



In the Supreme Court of Bermuda

DIVORCE JURISDICTION

2022: No. 45

BETWEEN:

WIFE

Petitioner

- and -

HUSBAND

Respondent

COSTS RULING

(Determination on the Papers)

Before: Hon. Alexandra Wheatley, Assistant Justice

Filings: Nicole Cavanagh of MJM Limited, for the Petitioner

Georgia Marshall of Marshall Diel & Myers Limited, for the Respondent

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Costs in Ancillary Relief Proceedings; Order 62 of the Rules of the Supreme Court 1985;

RULING of Assistant Justice Alexandra Wheatley

INTRODUCTION

1. This is my ruling on the discrete issue of costs following the judgment delivered on 31 January 2025 (the **Judgment**) resolving the parties' ancillary relief applications. In that judgment I indicated, consistently with established Bermuda practice in family law cases, that the *starting point* is that there should be no order as to costs; however, I afforded the parties liberty to apply if they wished to be heard on costs.
2. The Wife has applied for a costs order in her favour. The Husband opposes that application and invites either (a) an order that the Wife pay his costs, or (b) a "*no order as to costs*" disposition. The parties have agreed that the costs issue be determined on the papers. I have carefully considered the written submissions and the underlying materials filed by both sides.
3. Overall, the parties' respective positions are summarized as follows:
 - (i) The Wife submits that she was the successful party; that she made reasonable, without-prejudice offers on 4 April 2024 and 12 April 2024; that the Husband unreasonably rejected those offers; and that (looking at the relief actually granted) her offers were at least met and in material respects exceeded, so as to justify indemnity costs from the date of her *first* settlement offer. She also draws attention to findings in the substantive judgment concerning the Husband's disclosure and the implausibility of his claimed residence in the former matrimonial home (**FMH**).

The Wife asks me to order her costs on the indemnity basis from the date of her first offer for settlement and to make no other *inter partes* costs order beyond that period (subject to the Consent Order). The Husband resists.

- (ii) The Husband's position is that the Wife had, at best, partial success; that she advanced inflated or shifting claims (including, at one stage, claims for spousal maintenance, pension sharing and a *Mesher* order) before abandoning them; that he made reasonable settlement proposals from an early stage (May and November 2023); and that the usual result in matrimonial proceedings in Bermuda is "*no order as to costs*" unless there is unreasonable litigation conduct. He relies on authorities to that effect and maintains that his stance was measured and settlement-oriented.

4. There is an additional procedural feature. By way of a Consent Order dated 23 September 2024 (**Consent Order**) which was made in the context of the matter being re-heard by a different judge, the Court assumed responsibility for costs “related to the re-hearing,” with effect from 25 July 2024 (the **Effective Date**).
5. For the reasons that follow, I am satisfied that ordering that the Wife recover her costs on the indemnity basis from 4 April 2024 (her first without-prejudice offer) up to 24 July 2024 (the day before the Effective Date), such costs to be taxed if not agreed would not be disproportionate or unfair given the circumstances of this particular case. All other costs, including those of this application, save as noted below, shall be on the basis that each party bears his or her own respective costs.

THE LAW

6. In civil proceedings generally, Order 62 rule 3(3) of the Rules of the Supreme Court 1985 (**RSC**) embodies the familiar principle that “costs follow the event”. In matrimonial proceedings, however, Bermuda has moved away from that position.
7. In *A.R.M.F v A.J.F* [2019] SC (Bda) 4 Div, Subair Williams J explained that the RSC Order 62, rule 3(5) was introduced with effect from 1 January 2006 and excludes proceedings under the Matrimonial Causes Act 1974 (**MCA**) from the “costs follow the event” rule. The effect is that the starting point in matrimonial proceedings is “no order as to costs”, though the court retains a broad discretion to depart from that starting point where it deems just.
8. Subair Williams J in *A.R.M.F v A.J.F* confirms the position on costs as it stood before the 2006 change, referring in particular to the case of *Davy v Zouppas Davy (Costs)* [2005] Bda LR 51. The judgment also explains why the post-2006 regime brings Bermuda practice more closely in line with English family costs principles, under which there is likewise no presumption that costs follow the event in financial remedies litigation.
9. The parties’ submissions also consider pre- and post-2006 authorities in this jurisdiction. For my purposes two points suffice:
 - (i) First, the starting point remains “no order as to costs” in matrimonial proceedings in Bermuda; that starting point is not a fetter, but an orientation. The court may depart from it in the interests of justice, including by reference to litigation conduct, compliance with orders, and the approach taken to settlement. In accordance with Order 62, rule 10(1) of the RSC, unreasonable or improper acts or omissions, is among the provisions the court may take into account.
 - (ii) Secondly, the cases cited by Ms Cavanagh that proceeded on a “costs follow the event” basis must be understood in context. As Subair Williams J has observed,

those authorities predate the 2006 amendment to the RSC and therefore do not determine the modern starting point in matrimonial causes. The 2006 amendment is the point at which the position changed.

10. When, then, can the court depart from the “no order as to costs” starting point? In both Bermuda and in England and Wales, the guiding principle is that a costs order may be made where a party’s conduct in the proceedings justifies it—for example, in cases of non-disclosure, non-compliance, or an unreasonable approach to settlement once the “financial landscape” is sufficiently clear. See *A.R.M.F v A.J.F* where the English authorities discussed.
11. The form of any departure is a question of discretion. In some cases, standard-basis costs are appropriate from a particular date. In more marked cases, indemnity-basis costs may be ordered “from” a specific date where the refusal of a reasonable offer (or persistence in an unreasonable stance) took the case “outside the norm”. The English Court of Appeal’s judgment in *Epsom College v Pierse Contracting Southern Ltd* [2011] EWCA Civ 1449 is frequently cited as an illustration: indemnity costs can properly be awarded where there has been an unreasonable failure to accept sensible offers or an unreasonable resistance to a pragmatic solution.
12. Similarly, in *Southwark LBC v IBM UK Ltd* [2011] EWHC 653 (TCC), the court divided the costs orders by fixing a date by which the reasonable course should have been recognised and adopted. Costs were ordered on the standard basis up to the cut-off and on the indemnity basis thereafter—a pragmatic approach I find helpful when calibrating a fair order in this case.
13. I stress that nothing in these authorities displaces the starting point in Bermuda matrimonial cases. Rather, they illustrate *how and when* a ‘date-from-which’ order may fairly reflect litigation conduct tied to without prejudice offers.

THE PARTIES’ POSITIONS

The Wife

18. On behalf of the Wife, Ms Cavanagh submits that the Wife was the successful party at trial in any real-world sense. She points to the fact that the court ordered the transfer of the Husband’s interest in the FMH to the Wife, directed the Husband to vacate the FMH, made child maintenance orders consistent with the Wife’s stance, and required that the children’s health and dental insurance remain under the Husband’s existing policy.
19. Ms Cavanagh further emphasized that the Court rejected key aspects of the Husband’s case, including his account of continued occupation of the FMH and elements of his financial presentation. On this basis, Ms Cavanagh argues that costs should follow the event in substance.

20. Turning to the without prejudice offers, Ms Cavanagh notes that the Wife made two without prejudice offers in April 2024:
- (i) 4 April 2024: a Mesher order proposal allocating 80% of the net equity in the FMH to the Wife and 20% to the Husband, together with a division of outgoing liabilities (the Wife taking the mortgage, the Husband the promissory note and certain household costs), with no order as to costs.
 - (ii) 12 April 2024: a revised proposal under which the Wife would retain the FMH, bear the outgoings, pay the Husband \$20,000 within 35 days of a consent order, and the Husband would remain responsible for the promissory note and certain child-related expenses; again with no order as to costs.
21. Ms Cavanagh emphasises that both offers were at least matched—and in material respects exceeded—by the eventual outcome.
22. Further, Ms Cavanagh highlighted that the Judgment noted deficiencies in the Husband’s disclosure (including late admissions about cash withdrawals and the use of funds from the children’s accounts) and rejected as implausible his claim to have continued living in the FMH. Ms Cavanagh contends that those findings, taken together with the chronology of the without-prejudice offers, warrant an order that the Husband pay the Wife’s costs on the indemnity basis.

The Husband

23. On behalf of the Husband, Mrs Marshall submits that the default position in matrimonial cases is no order as to costs, and that nothing in this case justifies a departure. She characterises the Wife’s success as partial. In particular, Mrs Marshall points to the fact that the Wife abandoned certain claims (including spousal maintenance, pension sharing, and a Mesher order) and that her final position was not accepted in full—particularly as regards allocation of the promissory note and aspects of equity division and costs.
24. As to without prejudice offers, Mrs Marshall notes that the Husband put forward reasonable proposals early—namely, on 2 May 2023 and 22 November 2023—offering lump sums (\$20,000 and then \$55,000 in staged payments) together with arrangements for the children’s indirect expenses. She contends that the Wife either rejected these proposals or failed to engage constructively. When the Wife advanced her April 2024 offers, Mrs Marshall submits that the parties remained far apart, and she highlights the Husband’s counterproposal of 5 April 2024 (to retain the FMH and pay the Wife \$30,000 within six months, together with other terms) as a realistic attempt at resolution. On this footing, she invites the Court to make a costs order in the Husband’s favour, or at the very least to make no order as to costs.

25. Finally, Mrs Marshall relies on authority for the proposition that success alone does not dictate costs in family cases. She stresses that what matters is litigation conduct and reasonableness in negotiation and compliance. In that regard, she cites *A.R.M.F v A.J.F, A v A (Costs Appeal)*, and English authorities such as *OG v AG* [2020] EWFC 52 and *HO v TL* [2023] EWFC 216, which emphasise that the court may penalise unreasonable litigation conduct, but that one must distinguish such conduct from personal behaviour during the marriage.

APPLYING FACTS TO THE LAW

(1) Starting point and the proper focus

21. I begin from the now-settled starting point in Bermuda: no order as to costs in matrimonial proceedings. That starting point reflects the policy judgment captured by Order 62, rule 3(5) since 1 January 2006, and it accords with the family-law aim of encouraging realistic settlement while avoiding satellite costs litigation. The court's discretion is broad but principled. I therefore ask: did either party's conduct in relation to the proceedings warrant a departure from the starting point? In answering that question, I focus on litigation conduct—in particular, the reasonableness of each party's stance in settlement once the financial landscape was sufficiently clear—not on personal behaviour during the marriage.
22. I also make plain at the outset that I do not find the Husband's litigation conduct to have been "reprehensible." That is not the basis of the order I make. The question is more modest but still important: did the Husband, by unreasonably rejecting the Wife's reasonable without prejudice proposals from a given date, render it just to award the Wife her costs from that date on the indemnity basis, with all other costs otherwise left where they fall? For the reasons that follow, I conclude that he did.

(2) The reasonableness of the Wife's proposals

23. By early April 2024, the issues had crystallised around (i) who should retain the FMH and on what terms, (ii) ongoing outgoings and liabilities (mortgage, promissory note, utilities and taxes), and (iii) child maintenance and health insurance. The Wife's first offer on 4 April 2024 was structured, near-term, and proportionate to the parties' circumstances. It proposed an 80:20 equity split in her favour, with the parties picking up different secured liabilities, each retaining vehicles and pensions, and no order as to costs. The second offer on 12 April 2024 moved further toward a clean break: the Wife would retain the FMH, pay the Husband \$20,000 within 35 days, assume outgoings, and the Husband would remain responsible for the promissory note and certain child-related costs. There is no doubt that both offers sought to avert further expense and settle the central dispute.
24. The Husband says he was not able reasonably to accept those terms, and he points to his own proposals in May and November 2023, as well as his 5 April 2024 counter-offer. I have considered those offers. The 2023 offers (notably the staged \$55,000 proposal) were made

at an earlier stage and entailed lengthy tail-risk (including a final instalment linked to retirement), which is rarely helpful in a family case where the stability of the children's housing and near-term financial clarity are paramount. The 5 April 2024 counter-proposal—Husband to retain the FMH and pay the Wife \$30,000 in six months, with other terms—did not align with the practical realities which had by then emerged and which were reflected in the eventual orders: namely, that the FMH should pass to the Wife, that the Husband should vacate, and that child maintenance and health insurance should be ordered in the manner they were.

25. Against that backdrop, and considering the Judgment, the Wife's April 2024 proposals were, in my view, reasonable in the sense that they anticipated the shape of orders ultimately made. It is true that there are differences in detail (for example, responsibility for the promissory note transitions after the Husband's departure), and I accept that the Wife did not obtain everything she sought at every stage. That is normal. The question is not whether the Wife obtained *all* she asked for, but whether the Husband should reasonably have accepted one of the Wife's April proposals, thereby avoiding the additional costs of litigating to judgment.
26. I find that, by 4 April 2024, the Wife had tabled a sensible framework which a reasonable litigant, acting with proper regard to the welfare of the children and the costs of litigation, should have accepted or constructively refined. The 12 April 2024 offer only strengthened that conclusion. The Husband's refusal to accept either, and his persistence in a position inconsistent with the outcome the court ultimately found to be just, took the case "outside the norm" from that point onwards.

(3) Why an indemnity order, and why from 4 April 2024?

27. Having found that the 4 April 2024 offer was reasonable and that refusal of it was unreasonable in the circumstances, the question then becomes one of calibration. A set of principles emerges from the authorities:
 - (i) The court's discretion to depart from the "no order as to costs" starting point may properly be exercised from a particular date when settlement should have occurred.
 - (ii) Where the refusal of a reasonable offer takes the case "outside the norm," a costs order on an indemnity basis can be appropriate to reflect the wasted expense caused by the unreasonable refusal. There does not need to be any finding of reprehensible conduct.
28. I am satisfied that an indemnity costs order is justified from 4 April 2024, the date of the Wife's first offer. That proposal was realistic, well-structured, and closely aligned with the court's eventual orders on the FMH, vacancy, child maintenance, and health insurance. In light of those factors, and the proportionality of settling on those terms, it is appropriate to depart from the usual "each bears own costs" approach for the subsequent phase of the case. Although the Wife later adjusted her position on a Mesher Order and pension sharing, my

conclusion is reinforced by the findings in the substantive judgment regarding the implausibility of the Husband's claimed occupation of the FMH and weaknesses in his financial disclosure. While this conduct does not amount to "reprehensible" behaviour, it falls short of the open and transparent approach to litigation that the costs rules are designed to promote.

29. I decline to make any indemnity order for the period before 4 April 2024. At that stage, the parties' positions were still evolving, and the Husband's May and November 2023 proposals do not justify a costs order in either direction. The default "no order as to costs" position remains appropriate for this earlier period.
30. I am also satisfied that an indemnity costs order is not justified after 24 July 2024. By agreement, the Court assumed the costs of the re-hearing from 25 July 2024 onwards. To make any *inter partes* order for that period would conflict with the parties' Consent Order and be wrong in principle.
31. Finally, the Wife sought indemnity costs from 31 January 2025 in respect of the post-judgment "costs of costs" phase. In my view, the fair outcome is that each party bears their own costs of these applications. The issues raised were properly arguable on both sides, and my date-from-which approach recognises the Wife's without-prejudice position without inviting further satellite litigation about costs. The fairest balance is achieved by making no order as to costs on these applications.

(4) Success and the "Elgindata" lens

28. The Wife asked me to consider the concept of the "successful party" and the possibility of reducing costs to reflect time spent on issues not ultimately won. I set out my position briefly. Even without applying a strict "costs follow the event" rule (which does not govern these proceedings), it is clear that the Wife was the successful litigant in the practical sense recognised by the "*Elgindata*" line of authority: she secured decisive relief in relation to the FMH, obtained child maintenance and insurance orders consistent with her position, and defeated the Husband's central claim to retain the FMH. That said, in family cases the *Elgindata* principle is a blunt tool. A fairer and more balanced approach here is to adopt the 'date-from-which' method: it recognises both success and settlement conduct without descending into issue-by-issue costs accounting.

(5) Affordability and proportionality

29. The Husband argued that his ability to pay should be considered when deciding on costs. I agree that in family cases the practical financial impact of a costs order is important. The Wife pointed to the Husband's net income in 2023 and early 2024, and the reduction in his expenses after leaving the FMH, as showing he could afford an adverse order. I make no detailed findings on those figures but note there is no evidence that an indemnity costs order for the period 4 April to 24 July 2024 would be disproportionate or unfair. The period is

limited and defined, and taxation will ensure that only reasonable costs are recoverable, subject to the indemnity basis.

CONCLUSION

37. For the reasons given, this ruling is intended to give effect to the modern approach in Bermuda regarding substantive hearings for matrimonial cases: the default is no order as to costs, but reasonable settlement conduct must be recognised and encouraged. From 4 April 2024, the Wife did what a litigant is expected to do; the Husband did not. The order I have made reflects that balance, while preserving “no order as to costs” both for the periods to which it properly applies and for the applications decided today.
38. Counsel are invited to use their best endeavours to facilitate agreement on the precise figures, thereby avoiding a taxation hearing. The Court hopes that this ruling brings to an end the parties’ costly litigation and encourages them to focus their resources, financial and emotional, on the welfare of their children.

DATED this 8th day of October 2025



ALEXANDRA WHEATLEY
ASSISTANT JUSTICE OF THE SUPREME COURT