



1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 FAMILY DIVISION
3

4 CAUSE NO. FAM 66 OF 2014
5

6 BETWEEN: DJ PETITIONER
7

8 AND:
9 BJ
10 RESPONDENT
11

12 Appearances: Mr. Andrew Woodcock of Hampson and Company for
13 the Petitioner

14 Mr. Guy Dilliway-Parry of Priestleys for the
15 Respondent
16

17 Before: The Hon. Justice Cheryll Richards Q.C.
18

19 Hearing: 16th September 2019

20 Draft Judgment Circulated: 23rd December 2019

21 Further Submissions: 9th January 2020
22

23 HEADNOTE

24 *Family Law – Costs in respect of Final Ancillaries*
25

26 JUDGMENT
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1 INTRODUCTION

2 1. This is a ruling on costs following a reserved ruling on the 5th August 2019 on the final
3 ancillary application in this matter.

4
5 2. On the basis of the general practice in matrimonial cases, that costs follow the event, the
6 Petitioner (the wife) seeks costs on the standard basis and payment of a sum on account
7 for costs in the amount of CI\$95,000.00. On the 16th September 2019 oral arguments
8 were made by both parties.

9
10 3. The wife submits that the award made by the Court in its August ruling was significantly
11 more favourable to her than the offer made by the Respondent (the husband) and that
12 she was therefore the successful party. The husband in reply argues that neither party
13 was entirely successful and that no award of costs should be made.

14 THE LEGAL POSITION

15
16 4. Section 24 of the *Judicature Law (2017 Revision)* provides a power to order costs in the
17 discretion of the Court. It is *inter alia* in the following terms:

- 18
19 “24. (1) *Subject to the provisions of this or any other Law and to*
20 *rules of court, the costs of and incidental to all civil*
21 *proceedings in-*
22 *(a) the Court of Appeal; and*
23 *(b) the Grand Court,*
24 *shall be in the discretion of the relevant court.*
25 (2) *Without prejudice to any general power to make rules of*
26 *court, such rules may make provisions for regulating*
27 *matters relating to the costs of those proceedings including,*
28 *in particular, the entitlement to costs, the taxation of costs,*
29 *the powers of taxing officers and the powers of judges to*
30 *review decisions of taxing officers.*



- 1 (3) The court shall have full power to determine by whom and
2 to what extent the costs are to be paid.
3 (4) In any criminal or civil proceedings, the court may disallow
4 or (as the case may be) order the attorney-at-law or foreign
5 lawyer concerned to meet the whole of any wasted costs or
6 such part of them as may be determined in accordance with
7 the rules of court.”
8

9 5. The Grand Court Rules O.62 r.4 provides, *inter alia*:

- 10 “(2) The overriding objective of this Order is that a successful
11 party to any proceeding should recover from the opposing
12 party the reasonable costs incurred by him in conducting
13 that proceeding in an economical, expeditious and proper
14 manner unless otherwise ordered by the Court.
15
16 (5) If the Court in the exercise of its discretion sees fit to make
17 any order as to the costs of any proceedings, the Court shall
18 order the costs to follow the event, except when it appears
19 to the Court that in the circumstances of the case some
20 other order should be made as to the whole or any part of
21 the costs.
22 (6) The amount of the costs which a successful party shall be
23 entitled to recover from any other party is -
24 (a) the fixed costs prescribed in rule 7;
25 (b) the amount assessed by the Judge in accordance
26 with rule 8;
27 (c) the amount allowed after taxation on the standard
28 basis; or
29 (d) the amount allowed after taxation on the indemnity
30 basis.
31
32 (7) The orders which the court may make under this rule
33 include an order that a party must pay -
34 (a) a proportion of another party’s costs;
35 (b) a stated amount in respect of another party’s costs;
36 (c) costs from or until a certain date only;
37 (d) costs incurred before proceedings have begun;
38 (e) costs relating to particular steps taken in the
39 proceedings;
40 (f) costs relating only to a distinct part of the
41 proceedings; and
42 (g) interest on costs (at the prescribed rate for Cayman
43 Islands dollars) from or until a certain date,
44 including a date before judgment.”
45



1 6. In *Gojkovic v. Gojkovic (No. 2)*¹ the English Court of Appeal held that although a court
2 exercises a wider discretion in respect of costs in family proceedings, than in other civil
3 proceedings, to make no order of costs was unusual. With the exception of matters
4 involving children or some special circumstance, where funds are available, costs *prima*
5 *facie* followed the event. In that case where a wife had obtained an award which was in
6 excess of the husband's final offer, she was held entitled to have her costs.

7
8 7. Butler-Sloss J. discussed the principles which govern costs in applications for financial
9 relief cases where open offers and *Calderbank* offers are made. The starting point is the
10 general principles as to entitlement to costs in civil matters. The *prima facie* position of
11 costs following the event may be affected by factors including the behavior of one party,
12 such as in material non-disclosure of documents and delay or excessive zeal in seeking
13 disclosure. The learned Judge stated:

14 *"But the starting point in a case where there has been an offer is that, prima facie ,*
15 *if the applicant receives no more or less than the offer made, she/he is at risk not*
16 *only of not being awarded costs, but also of paying the costs of the other party after*
17 *communication of the offer and a reasonable time to consider it. That seems clear*
18 *from the decided cases and is in accord with the Supreme Court and County Court*
19 *Rules requiring the court to have regard to the offer. I cannot, for my part, see why*
20 *there is any difference in principle between the position of a party who fails to obtain*
21 *an order equal to the offer made and pays the costs, and a party who fails by the*
22 *offer to meet the award made by the court. In the latter case prima facie costs should*
23 *follow the event, as they would do in a payment into court, with the proviso that*
24 *other factors in the Family Division may alter that prima facie position. "*
25

26 8. The learned Judge noted that the husband in that case was left with a sizeable sum and
27 did not hold the same view as that of the trial judge that as the wife could afford to pay
28 her costs out of the lump sum awarded, she should not receive her costs.

¹ [1992] Fam. 40



1 9. In the case of *McTaggart v. McTaggart*² the Cayman Islands Court of Appeal stated
2 that while the position has changed in England and Wales following the enactment of
3 the Family Procedure Rules 2010, there has been no corresponding change in this
4 jurisdiction. The position in this jurisdiction is that:

5 *"If the court in the exercise of its discretion sees fit to make any order as to costs in*
6 *ancillary relief proceedings, it shall order costs to follow the event (save where there*
7 *are some special circumstances)."*
8

9 10. The Court referred with approval to the case of *Gojkovic v. Gojkovic* and summarised
10 the conclusions of Butler-Sloss L.J. as follows:

11 *"The effect of a requirement that "costs follow the event"—although not, at the time,*
12 *directly applicable in matrimonial proceedings in England and Wales (see R.S.C.,*
13 *O.62, r.3(5))—was considered at some length by Butler-Sloss, L.J. in Gojkovic v.*
14 *Gojkovic (No. 2) (3). She concluded that the general principle was that if, after*
15 *contested proceedings, a party obtains an order which is more beneficial to him or*
16 *her than an offer made by the other party under the Calderbank procedure, then the*
17 *other party should pay the costs of the proceedings: conversely, if a party fails to*
18 *obtain an order which is more beneficial than that which could have been accepted*
19 *under the Calderbank procedure, then that party must expect to pay the costs of the*
20 *offeror from the date of the offer."*
21

22 11. In its application of the general principle the Court observed that it was likely to be
23 regarded as significant *inter alia* that the wife had been awarded substantially more than
24 the husband's second *Calderbank* offer. The Court noted that if the burden of costs
25 which the wife has to bear is such as to make serious inroads into the amount which she
26 would have available for investment, fairness may require that the amount of the
27 additional capital sum to be paid to her receive further consideration.
28



² [2011] (2) CILR 417

12. In its full judgment on costs in the said case³, the Court confirmed these principles and held that:-

"The starting point in "big money" cases, when making a costs order under the Matrimonial Causes Law (2005 Revision), s.21, was that costs should follow the event, and not lie where they fell. The court retained a discretion to depart from this position, and in exercising that discretion it was required by s.19 to consider the parties' resources, including their liability for costs. If an otherwise fair allocation of resources would be rendered unfair by a party's need to meet costs, then the court had discretion to alter the allocation of matrimonial property under s.21(b), order a payment to be made to the party under s.21(e), or make a costs order under s.21(g). In deciding which approach to adopt, the court should have in mind the desirability of avoiding additional litigation to determine costs, and give serious consideration to adjusting orders under s.21(b) or (e)."

13. The Court concluded that provision ought to have been made for the payment of the wife's costs given that the award made to her exceeded the *Calderbank* offers made by the husband. The Court further concluded that the wife should receive her costs given that the order which she obtained was in excess of any offer made by the husband. The discretionary nature of the exercise was emphasized by the Court as follows:

"Nevertheless, it is important to keep in mind (a) that GCR, O.62, r.4 recognizes that the court has a discretion whether or not to make any order as to the costs of any proceedings- the mandatory requirement that "the Court shall order the costs to follow the event" arises only 'if the court in the exercise of its discretion sees fit to make any order as to the costs of the proceedings' – and (b) that the mandatory requirement is, itself, qualified by the words 'except where it appears to the court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.'"

14. The principles discussed in the case of *McTaggart v. McTaggart* have been applied in the earlier stages of this matter in October 2015 in the ruling of Williams J⁴. This related to the husband's unsuccessful application for leave to appeal a costs order.

³ [2015] (1) CILR 123

⁴ 17th November 2015



1 15. In *Mars UK v Teknowledge Ltd.*⁵, Jacob J gave consideration to the applicable principles
2 on an application for payment of an amount of costs on account. The learned Judge
3 concluded that as a first step, there is a need to form a rough view as to the ultimate
4 amount of assessed costs in respect of which an interim payment is to be made. A court
5 should consider ordering a payment of a lesser amount approximately equal to what is
6 almost certain to be collected. The circumstances to be taken into account in the exercise
7 of a discretion whether to order a payment on account include whether or not a party
8 may wish to appeal. A second consideration is dealing with the case in a way which is
9 proportionate to the financial position of each party. This is one of the matters which
10 must be considered in line with the overriding objective to deal with cases justly. The
11 learned Judge stated:



12 *"The overriding objective applies as much to the exercise of the costs discretion as*
13 *to any other discretion given under the Rules. This is a case, for example, where*
14 *there is a wealthy successful party and a financially weak unsuccessful party. That*
15 *is one thing that should be taken into account. Other things that might be taken into*
16 *account are the likelihood of an appeal or possibly successful appeal. For example,*
17 *there may be a case in which a claimant is financially weak. Even if it succeeds there*
18 *might be an appeal by the defendant and the claimant needs the money to respond*
19 *to the appeal. That would be a particularly good reason for ordering a payment on*
20 *account."*
21

22 16. The principles discussed in the case of *Mars UK Ltd. v. Teknowledge Ltd.* with respect
23 to interim payments were reviewed with approval in the Grand Court case of *Riad*
24 *Tawfiq Al Sadik*⁶. Kawaley J summarized the principles in the following way:-

25 "25. I would summarise the governing principles under Cayman Islands law in
26 a more robust pro-receiving party manner as follows:

- 27
28 (a) GCR Order 62 rule 4 (7) (h) confers an unfettered discretion on the
29 Court to order the payment of "where the Court orders the paying
30 party to pay costs subject to taxation, a reasonable sum on account
31 of costs, such sum to be assessed summarily";

⁵ [2000] FSR 138

⁶ FSD 47 of 2009, 6th August 2019



- (b) *the governing principle underpinning this power, and the raison d'etre for the rule, is that "the successful party is entitled to the money. In principle he ought to get it as soon as possible. It does not seem to me to be a good reason for keeping him out of some of his costs that you need time to work out the total amount": per Jacob J in Mars UK Ltd-v-Teknowledge Ltd (Costs) [1999] 2 Costs L.R. 598 at 601;*
- (c) *in my judgment Jacob J's framing of the relevant principle is, with respect, more persuasive than the more cautiously expressed formulation of the English Court of Appeal in Blakemore-v-Cummings [2010] 1 WLR 983 (at paragraph 23), notwithstanding the fact that Investcorp's counsel was content to rely on this somewhat more restrictive formulation. In that case the principle that a successful party should not be kept out of their costs was described as "an important consideration". With respect, that understates the true weight the principle deserves. The principle that a successful party should be paid some of his costs immediately and before taxation is not simply "an important consideration", it is the governing and predominant principle articulated by the interim payment on account of costs rule;*
- (d) *the purpose of the rule is to enable the Court to avoid the injustice of delayed payment of all costs until the total amount is determined upon taxation through a summary partial assessment. This is because the need to carry out a detailed assessment through taxation is "not a good reason" for not ordering some costs to be paid immediately. Whether or not the discretion should be exercised is not shaped by the need to do justice in an abstract sense, entirely untethered from the core purpose of the rule. Whether or not an interim payment on account of costs should be ordered will almost invariably require an assessment to be made of whether or not there is a good reason not to order an interim payment and/or a good reason for requiring the receiving party to be deprived of any costs until the taxation process is complete;*
- (e) *GCR Order 62 rule 4 (7) (h), properly construed, contains an implicit starting assumption that an interim payment should be made. Obviously this starting assumption has somewhat less weight than an express statutory presumption. But the starting assumption arises from the indisputable fact that the core function of the rule is:*
- (i) *to articulate the principle that the mere fact that a taxation hearing is pending is "not ... a good reason" for depriving them of all of their costs, and*
 - (ii) *to empower the Court to summarily assess an appropriate partial costs payment which should immediately be made;*

1 (f) the current English CPR rule 44.2 (8) in my judgment simply makes
2 the implicit assumption in the earlier English rule explicit, giving
3 express legislative approval to the approach of Jacobs J in Mars
4 UK (which was, perhaps unintentionally, somewhat diluted by the
5 Court of Appeal in Blakemore (or Blackmore) by providing that
6 where taxation is ordered, the Court "will order that party to pay a
7 reasonable sum on account of costs, unless there is good reason not
8 to do so" [emphasis added]. To my mind it merely states more
9 clearly and explicitly what is already implicit in the current Cayman
10 Islands rule rather than articulating an entirely distinct and
11 different jurisdictional approach;

12
13 (g) in concluding that GCR Order 62 rule 4(7) (h) contains an implicit
14 starting assumption in favour of an interim payment on account of
15 costs, I do not ignore the fact that power to make such an Order is
16 clearly discretionary and that the strength of the starting
17 assumption may be weaker or stronger depending on the
18 circumstances of each case. It is important to remember however,
19 that when Jacobs J in Mars UK Ltd-v-Teknowledge Ltd
20 (Costs)[1999] 2 Costs L.R. 598 at 601 was discussing the
21 overriding objective as applying "as much to the exercise of the
22 costs discretion as to any other discretion given under the Rules",
23 he was dealing with a somewhat different procedural code. The
24 impact of the Overriding Objective in the Preamble to the Grand
25 Court Rules may apply in a general sense to GCR Order 62 as much
26 as it applies to other parts of the GCR code. But when construing
27 the jurisdiction conferred by Order 62, it is important to have
28 regard to GCR Order 62 rule 4 (2), which states in terms which
29 provide in a general sense support for a more robust approach to
30 construing GCR Order 62 rule 4 (7) (h):

31
32 "(2) The overriding objective of this Order is that a
33 successful party to any proceeding should recover
34 from the opposing party the reasonable costs
35 incurred by him in conducting that proceeding in
36 an economical, expeditious and proper manner
37 unless otherwise ordered by the Court";



40 (h) one recognised and significant reason for not ordering an interim
41 payment on account of costs is the need to avoid stifling an appeal:
42 Re BDO [2018 (1) CILR 187] (Parker J at paragraphs 37-38).
43 Another is that the application for an interim payment should not
44 be a disproportionate proceeding: per Jacobs J in Mars UK Ltd-
45 v-Teknowledge Ltd (Costs) [1999] 2 Costs L.R. 598 at 601. Another
46 circumstance which may displace the assumption that an interim
47 payment on account of costs should be made is the mere fact of the
48 pendency of an appeal, although the primary considerations might
49 relate to the need to suspend any order (or secure repayment)
50 rather than whether or not an order should be made;

- (i) *a summary assessment of the appropriate interim payment amount must obviously be possible and sufficient supporting material (e.g. a draft bill of costs or a breakdown of incurred costs) must be placed before the Court);*
- (j) *the Court's discretionary powers under the rule are sufficiently flexible to enable justice to be done on a case by case basis, being guided by both the letter and spirit of the relevant rule."*

THE SUBMISSIONS

17. The parties agree that the *Calderbank* approach was followed in this case and there is also agreement as to the applicable legal principles. There is disagreement as to whether or not there was a successful party.

18. Following the hearing, Practice Direction 3 of 2019 was gazetted on the 9th October 2019. This requires that the parties provide schedules of costs at least 14 days before the ancillary hearing. Going forward this will assist to eliminate the need for second hearings such as in this matter.

19. In this case which pre-dated that Direction, no such schedules were provided at the time of or prior to the hearing. By Affidavit dated 13th September 2019, the wife has now provided evidence of a global sum of CI \$215,000.00 as being the costs incurred to date. She attests that a portion of that sum was written down leaving approximately CI \$195,000.00 outstanding.

20. Bills which have been provided by her may be sub-divided as follows:





	Dates	Costs CIS	GBP£
Attorneys 1 st in time	March 2014 – Dec. 2017	118,199.00	
Attorneys 2 nd in time	May 2018 – March 2019	18,494.50	
Attorneys 3 rd in time	May 2019 – July 2019	37,293.97	
Expert's Report		19,586.25	
Senior Counsel	28 th May 2019 – 5 th June 2019		35,000.00
Total CIS		193,573.72	
Total GBP			35,000.00⁷

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21. The wife refers to the final *Calderbank* offer made by the husband before trial which was as follows:

	Wife CIS	Husband CIS
Capital Payment	1,010,278.00	410,000.00
Housing Lump Sum	298,750.00	Nil
Maintenance including rent	10,212.00	6,156.00

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22. Counsel on behalf of the wife submits that the wife should not be deprived of her costs for two reasons. The husband is the economically dominant party to the proceedings, and it was open to him to present a reasonable and achievable offer of settlement. Additionally it is urged that the economic disparity between the parties is such that there is no basis for the exercise of a discretion in a manner such as to deprive the wife of her costs. It is further argued that in any event, the difference between the offer made by the husband and the sums awarded under the judgment is significantly greater than the difference between the wife's offer and the sum ultimately awarded.

14

15

16

17

23. Counsel on behalf of the husband makes four principal submissions. Firstly that by virtue of the decisions of the Court of Appeal in the cited case of *McTaggart v. McTaggart* and GCR O.62. r.4, the costs which are recoverable are only those relating to the wife's application for financial relief. The wife is seeking to recover the entire cost of the

⁷ Rate of 1.1 to the CI dollar

1 divorce proceedings to include not only the application for financial relief but also
2 including but not limited to a) resolution of the Further Amended Petition and b)
3 disclosure issues relating to the wife's assertion that the husband had a financial interest
4 in the Firm to which he is employed. This assertion was subsequently abandoned.

5
6 24. Under this heading, Counsel on behalf of the husband submits that the original Petition
7 which was filed on the 15th April 2014 was twice amended. This was done on the 2nd
8 October 2014 and on the 7th September 2015 before the Petition was subsequently agreed
9 to by the husband and proved. The issues requiring amendment related to the reference
10 to co-respondent RK and the wife's non-compliance with the Grand Court Rules.

11
12 25. By Summons filed on the 23rd July 2014, the wife sought leave to file an Amended
13 Petition. By Order of the Learned Chief Justice made on the 28th July 2014, the wife's
14 Summons was dismissed and there was a direction to her to amend the Petition so as to
15 properly particularize the material facts in accordance with the Grand Court Rules. Costs
16 were reserved.

17
18 26. It is submitted by Counsel for the husband that applications for amendments to the
19 Petition cannot be characterised as a success for the wife who failed to draft the
20 document in compliance with the Rules.

21
22 27. The wife in response to this argument submitted that work in relation to the Petition was
23 done at the behest of the husband and was a necessary part of the process.

24
25 28. As a second limb under this heading Counsel for the husband submitted that in the course
26 of the proceedings a number of ancillary applications involving maintenance, disclosure,

1 removal of child from the jurisdiction and adjournments had been dealt with by different
2 judges. In some cases costs orders had been made. Counsel detailed these as follows:

3 i. "On the 4th September 2015, Williams J. ordered that the Respondent
4 should pay 50% of the Petitioner's costs of preparation for, and attendance
5 at that hearing.

6
7 ii. On the 17th November 2015, Williams J. ordered that the Respondent
8 should "*pay the wife's costs incurred in preparation for and attendance at*
9 *the hearing of the leave to appeal application*"

10
11 iii. On the 14th December 2017, Gunn J. ordered that the "*Respondent shall pay*
12 *fifty percent of the Petitioner's costs in preparation for and attendance at*
13 *the hearing of her application [for increased maintenance]. Such costs to*
14 *be taxed if not agreed*";

15
16 iv. On the 14th December 2017, Gunn J. ordered that the "*Petitioner shall pay*
17 *the Respondent's costs in preparation for and attendance at the hearing of*
18 *this 14 December summons [for removal from the jurisdiction]. Such costs*
19 *to be taxed if not agreed*".

20
21 v. On the 10th April 2019, Gunn J. ordered that "*The Petitioner is to pay all of*
22 *the Respondent's costs of and incidental to the adjournment of the final*
23 *ancillary hearing which was listed for 1 April 2019, to be taxed if not*
24 *agreed*" and "*with respect to the Respondent's costs referred to in [the above*
25 *paragraph]: (i) these shall include preparation for and attendance at the*





1 *hearing of the Petitioner's summons on 27 March 2019, preparation for and*
2 *attendance at today's CMC and drafting of any response by the Respondent*
3 *to any affidavit filed by the Petitioner in accordance with paragraph 2 of*
4 *this order; (ii) these shall not include costs of drafting of 22 March 2019*
5 *Affidavit by Respondent; (iii) potential further costs in relation to disclosure*
6 *requests of the Petitioner are reserved and leave is granted by the*
7 *Respondent to apply in relation to these costs following the Petitioner's*
8 *response to paragraph 1 of this order".*

9
10
11 29. In the course of this hearing, Counsel on behalf of the wife in response to these
12 submissions clarified that costs are not being sought with respect to matters which have
13 already been decided and agreed that any costs order would be separate from those
14 already made. It was stated that the wife is not seeking to reopen costs orders which
15 would be dealt with separately during the taxation process. Costs are being sought which
16 are not covered by existing costs orders.

17
18 30. The primary submission made on behalf of the husband is that both parties failed to
19 achieve or come within a reasonable margin of their offers and thus neither party
20 succeeded in achieving an order which at least met their best efforts. It is urged that the
21 Court's judgment came within an appreciable margin of the highest offer made by the
22 husband, and was very significantly below the lowest offer made by the wife. My view
23 is that on a reading of the principles set out by the Cayman Islands Court of Appeal and
24 in the case of *Gojkovic v. Gojkovic* this does not appear to be the applicable test.

1 31. Counsel for the husband also places some reliance on the fact that in the course of
2 negotiations, the second *Calderbank* offer made by the husband, was for a lump sum of
3 CI\$175,000.00, and purchase of a property for J. of a value of \$700,000.00. This was
4 made on the 16th July 2018, and the wife did not respond to this offer until the 1st
5 November 2018 whereupon it was rejected with no counter offer. Counsel submits that
6 effectively the wife withdrew from the negotiation process.

7
8 32. The husband made a further written offer on the 23rd May 2019 and the wife countered
9 on the 31st May 2019 with the offer of a capital payment of CI\$1,010,278.00, purchase
10 of a house of a value CI\$2,350,000.00 with further lump sum payment of CI\$298,750.00
11 and maintenance payments of CI\$10,212.00.

12
13 33. I have given consideration to the submission made on behalf of the husband that the wife
14 delayed for the five months between June and November 2018 and withdrew from the
15 negotiation process by not responding with a counter offer. While this non-response may
16 not have been helpful in resolving the matter, I do note that in May 2019, the wife
17 responded to a further offer from the husband and effectively re-engaged in the
18 negotiation process. I do not consider that her conduct in the intervening period is such
19 that she should be penalized in costs if she is the successful party. There was somewhat
20 of a gulf between the parties. The husband's first offer was for a lump sum payment of
21 \$150,000.00 which he had increased by \$25,000.00 to \$175,000.00 in response to the
22 wife's counter offer of CI\$925,000.00.

23
24 34. The wife submitted that her last offer was made on the 31st May 2019 and that the last
25 offer made by the husband was an oral without prejudice offer on the 3rd June 2019 to
26 increase the capital payment to CI \$410,000.00. The table below shows the husband's
27 final offers and the award made by the Court:





	Wife CIS	Husband CIS	Award
Capital Payment	1,010,278.00	410,000.00	747,878.99
Housing down payment Lump Sum	298,750.00	Nil	10 % of price
Maintenance including rent	10,212.00	6,156.00	7,157.00
Housing value	1,200,000.00	700,000.00 to 800,000.00	800,000.00 to 900,000.00

1

2 35. Counsel on behalf of the husband submitted thirdly that the judgment determined that
3 assets accumulated during the marriage should be distributed equally, this must mean
4 assets net of liabilities and thus that the cost liabilities of the parties should be divided
5 equally. It was urged that:

6 *“Further, to any extent that the Respondent was responsible for the wife's costs in*
7 *these proceedings this would constitute a liability that accrued "during the*
8 *marriage" as defined. As such, this liability would reduce the distributable amount*
9 *to be divided equally between the parties to the exact extent of any such order.”*
10

11 36. It is difficult to accept this submission in these circumstances where what is being
12 determined is whether costs should *follow the event*, the event in this case being the
13 conclusion of ancillary proceedings.

14
15 37. Having considered all the circumstances of the case and the submissions made by both
16 Counsel, subject to exceptions which arise in respect of some items, I do not see a basis
17 for other than the usual course to apply that costs follow the event. Applying the
18 principles discussed in the cases cited above, I conclude that the earlier judgment was
19 more favorable to the wife than the best offers of the husband. In summary, the husband
20 in this case ‘failed to obtain an overall order which was more beneficial than that which
21 could have been accepted under the *Calderbank* procedure’. Now that the extent of the
22 wife’s costs is known, it is undoubtedly the case, that this would amount to a significant
23 dent in the lump sum payment awarded to her. In these circumstances where she is the

1 financially weaker party, where the husband's resources are substantial, where by virtue
2 of the judgment made he is left with a significant asset balance, the justice of this case
3 requires that the usual principle is applied. The wife is entitled to her costs as the
4 successful party.

5
6 38. Counsel on behalf of the husband made the alternative submission that there are special
7 circumstances such that the wife should not be awarded costs. These include in particular
8 the wife's pursuit of disclosure with respect to the husband's partnership in the Firm to
9 which he is employed.

10
11 39. I refer to paragraph 26 of the earlier judgment in this matter which references the pre-
12 nuptial agreement between the parties which undoubtedly lead to the confusion as to the
13 nature of the husband's interest in the Firm. In that agreement, his interest is described
14 as partnership interest and the assets therein as ownership percentage as a partner/owner
15 of the Firm. The husband's concern with respect to costs is that the wife is seeking an
16 order for the payment of costs of an expert witness in relation to the husband's interest,
17 in circumstances where the matter had been clarified by the Affidavit of LN, the Director
18 of Finance and Operations, as far back as the 17th June 2016 and that several offers had
19 been made to provide her Attorneys with inspection of the documents which would
20 support the factual position.

21
22 40. The sequence of events as put forward by the husband is *inter alia*:

- 23
24 a. 11th July 2014: details of ownership of firm provided by husband in his response to
25 the request for further and better particulars;
26 b. 17th June 2016: Affidavit of LN provided, setting out in full detail the nature of the
27 husband's interest in Firm and extending invitation to review documents;

- 1 c. December 2016 – January 2017: email exchange between Attorneys on behalf of
2 Firm and counsel for wife providing further full details in respect of questions raised;
3 d. 1st February 2017: Invitation to review documentation of Firm re-sent;
4 e. 26th May 2017: offer accepted;
5 f. 3rd August 2017: Date for review of documents set, cancelled on day by wife's
6 Attorneys, no further attempts to make appointment made;
7 g. 14th June 2017 & 3 August 2017: appointment to review documents cancelled by
8 wife;
9 h. 4th December 2018: Court strongly invites allowance of a further appointment;
10 i. 8th and 27th February 2019: Attendance at offices of Firm for review of documents.
11 Counsel for wife provided with opportunity to ask any other questions, declined.
12 j. Undisclosed date: wife instructs "*expert's report which was relevant to an*
13 *assessment of the assets of the Respondent in these proceedings*";
14 k. 3rd June 2019: wife abandons previous assertions in respect of Firm at trial.
15

16 41. Counsel for the husband submits further that it was open to the wife to satisfy herself as
17 to the position since July 2014 and that she declined to do so until February 2019. It is
18 submitted that her position with respect to the husband's interest has been entirely
19 unreasonable and that the Court should exercise its discretion by making an order in
20 favour of the husband with respect to costs associated with disclosure issues concerning
21 the Firm since July 2014.

22
23 42. In response Counsel on behalf of the wife submits that there was a significant lack of
24 clarity on this issue. It is said that all the hallmarks indicated that there was equity
25 partnership, yet there was a denial of ownership. It is further said that these were matters

1 which required detailed investigation in the course of the proceedings, so that the steps
2 taken to investigate were all reasonable in the circumstances.

3
4 43. In my view a legitimate issue arose as to the husband's status in the Firm given the
5 manner in which the husband described his interest in the pre-nuptial agreement. In the
6 face of this, the wife's' initial attempt to clarify the matter was entirely reasonable in the
7 circumstances. The husband seeks his costs incurred since 2014, for complying with the
8 wife's disclosure requests concerning the Firm. He says that he made earnest efforts to
9 provide full disclosure. I do have a concern that following the receipt of the Affidavit
10 of 17th June 2016 which sets out the detail as to the nature of his interest and after having
11 been offered the opportunity to review the relevant documents there was considerable
12 delay in accepting this opportunity. The Affidavit of LN of 17th June 2016 was an
13 important response from someone other than the husband. The Attorneys on behalf of
14 the Firm wrote to Counsel for the wife in December 2016 and January 2017 and an
15 invitation to inspect was re-sent on 1st February 2017. That invitation was not acted upon
16 until the 27th February 2019. The matter also appears to have been further pursued
17 beyond the review of the documents. The wife may well have persisted long beyond
18 the point reasonably necessary.

19
20 44. In light of the submissions of Counsel on behalf of the husband, I have given
21 consideration to whether the wife's' conduct with respect to these disclosure issues
22 constitute special circumstances in the sense discussed in the case of *Gojovic v. Gojovic*
23 such that she should either be required to pay the costs of the husband or be deprived of
24 her costs in whole or in part.
25



1 45. In my view the husband created the confusion in the first place and the onus was on him
2 to clarify the situation. He ought not to be seeking recompense for clarifying the
3 confusion that he himself caused. I would decline his application for costs but do not
4 consider that the wife should be entitled to the entirety of her costs on this issue.

5
6 46. I considered whether the cutoff date should be from 2014 as highlighted by the husband
7 but it was not unreasonable in light of the lack of clarity, for the wife to have sought
8 some input from an independent person. I also considered whether the cutoff date of
9 17th June 2016, the date of the Affidavit of LN should be utilised. However the offer
10 having been extended in that Affidavit, it was not unreasonable to seek to examine/
11 inspect the documents as offered. In so far as there were costs attendant on the invited
12 examination, it is difficult to see the basis for exclusion of these. However to have
13 persisted beyond February 2019 stretches the boundaries of reasonableness. I would
14 accept the submission of the husband to the extent that the wife's costs on this issue, are
15 limited to costs incurred up to February 2019.

16
17 47. I accept the submissions of the husband with respect to costs for resolution and
18 amendment of the Petition.

19
20 48. The costs awarded to the wife on this hearing therefore exclude the following:

- 21 a. costs which have already been covered by cost orders previously made as outlined
22 above.
23 b. costs incurred after February 2019 with respect to the husband's interest in the Firm.
24 c. costs in relation to the resolution and amendment of the Petition.



1 **PAYMENT ON ACCOUNT**

2 49. With respect to the wife's application for an interim payment, the general principles are
3 agreed. I am guided by the principles detailed above in the cases of *Mars UK. v.*
4 *Teknowledge Ltd.* and *Riad Tawfiq Al Sadik*. The circumstances of the present case
5 would allow for the exercise of a discretion in line with the principles detailed therein.
6 The financially stronger party in this case wishes to exercise his right of appeal. The wife
7 will need funds in order to respond. As the learned Judge stated in the latter case, the
8 purpose of the rule as to interim payments is to enable the Court to avoid the injustice of
9 delayed payments of all costs until the total amount is determined, through a summary
10 partial assessment. In the exercise of my discretion I consider that it is appropriate in this
11 case that a payment on account be ordered.



12
13 50. The husband submits that payment of any sum would have a bearing on the final form
14 of the order in respect of the payment of the lump sum over a period of months and that
15 more time would be needed to pay, perhaps six months if ordered to pay costs. The wife
16 submits that it would be unreasonable to allow a further time period and that twelve
17 months would be too long a period.

18
19 51. The husband's monthly income is some \$62,866.00 per month. He has the asset base
20 and resources to meet an interim order of costs. To give any extended time to pay would
21 defeat the purpose of a payment on account.

22
23 52. Excluding the cost for the Expert's report, which is challenged and which is post
24 February 2019, and using a rough estimate of about one-half of the costs, which appear
25 to fall within the period during which no previous cost orders were made, this would
26 amount to approximately C\$94,288.47.00.

1 53. On making allowance for the possibility of reduction in the taxation process, I would
2 consider that the amount on account should be conservatively no more than 70% or
3 CI\$66,001.92.

4
5 54. Costs are awarded to the wife on the standard basis to be taxed if not agreed subject to
6 the exclusions identified above. An interim payment on account of CI\$66,001.92 should
7 be made by the husband to the wife. This should be paid within 14 days of the date of
8 this Order.

9

10 **COSTS IN RELATION TO THE APPLICATION**

11 55. In respect of costs attendant upon this application, Counsel on behalf of the husband
12 submitted that given the partial success of both parties, either there should be no order
13 for costs or there should be a limited order for costs. Counsel noted that:

14

15 i. The wife's position at the costs hearing was that the costs of the entire
16 proceedings should be awarded in her favour with an interim order sought of
17 CI\$95,000.

18

19 ii. Costs were disallowed, in particular those in relation to the Petition and
20 discovery since February 2019.

21

22 iii. An interim costs order of a lesser amount was made;

23

24 56. In response, Counsel on behalf of the wife submitted that in the main the wife was
25 successful in her application for costs and that the costs of the hearing of the 16th
26 September 2019 should simply be included in the taxation of the costs of the action.



1 57. I accept the submissions of the husband on this aspect. Given the partial success of the
2 wife, the husband should pay 50 % of her costs in respect of this application.
3

4 **Dated this the 14th day of February 2020**

5
6 



7 **Honourable Justice Cheryll Richards Q.C.**
8 **Judge of the Grand Court**