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

CICA (Civil) Appeals No 28 of 2019 and 12 of 2021
(Formerly FAM 66 of 2014)

BETWEEN:

AH

Respondent /Appellant

-AND-

AW

Petitioner/Respondent

CONSIDERED ON THE PAPERS
BEFORE:

The Rt. Hon Sir John Goldring, President
The Hon. John Martin, Justice of Appeal
The Hon Sir. Richard Field, Justice of Appeal

Judgment circulated: **28th February 2022**

Judgment delivered: **17th March 2022**

Judgment on Costs

The Rt. Hon Sir John Goldring, President

Introduction

1. The court now has to consider the appropriate order for costs in this seemingly interminable litigation in which the main beneficiaries appear to be the lawyers. In summary, costs were incurred in the Grand Court hearing of 3 June 2019, the appeal from that hearing of 4 May 2020, the re-calculation hearing before the Grand Court of 28 October 2020 and the further appeal from that judgment of 8 September 2021. Although not relevant for present purposes, the husband (as I shall for convenience refer to him) has now sought leave to appeal the decision in the further hearing to the Judicial Committee of the Privy Council.

2. The costs of the wife (as I shall, again for convenience, refer to her) of the initial Grand Court hearing were approximately US$284,000. 'An informed estimate' of her costs thereafter is US$146,910.87 (ignoring costs incurred in a subsequent hearing before Richards J): see paragraph 73 of the wife's skeleton argument. In short, therefore, the wife's total costs amount to no less than US$431,000 in round figures. It is said the husband's costs are likely to be higher.

3. The 'clean break' capital sum awarded to the wife by Richards J at the first Grand Court hearing was CI$747,878.99. She awarded CI$650,000 following the first Court of Appeal judgment and the ensuing re-calculation hearing. That award was upheld by the Court of Appeal as within the legitimate range of awards available to her having regard to the strands of need (in particular) and compensation. It is self-evident that any substantial order of costs against the wife would inevitably materially erode that sum.

The legal principles

4. By section 21(e) of the Matrimonial Causes Act (2005 Revision):

> "*At the time of pronouncing a decree under this Law, the Court shall, as appropriate, make orders for—*
>
> . . .
>
> *(e) making financial provision from the property of either spouse for the children of the marriage and for the other spouse.*
>
> . . .
>
> *(g) costs.*"

5. Part II of the Grand Court Rules 1995 (as revised) concerns "*entitlement to costs.*" O.62, r.4 sets out the "*general principles*." It provides:

> "*(1) This rule shall have effect unless otherwise provided by any Law.*
>
> *(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 in an economical, expeditious and proper manner unless otherwise ordered by the Court…*
>
> *…(5) If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, 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 those costs."

6. Although no longer reflecting the position in England and Wales, it is necessary in the present jurisdiction briefly to refer to the case of *Gojkovic v. Gojkovic (No. 2)* [1992] Fam 40. In that case Butler-Sloss J (as she then was) held that although a court exercises a wider discretion in respect of costs in family proceedings than in other civil proceedings, to make no order of costs was unusual. With the exception of matters involving children or some special circumstance, where funds are available, costs *prima facie* follow the event. That starting position may be affected by factors such as a party's behaviour. As to the position where an open or *Calderbank* offer has been made, the judge said:

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

7. In *McTaggart v McTaggart* 2015 (1) CILR 123 the President, with whose judgment JAs Mottley and Campbell agreed, set out "*The approach to the award in "big money" cases which is to be adopted in this jurisdiction.*" He said:

> "*21…Whatever may now be the position in family proceedings in England and Wales, the position in this jurisdiction remains that set out in GCR O62, r4: if the court in the exercise of its discretion sees fit to make any order as to costs in ancillary relief proceedings, it shall order costs to follow the event (save where there are special circumstances)….*
>
> *23….until and unless there is a change to the relevant rule in this jurisdiction, in awarding costs in ancillary relief proceedings the courts here should give effect to the provisions of GCR, O.62 r.4- that generally, a successful*

party…should recover from the opposing party the reasonable costs incurred by him in conducting that proceeding in an economical, expeditious and proper manner- and, in applying the principle that "costs follow the event," should follow the guidance in Gojkovic.

24. *Nevertheless, it is important to bear 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 any 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.*

25. *In deciding whether or not to make any order as to the costs of ancillary relief proceedings, the court should have in mind that the powers conferred by s.21 of the Matrimonial Causes Law (2005 Revision)—and, in particular, the power to make an order for the disposition of matrimonial property, conferred by para. (b) of that section, the power to make financial provision for one spouse out of the property of another conferred by para. (e) and the power to make an order for costs, conferred by para. (g)—must be exercised with regard to the direction, in s.19 of that Law, that in dealing with all ancillary matters, the court shall have regard to (inter alia) "the needs, financial and other resources" of the parties.*

26 *Having regard to the needs and financial resources of a party requires, it seems to me, that—in exercising its powers under s.21 of the Law—the court takes account of the need of each party to discharge his or her liabilities to their respective legal representatives in respect of the costs of the ancillary relief proceedings and the resources available to each party to meet that need. So, in a "big money" case, the court should ask itself—when determining what order to make under s.21(b) of the Law for the disposition of the matrimonial property—whether the order which it is proposing to make will adequately meet the need of each party in relation to his or her liabilities in respect of costs. If the court is not satisfied that the order which it is proposing to make will adequately meet*

the need of, say, the wife in respect of her liability to her legal representatives then, as it seems to me, there are three courses open to it: (a) it can vary the proposed order under s.21(b)—that is to say, it can make an order under that section which awards the wife a greater proportionate share of the matrimonial property; (b) it can leave the order under s.21(b) in the form proposed and make an order under s.21(e) for a payment by the husband to the wife which includes a sufficient sum to meet that need; or (c) it can leave the matter to be dealt with by an order for costs in the wife's favour.

27 *Further, if in a "big money" case the resources available to one party (usually, but not, of course, invariably, the husband) are substantially greater than the resources available to the other (again usually, but not invariably, the wife) it can be expected that, in so far as the needs of the party whose resources are the lesser are not met by an order under s.21(b), he (or, more usually, she) will be seeking an order under s.21(e) of the Law for a transfer of property. Again, as it seems to me, the court should ask itself—when determining what order to make under s.21(e) for the transfer of, say, the husband's property to the wife—whether the order which it is proposing to make will adequately meet the need of each party in relation to his or her liabilities in respect of costs. If the court is not satisfied that the order which it is proposing to make will adequately meet the need of, say, the wife in respect of her liability to her legal representatives then, as it seems to me, there are two courses open to it: (a) it can vary the proposed order under s.21(e)—that is to say, it can make an order under that section which makes greater financial provision for the wife out of the property of the husband; or (b) it can leave the matter to be dealt with by an order for costs in the wife's favour.*

28 *In deciding whether to make provision for, say, the wife's need in respect of her liability to her legal representatives by an order under paras. (b) or (e) of s.21 of the Law, or to leave the matter to be dealt with by an order for costs in her favour, the court should have in mind the observation of Mr. Mostyn, Q.C. in GW v. RW (3) ([2003] EWHC 611 (Fam) at para. 93) as to the desirability of avoiding "satellite costs assessment litigation," which, as he said, can itself be protracted and acrimonious, and which "prolongs the agony between the parties…*

> *33 For the reasons which I have explained, in principle the most appropriate way to make provision for the wife's costs of the ancillary relief proceedings in the Grand Court would be to adjust the amount of the additional capital sum so far as necessary to meet her need to pay those costs, and to give effect to that adjustment by increasing the aggregate sum payable under para. 5 of the judge's order of June 28th, 2010 (as varied by the order made by this court on December 8th, 2011).*"

8. In paragraph 6 the President confirmed what he had said at the time of the substantive judgment:

> "*...If the burden of costs which [the wife]...has to bear is such as to make serious inroads into the amount which she will have available for investment, fairness may require that the amount of the additional capital sum to be paid to her receives further consideration.*"

9. Although on behalf of the wife Mr Yates draws the court's attention to some English authority, both parties essentially accept that *McTaggart* prescribes the approach this court should follow.

The detail

10. At the first Grand Court hearing, the judge, having concluded that the wife had succeeded, ordered that costs should follow the event. She was, however, critical of the wife's conduct in two particular respects. First, the manner in which she sought to pursue an issue regarding the husband's interest in the Firm and, second, her conduct regarding an adjournment and the amendment of her petition. Accordingly, she ordered that:

> "*(1) ...the Respondent shall pay the Petitioner's costs of and incidental to the proceedings, to be agreed or assessed on the standard basis.*
>
> *(2) The costs awarded to the Petitioner shall exclude:*
>
> *a. Costs which have already been the subject of costs Orders made in the course of the proceedings;*
>
> *b. Costs incurred after February 2019 in respect to the Respondent's interest in the Firm; and*
>
> *c. Costs in relation to the adjournment and amendment of the Petition.*
>
> *(3) The Respondent shall pay the Petitioner the sum of CI$66,001.92 on account of costs, within 14 days of the date of this Order.*

(4) The Respondent shall pay 50% of the Petitioner's costs of her application for costs including the hearing of 16 September 2019".

11. In its first judgment, the Court of Appeal was more critical of the wife. It set out the position in the following way (paragraph 92):

> *As I have set out above (paragraph 64), on 17 June 2016 AH provided independent evidence of the nature of his interest in the Firm. AW was invited to review the relevant documents. She did not do so. She or her attorneys did not respond to several further requests. When there was finally such a review in February 2019 (at the urging of the court), it took a further 4 months before AW abandoned her fruitless pursuit of this aspect of the case. Had AW or her former attorneys acted with due diligence, the review of the Firm's material should have taken place by the end of September 2016 at the latest, followed by a speedy decision to abandon pursuit of that part of the case. While obviously it is impossible to be precise, it seems to me that had that happened, and being as fair to AW as I can be, the case should probably have been heard some 2 years before it was, that is to say, by the middle of 2017.*
>
> *On the assumption that during the period from the middle of 2017 and June 2019 there was an increase in the value of AH's assets, it follows that AW should not benefit from that increase. It would, in my judgment, be manifestly unfair for her to do so."*

The husband's submissions

12. The husband accepts that the reduction in the amount awarded (of CI$98,878.95) is insufficient to warrant interference with the primary ruling of the Grand Court that costs should follow the event. However, he submits that clause (2)(b) of the costs order should be amended to exclude costs associated with the husband's interest in a Cayman firm ("the Firm") from July 2017 and other costs not directly arising in relation to the final ancillary hearing from July 2017.

13. As to the first appeal, the husband submits that he succeeded and should therefore have his costs. It is said that 'the success in relation to the amount awarded was substantial in relation to the recalculated figure in the sum of several hundred thousand dollars and, even after the discretionary uplift by the Grand Court after that recalculation, the reduction of CI$98,000 was not by any means de minimis. [The wife]…sought to maintain the original award and failed to do so.'

14. As to the re-calculation hearing, the husband submits he succeeded and should therefore have his costs. It is said the wife unsuccessfully contended that the recalculated sum in accordance with the prenuptial agreement was CI$454,347, whereas the judge found it was CI$348,210. She argued for a sum of CI$724,557.05 to reflect the strands of need and compensation and sharing. She wrongly sought to argue that the additional elements should be taken into account. The judge found the correct sum was CI$650,000. As it is put, '[the husband]…therefore succeeded against [the wife's]…arguments and costs should follow that event.' As a backstop, it is submitted that the only proper order would be no order for costs.

15. As to the second appeal, it is accepted the wife succeeded and is entitled to her costs.

Analysis and conclusion

16. The overriding objective of GCR, O.62. r. 4 is that a successful party to any proceeding should recover from the opposing party their reasonable costs. If the court sees fit to make an order for costs, they must follow the event, unless in the circumstances it appears to the court some other order should be made as to all or part of the costs. In exercising its discretion under the Order, in family cases, it is necessary, as was spelled out in *McTaggart*, to have well in mind "*the needs, financial and other resources*" of the parties. The court in the exercise of its discretion, is likely to take into account the amount of legal costs reasonably incurred and the respective needs and resources of the parties. Here, the legal costs are substantial, the resources of the husband are much greater than those of the wife and the capital sum awarded to the wife substantially reflects her needs. If an order for costs reasonably incurred results in the material erosion of a capital sum awarded to reflect a party's needs, that is a feature which the court may take into account (assuming, of course, that that sum has not been augmented to reflect those costs).

17. Moreover, in approaching the court's exercise of its discretion in respect of costs, it does seem to me necessary to have regard to the proceedings as a whole and their overall outcome.

The first Grand Court hearing

18. The areas of dispute were wide. On every major issue the husband failed. The wife's interpretation of the pre-nuptial agreement succeeded. The husband offered a capital payment of CI$410,000. The wife was awarded CI$747,879.99. The husband offered CI$6,156.00 for child maintenance. The judge awarded CI$7,197. The husband offered CI$700,000-

CI$800,000 for a house. The judge awarded CI$800,000-CI$900,000. The husband made no offer to as a down payment on a home. The judge awarded 10% of the price.

19. Plainly rightly in the light of her findings, the judge made the order set out in paragraph 10 above. I would only make two changes to reflect the judgment of the Court of Appeal from the order made by the judge. Firstly, I would order that the wife should not be entitled to recover such part of her costs (if any) in bringing the proceedings to trial, which would not have been incurred had the trial taken place in June 2017 as opposed to June 2019, and, secondly, at sub-paragraph c, that the wife should not have costs incurred after June 2017 in respect of the Respondent's interest in the Firm.

The first Court of Appeal hearing and the re-calculation hearing

20. As I set out in paragraph 1 of the first appeal, the husband disputed virtually every element of the first Grand Court judgment. As I said:

> "*While accepting that both parties intended to be bound by the pre-nuptial agreement, he firstly submits the judge wrongly construed it. Paragraph 4 of the Agreement did not provide, as the judge found, that property acquired by him after final separation but before dissolution, was joint property, and fell to be shared; nor did paragraph 6(e), again as the judge found, require him to provide all the educational and other expenses for Y. Secondly, he submits that the cost of the house the judge ordered be purchased was excessive. Thirdly, he submits that if the judge did rightly construe the Agreement, it was unfair in all the circumstances for the court to hold him to it. Fourthly, he submits AW should make a contribution to Y's maintenance; that the judge erred in her findings regarding AW's income. Finally, he appeals the order for costs that the judge made*."

21. The husband succeeded in respect of only one aspect. The court found that the wife failed to act with due diligence, that had she done so, the case would probably have been heard by the middle of 2017 (see paragraph 11 above). The court remitted the matter to the judge, for her to reconsider the position in the light of that finding. At that hearing, the judge rejected the wife's submission that the appropriate capital sum under the pre-nuptial agreement should be CI$454,347. She found it should be CI$348,210. Having regard, as the Court of Appeal concluded in its second hearing, to the strands of need (in particular) and compensation, the

judge found that the appropriate capital sum was CI$650,000. She rejected the wife's submission that the appropriate sum should be CI$724,577.05. At no stage did the husband offer the wife CI$650,000, or any sum approaching it.

22. From the beginning of this protracted litigation, the husband, who is the party with means, has sought to dispute virtually every element of the wife's claim, whether relating to their child or payment for the wife. At no stage has he recognised that the wife is entitled to a substantial sum by way of a capital payment. At no stage has he offered an appropriate sum. While the husband succeeded in respect of one element in first Court of Appeal hearing, the outcome is that the husband still has to pay the wife CI$650,000, which on any view is a substantial capital sum, albeit less than the judge's original award.

23. While I accept the wife did not succeed on every aspect of her case in the re-calculation hearing, that was against the background of the husband failing to offer or concede an appropriate capital sum, in particular, for the wife's needs. Looking at the outcome of the re-calculation hearing in the round, it cannot in my judgment be said the husband was the successful party.

24. As to the first Court of Appeal hearing, the husband should pay 95% of the wife's costs. That would, in my judgment, sufficiently reflect the single element in respect of which the husband succeeded.

25. As to the re-calculation hearing, having regard to what I have said in paragraphs 22 and 23, it seems to me the husband should pay the wife's costs.

26. There is no dispute but that the husband should pay the wife's costs of the second Court of Appeal hearing.

27. If not agreed, costs should be on the standard basis.

The applications for a stay

28. It does not seem appropriate for this court now to deal with the issue of costs arising from the stay applications. They are for the Grand Court. This court will only consider them should appeals arise.

Payment of costs on account

29. At paragraphs 49-54 of her judgment on costs, Richards J set out the principles she should apply. They were agreed. As it did to her, it seems to me appropriate that there should be a payment on account. In seeking such costs, the wife submits (paragraph 84 of the wife's skeleton argument), that "*Given the total costs of Appeal 1, the Recalculation Hearing and Appeal 2 amount at least to US$150,000, a payment of US$105,000 would be appropriate. This is consistent with the Costs Judgment of Richards J who felt that any payment on account should conservatively be 70% of the bill*."

30. While I am sympathetic to the wife's argument, there is some substance in the husband's submission that the taxation process in these proceedings will be complex and that there is a significant margin of uncertainty. In the circumstances I have concluded that the payment on account should be US$90,000, some 60% of the costs figure suggested by the wife.

The Hon Sir Richard Field, Justice of Appeal

31. I agree.

The Hon John Martin, QC, Justice of Appeal

32. I also agree.