The Law Society

Law Society response

Consultation in relation to the treatment of Calderbank offers when determining issues relating to costs

October 2019

Preface

1. The Law Society is the professional body for solicitors in England and Wales, representing registered legal practitioners. The Society represents the profession to parliament, government and regulatory bodies and has a public interest in the reform of the law.

2. The Law Society works to represent the interests of family law practitioners by engaging in law reform in family justice, providing guidance to the profession, advising on good practice and by working towards an improved family justice system for all users.

Consultation Question

Do you consider that offers made “without prejudice save as to costs” should be admissible in considering the “conduct” of a party for the purposes of FPR r28.3?

3. On balance we do think that offers made “without prejudice save as to costs”, which are clearly marked as such, should be recognised for the purpose of Family Procedure Rules (FPR) rule 28.3[1]. Ideally family cases would not reach a final hearing, as they would be resolved earlier, and this is why we are supporting this amendment.

4. However, any consideration of privileged offers should not be categorised as litigation conduct, which is different and usually the subject of strong condemnation by the courts where costs have been incurred unnecessarily through the way one party has conducted themselves in the litigation. There should be a separate category or head of opportunity for costs orders to be made, after judgment has been given. This would allow consideration to be given to other factors such as wealth, needs and timing of such offers.

5. It is our view that the FPR should have a new set of its own costs rules and we would want to see detailed guidance included in a bespoke Practice Direction on costs.

6. To achieve fairness without unpicking what is often a difficult balancing exercise distributing limited assets may not be easy, particularly in a ‘needs’ case.

7. Many judgments are predicated on an assessment of needs and any costs award can upset that assessment. Viewing needs as an elastic concept in turn allows for an assessment of whether any costs consequences are appropriate and affordable.

8. Such considerations and concerns are less prevalent in sharing cases, where the share received by the parties meets or exceeds their needs. There should only be one set of costs rules. It is for this reason that we support the proposal that the consideration of a costs order must remain at the discretion of the judge, rather than the imposition of an order being mandatory.

9. Our members do have reservations about cases where one party is a litigant in person and the other is represented. The complexities of “Calderbank” type offers and the nuances of winning or losing in the often-multifaceted terms of settlement (i.e. winning on some terms and losing on other terms) would have a huge impact on people struggling on their own with the legal system.

[1] Rule 28.3: Costs in financial remedy proceedings https://www.justice.gov.uk/courts/procedure-rules/family/parts/part_28#IDARESIC

10. Access to justice and legal advice or information needs to be a consideration for those people. We suggest any practice directions or changes should be in plain language, so it is accessible for litigants in person as well as practitioners.

11. It is important that parties understand that the timing of offers is key, as is the indication that one party will be seeking a costs award based on offers.

12. When there has been litigation conduct that may warrant a costs order, it is already obvious before the start of the trial. It appears in the skeleton note for the trial, closing submissions and the costs schedule that is already prepared. It will also have featured in correspondence. This is not necessarily so with “Calderbank” offers.

13. The experience of our members who have worked with these types of offers previously is that upon judgement being given orally, it was not immediately obvious which side had done better or worse on the respective privileged offers, and therefore which would in fact be making the costs application.

14. Detailed costs schedules require a similarly detailed costs claim which takes time and further costs to prepare. It is really only worthwhile if the claim is likely to have a fair chance of success, and this is not known until judgement has been delivered.

15. Where judgement is reserved, as occurs with complex cases, and is handed down in writing, there is little point preparing a costs schedule for a costs claim until judgement is received.

16. Where judgement is reserved and given orally subsequently, again, in order to save costs it is invariably better for any costs claims to be put into a separate self-contained hearing after the parties have had the chance to review the judgement.

17. It is only in instances of *ex tempore* judgements where these claims may be disposed of immediately; and even this presumes that there is sufficient time left for costs claims to be argued.

18. We would want this factored into the procedure in respect of this distinctive category of costs claims. To help this “Calderbank lite” option to work in practice the following is suggested:

    i. Costs are to be determined by the trial judge. This may mean a longer listing for the final hearing, with consequential impact on delays in listings and costs of hearings.

       The additional costs, stress, time and delay in the matter being handled by a costs judge should be avoided. Alternatively, provision could be made in the new rules that costs claims will always be dealt with subsequent to the day of the judgement either as a paper application or a separate self-contained hearing.

       This has the benefit of putting off the costs required for preparation of a costs claim until it is known that it will be actually made and therefore needed.

ii. Notice that an application for costs may be made and served no less than seven days before the final hearing or costs hearing, together with an N260[2] (or bespoke form for family costs recovery) by the party seeking a costs order.

    The current Forms H and H1[3] are not detailed enough and improvements to the N260 and Forms H and H1 are needed, as long as this is in such a way that they can be completed efficiently and proportionately.

    Ultimately the trial judge needs to be able to understand how all costs have arisen from the start of proceedings, not merely be made aware of outstanding costs.

    Currently the information provided is often limited and inaccurate about how costs have been incurred. For example, some exclude time spent on ‘general advice’ in their Forms H/H1.

19. Whether costs for all family proceedings (e.g. children, divorce) should be filed as well may be worth considering given these costs are likely to be relevant to the financial remedy proceedings, and the overall balancing exercise.

20. We also refer the Family Procedure Rule Committee to our response to its Costs Procedure consultation, submitted in August. There is a clear overlap between these consultations and ideally the two should be considered together.

21. We would also comment that the amendment to Practice Direction 28A in May of this year regarding open offers is still new and has not had time to bed down. It may be that this amendment together with further training, and a more robust approach taken by the judiciary, will mean that further amendments are not necessary.

22. When “Calderbank” was abolished, the expectation then was that practitioners would make many more and early open offers so that it was fully known to the trial judge what the respective positions of each party were throughout the case, and to order costs accordingly.

23. This has not happened in practice. Open offers have real and quite prejudicial drawbacks should a case result in a final hearing.

24. The vast majority of cases are ‘needs’ cases regardless of the level of wealth involved, and thus setting out a realistic proposal for settlement may be impossible. This is especially relevant until there has been reliable disclosure, often taking place shortly before the Financial Dispute Resolution hearing, without compromising the case that a party may run at a final hearing.

[2] Form N260: Make a summary assessment of costs you've incurred

[3] Form H: Estimate of costs for a financial remedy hearing and Form H1: Statement of costs (Financial remedy)

25. The hope that open offers would bring about more settlements, put pressure on unreasonable parties to settle and compromise cases to avoid high costs, has proved unrealistic and unreasonable in practice. Hence with a number of real misgivings, we support the introduction of a “Calderbank lite” given our strong commitment to seeing more settlements at an earlier stage with lower costs incurred.

26. Some of our members feel that “Calderbank” offers pre-2006 have created obstacles to settlement, whereby parties would continue their legal proceedings in order to recover their costs. This needs to be avoided if at all possible.

27. Fundamentally, the needs of the parties must come first, and any new cost rules introduced should not take away from the needs of the applicant and any children involved.