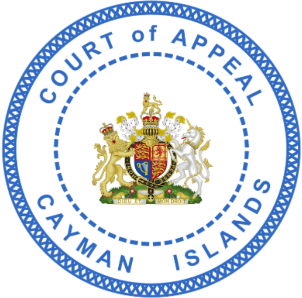
IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS
FAMILY DIVISION

CICA (Civil) Appeal No 2 of 2020
(Formerly FAM 53 of 2014)

BETWEEN:



A.M

Appellant

-v-

A.M

Respondent

BEFORE:	**The Hon John Martin, Justice of Appeal** **The Rt. Hon Sir Alan Moses, Justice of Appeal** **The Rt. Hon Sir Jack Beatson, Justice of Appeal**
Written Submissions Received from	**Mr. David McGrath of McGrath Tonner, for the Appellant** **Mr. David Holland of KSG Attorneys, for the Respondent**
Judgment delivered:	**20 November 2020**

FURTHER JUDGMENT ON COSTS

MOSES JA:

1. By our judgment handed down on 24 June 2020 dismissing the Appellant, H's appeal, the Court made no order as to costs. We said:

> "*Costs*
>
> 67. *W was required to ask for costs, as a condition of her legal aid certificate. There has been no change in the Cayman Islands to follow the change in the England and Wales Family Procedure Rules 2010 (see McTaggart v McTaggart [2011] (2) CILR 417). But H's application, in the light of the second welfare report from Ms Bailey and his relationship with I for the seventeen months prior to the hearing of W's application fully justify the view that H's conduct in pursuing the appeal was far from reprehensible and should be recognised by making no order as to costs. Both parties sought what was in the best interests of I, there were no winners and losers (see Cobb J in Re E-R [2016] EWHC 805[77].*"

2. On the day that the judgment was handed down, Counsel for W sought what were called directions. In effect W asked the court to re-consider the Order it had made as to costs because it was expected that W would be given an opportunity to make further submissions after the conclusion of the hearing of the case on 3 March 2020 and had been wrongly deprived of the opportunity to make those submissions.

3. Following that request, the court ordered that further submissions should be made. This ruling is made on the basis of these further submissions, advanced on behalf of both parties.

4. The starting point must be to acknowledge that this court erred in making a final order as to costs without giving an opportunity to make further submissions; (it should be stressed that this was the fault of the author of the judgment Moses JA, who led the other members of the court into error). Both parties, and, significantly the court Registrar, accept that at the end of the hearing in London, after the result had been announced, it was indicated that further submissions as to costs could be made in writing. It should be recalled that some submissions had been made in the written arguments which referred to the authorities cited in the judgment.

5. The sequence of events following the oral hearing and the announcement of the decision are of significance. The draft judgment was circulated for comments from both parties on 5 May 2020. The parties agreed comments on the judgment were received on 13 May 2020. There was a specific comment as to the costs paragraph 67:

> "*Clarification is sought as to the statement 'fully justify the view that H's conduct in pursuing the appeal was far from reprehensible and should be recognized by making no order as to costs'. This paragraph appears to relate to the costs of the relocation hearing rather than the appeal. Query whether it was intended to refer to H's conduct in opposing relocation rather than 'in pursuing the appeal'*"

6. The query was answered in the version of paragraph 67 referred to above. (Paragraph 1)

7. It must be obvious that the time for raising the issue as to whether the court had overlooked the indication that it would permit further submissions was when the parties were sent the draft judgment. Yet neither side sought to draw the court's error to its attention. On the contrary, W's legal advisers were content to confine themselves to a drafting point. The court's error was thus compounded by this failure which has never been explained and the court, in the belief that no further point arose other than the agreed drafting points proceeded to finalise the judgment which, as we have noted, was handed down on 24 June 2020.

8. The principle as to whether a court is allowed to change its mind and in what circumstances was explained by Baroness Hale in *In the Matter of L and B* [2013] UKSC 8. The court must be concerned not to encourage applications to the court to change its mind, which militates against finality, produces uncertainty, quite apart from the waste of time and costs. But the overriding objective must be to deal with the case justly (see Baroness Hale at [27], Neuberger J in *Re Blenheim (Restaurants) Ltd (No 3)* Ch D 9 Nov 1999 and *H v T* [2018] EWHC (Fam)).

9. A decision whether to allow and consider further submissions should be governed by the need to do justice to a party who clearly expected a further opportunity to make submissions and not by a wish to punish that party for failing to take the opportunity at the appropriate time. Although we should emphasise that the opportunity should have been taken at the time of the draft judgment which disclosed the court's error, the request to make further submissions was made only when the judgment was handed down. It is possible that the clarification sought on13 May 2020 was a preliminary request by W prior to making further submissions. If that is so then it is a pity that was not made clearer. But, whatever the explanation, it is inescapable that the court had offered the opportunity to make further submissions and had then, inadvertently, proceeded without doing so. In those circumstances we have considered the question of costs afresh, in the light of the submissions made by both parties.

10. W points out the starting point is that costs should follow the event. H lost his appeal both as to the relocation of I and as to a number of ancillary financial issues. GCR O.62 r 4 provides:

> "*(2). The Overriding objective of this Order is that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by him in conducting that proceeding….unless otherwise ordered by the Court."*

GCR O.62 r 4(5) provides:

> "*(5) If the Court in the exercise of its discretion sees fit to make any order as to the costs of the proceedings, the Court shall order the costs to follow the event, except when 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."*

11. W is undoubtedly in a far less happy financial position than H and, so she submits has incurred private legal fees and is likely to have to make a substantial contribution to Legal Aid in a case where she has succeeded. H complains that he is in no position to contest that new evidence at this stage. But we are prepared to assume that it is correct.

12. W also complains that the conduct of H in relation to financial issues is a continuing source of dispute. These disputes underline the unfortunate continuing hostility to the detriment of I. The court should be concerned in her interest to bring these disputes to an end.

13. It was with that hope that the court was disposed to make no order as to costs. It remains the fact that H had shown himself a responsible and caring father in the lengthy period while W was away while he looked after I on the Islands. The welfare officer on the Islands had changed her mind and it was no wonder that H, as a loving father, sought to resist the re-location application. Those considerations persuaded the court to the view that it should make no order. The fresh submissions do not detract from that fundamental consideration and it is for that reason we will again make no order as to the costs of the appeal.