deducted already	14
In the pot	86
Each receives	43

I think in this fairly marginal situation the court is unlikely to interfere, perhaps on the basis that one party has had to do more work in respect of the case

72. Same situation, one has drawn 6 but the other has now drawn 26

	100
Total already deducted	32
In the pot	68
Each receives	34

Herein lies the potential unfairness and inequity. Whereas if they had both taken 6, a party would have 44 as above, in this instance the party which only took 6 now has 34, for the only reason of the actions of the other party unilaterally taking more from the marital pot. If the costs already drawn are notionally brought back in, that party has 34 + 26 namely 60, contrast 40 of the other on the same basis and in equal sharing. Under what circumstances can the unilateral action by that one party mean this outcome should be fair?

Conclusion

73. I referred above to the accusatorial versus the inquisitorial. Of course one benefit of the former is that the judge is given arguments of law by each side. In the inquisitorial, the judge may well be on his or her own! Thus it was here. I would have welcomed argument from equally specialist junior counsel. The former husband of his own admission said he couldn't understand the exchanges and arguments during the closing submissions on these points and, with full respect, relatively few lay parties would. Accordingly, I conceded to counsel for the former wife that I had no obvious case law authorities to counter his argument. There may be some but I'm not aware at the preparation of this judgement. Deputy district judges do not have legal clerks! But equally I said that I didn't find the authorities referred to me, although helpful in respect of remarks made, dealing with the situation before me

74. Instead, I rely on 2 key elements namely what is no order as to costs in the sharing process and what does it mean fairly to share the marital partnership assets.

75. At its most straightforward, no order as to costs means simply the court makes no order for either party to pay the costs of the other. The default starting point that each is responsible for their own costs. Simple and straightforward. But that's not in reality and practice how it often works. The costs owing by one party appear on the balance sheet required by the Rules for the hearing. It's a liability. It forms part of the needs with recent Court of Appeal blessing, as above, that it should be, or could be, part of the needs provision. Immediately, no order as to costs becomes meaningless. Because the other party is paying those costs either on a needs basis or as part of the sharing process if they are deducted before equality sharing. Yet without any attempt at analysing if they are reasonable or fairly incurred; the argument rightly made by several of the judges in the reported decisions above.

To provide for the outstanding costs of one party in the substantive award and then simply to say no order as to costs is, bluntly, disingenuous, ignoring or even acknowledging the fact that a costs order has indirectly been made. This is why I believe the no order as to costs starting point and default from 2003, then in the immediate aftermath of White when I remember we were still working out what it meant in the dramatic redirection of financial remedies work, doesn't do the justice now as it was intended or expected. Specifically in the sharing scenario because I am adamant this discreet judgement only relates to that scenario.

76. No order as to costs on the understood basis that each party meets all their own costs is perfectly good and admirable, fitting the analogy as a marital partnership, when it is their own costs as a totality. Immediately it becomes only part of their costs being those outstanding, relatively arbitrarily at a point in time such as the date of the settlement at FDR or final hearing, the simple default of no order as to costs must be questioned in my assessment. It is particularly so when there has been a very different pattern of behaviour of the separate spouses. One may have taken their costs funding from marital assets and the other from their own non marital assets, with the former then divided equally net of the taken costs and the latter being held separately. One of them as in the case before me may have taken a substantial amount from the marital assets and still owe their lawyer a fairly substantial amount and the other much less so. One may have paid from existing resources and owe nothing and the other have a litigation loan or owe family and friends on a goodwill basis shown as a liability. I believe the no order as to costs needs unpacking as to the impact in each of these separate situations. How much does it mean accepting liability for the relatively random amount owing at a particular point in time and how much is it a more fundamental understanding of individual responsibility for legal costs of proceedings? As it happens, I only have to decide on the narrow circumstances before me. But I think generally there needs to be a wider discussion on this aspect.

77. I am clear that the no order as to costs principle with each party being responsible for their own costs cannot in a case like this lead to arbitrary and unfair outcomes, with relatively random and very different amounts which may be owing at a particular point in time of the settlement by each. Instead, it should be a more holistic, rounded and comprehensive analysis of the costs incurred by both parties in coming to the point where the overall marital assets are divided up and on the basis that each would be responsible for their own costs.

78. Secondly, what does it mean to share the marital partnership assets? We were introduced to this in White and yet 20 years on we are still working out some of the consequences; such is the impact of dramatic law reform. But in the circumstances of the case before me, what does it mean?

79. Perhaps a starting place is professional partnership. Those with the unhappy experience of a professional partnership breakup know about the turmoil and distress associated with the drawing of accounts as at a particular date of the acknowledged ending of the partnership. Once prepared, the division according to partnership interests occurs. In essence this is what the family Court is doing in a sharing case. Only professional partners after a partnership breakup and before the sharing out of the partnership funds do not support each other, pay rental

for the other's property, pay grocery bills, and so on. And this is the element which sometimes (but not always) makes it difficult for the family Court to go back with purity and precision to the date of separation and then divide up. Consequently as well this is why we have so many reported decisions on how to treat post separation income and resources. It is why the family Court has a discretion; to deal with these complicated and often facts specific situations.

80. But it may well be for example that in a professional partnership dispute where there remains goodwill, now former partners may agree for an advance for a partner in desperate financial need or indeed for legal and accountancy assistance in the partnership dissolution process. But this is not a gift, provision for needs or similar. It is an advance, an early payment, goodwill assistance for cash flow purposes as happens between partners even in a dissolution and we see happen between divorcing spouses from time to time. But to be consistent anticipated by our law as it presently stands and to be consistent for a party being responsible for their own legal costs in a sharing scenario, it is unfair for the significant costs drawn by one party out of the marital partnership assets not to be notionally brought back in before the division of those partnership assets of equal partners. To do otherwise is to give even greater encouragement to the unilateral action by one partner to the disadvantage of the other in the period after the end of the partnership and before resolution of accounts. Instead to recognise it as an advance, on account, a provision for needs out of what will be the eventual division, recognises what I suggest is the financial provision law in England and Wales from White onwards on this narrow and distinctive issue of legal costs being incurred and withdrawn from the marital partnership assets

81. The costs, precisely known from their lawyers, which either party draws down from the marital partnership assets to fund their legal costs in the resolution of the marital partnership dispute shouldn't be theirs alone, safeguarded from the division process and consequently meaning there is less in the pot for division. But more in the way of an advance from the marital partnership assets due to them on the division, whether by agreement, at an FDR or by ADR settlement or by judicial adjudication. As an advance, perhaps even an agreed advance to help fund legal costs in the partnership dispute, it is to be brought into account in the division. That taking into account, partnership funds already received, is not to be characterised as an add back in the way that the authorities refer to wanton dissipation. The fact that it is brought back in the arithmetic calculation should not be a reason for legal confusion with the so-called add back principle. It is more by way of an advance, a payment out, on account, from the marital partnership resources.

82. This is a judgement for this specific case. I appreciate there may be other instances where instead of drawing down from the marital resources for legal fees, one party may do so for disputed high living expenses which may be merely a continuation of the marriage and indeed may have been a friction of the marriage. Should this be akin to an advance from what will subsequently be received, especially when an adjudication is needed on that expenditure? This judgement does not attempt to decide because it doesn't have to

83. Another situation arising is that one spouse, without much lawyer involvement, feels completely confident of negotiating, perhaps litigating, and does so perfectly well whereas the other requires substantial handholding, as solicitors would describe it, many attendances and considerable assistance, including perhaps complete ignorance of any of the marital finances and so starting the disclosure exercise from scratch. They will have very different needs to draw down for their legal expenses. I think that is a reasonable consideration to be taken into account. But it needs to be known how, for the profession to settle cases

84. Accordingly having given careful consideration both during the closing submissions and then subsequently in preparing this reserved written discrete judgement when I have gone back to the authorities provided to me by counsel for the former wife, I do not find that on bringing back legal costs drawn from marital resources predominantly by one of the two spouses in order to have a fair division of the marital assets I am going against any of the higher court decisions or the remarks made by the judges in those decisions. Indeed I reject the notion of add back in as far as this has similarities with the high burden required in the quasi-conduct context. Instead, I believe this can be the only fair and just outcome in a sharing partnership case by bringing back the amount already withdrawn by each spouse for their legal fees and thereafter dividing the gross amount to establish the then share of the marital partnership resources.

85. I have already made clear that I think the question of the costs payable by one spouse to the other should wherever possible in a sharing case, the keywords in my opinion, be quantified and separate to the marital partnership division. I do not consider withdrawing funds from the marital partnership resources for legal fees, even although I was concerned about the level of those fees, represents litigation misconduct on the present state of judicial guidance and/or professional practice. Although in this case I did

DDJ David Hodson
14 November 2022

Postscript

86. I said in this reserved written judgement that I wasn't aware of any case law directly on these specific points in this sort of situation. Having handed down this judgement on 14 November 2022, on 18 November 2022 was published the decision of HHJ Hess of *YC v ZC* (2022) EWFC 137. Although not the same facts of course, it was similar territory. Very large payments taken from marital funds. Very substantial disparity in costs. Long marriage. A sharing case. Analysis of whether add back, or perhaps as I have configured it a form of advance or bringing into account, has to satisfy the test of wanton. Quite independently we seem to have come to the same conclusion namely that it doesn't and is a separate element altogether even if using the words add back. I refer particularly to the helpful and logical analysis at clause 42. We each seem in my opinion on my reading of the report to have worked it through to an outcome in different ways but have reached fairly similar analysis of our concerns about the legal costs and how they are applied in this sort of circumstance. I am publishing this judgment with his support. I hope there will now be careful and practical debate about outcomes in

these sorts of circumstances where the separate costs are so very different including in circumstances where they have already been taken from the marital resources

DDJ David Hodson
21 November 2022