THE GRAND COURT OF THE CAYMAN ISLANDS
FAMILY DIVISION

CAUSE NO. FAM 201 OF 2014

BETWEEN:

AKS

Petitioner

AND

JS

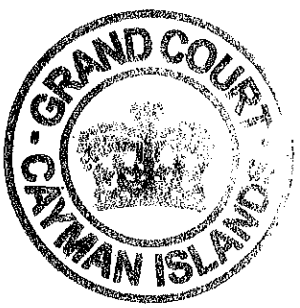
Respondent

AND

RS & HS

Proposed Intervenors

Appearances:	**Ms. Sheridan Brooks of Brooks & Brooks for the Petitioner** **Mr. Waide DaCosta for the Respondent** **Mr. Matthew Dors of Ritch & Conolly for the Proposed Intervenors**
Before:	**Hon. Justice Williams**
Date of Judgment:	**11 February 2016**
Written submissions in relation to costs:	**8 & 9 March 2016**
Draft Judgment on Costs Circulated:	**17 March 2016**
Judgment Delivered:	**22 March 2016**



HEADNOTE

Family Law – divorce - financial provision – costs in relation to application of a third party to intervene in ancillary relief proceedings – test when considering application for indemnity costs

JUDGMENT ON COSTS

The Application

1. On 3 February 2016 RS and HS's ("the Intervenors") Summons dated 25 September 2015 came on for hearing. In the Summons they sought an order permitting them to intervene in the ancillary relief proceedings involving their son JS and his wife AKS. The application was supported by JS and opposed by AKS.

The Background

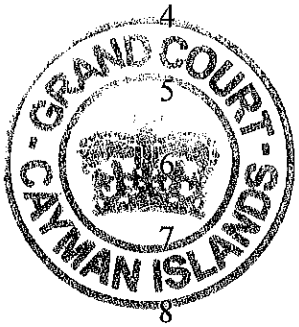
2. The background of the case is set out at paragraphs 2 to 6 of my perfected Judgment circulated on 11 February 2016. I do not intend to repeat that same detail herein.

3. At the first mention hearing on 1 May 2015 I gave comprehensive directions with the goal of fixing the ancillary hearing on the first open day after 20 July 2015. My notes from that day reflect that issues were raised about the effect of the purported investments made by each party's parents in the former matrimonial home. My notes record my indication that:

> *"Consideration should be given to inviting the parents to be joined as intervenors if it is argued by them that they have a separate discrete interest in the former matrimonial home."*

If neither party's parent(s) wished to intervene my direction provided for the filing of witness statements by 22 May 2015 as their evidence would most likely be relevant.

4. In compliance with my directions, on 22 May 2015 AKS served her Affidavit of Means in which she detailed her position about the Intervenors' financial contribution to the matrimonial home. On 16 June 2015 the Intervenors instructed their current attorneys, Ritch & Connolly. On 18 June 2015 JS's then attorneys, Travers Thorp Alberga, notified the Court and the other parties by email that RS and HS had engaged Ritch & Connolly to represent them as intervenors in the matter.



5. All of the parties were notified by the Court that the mention hearing on 16 July would have to vacated and be relisted. The attorney for JS and the attorney for the Intervenors provided the Court with their dates to avoid on 25 June 2015. The Court sent out several emails to try to obtain AKS's dates to avoid and eventually on 18 August 2015, almost 2 months later than the other parties, AKS's attorney provided dates to avoid.[1]

6. On 7 July 2015 the Intervenors' attorney wrote to the attorney for AKS to inform them that they had been instructed to intervene in the divorce proceedings. In the letter he indicated that it was necessary for their clients:

> *"to be a party to the proceedings in order to have their claim to an interest in the matrimonial home determined prior to any decision*

[1] I note that in an email sent by AKS's attorney to the Court on 17 July 2015 she stated that, as "both parties" were leaving the jurisdiction shortly due to attending a wedding, she would provide the dates to avoid for the mention hearing as soon as able to do so.

regarding the treatment of the matrimonial home in the divorce proceedings."

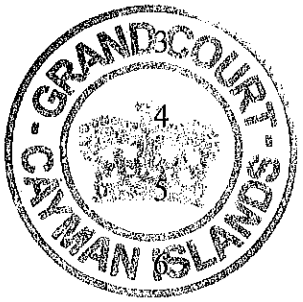
He enclosed a draft, coupled with a request for AKS to consent to the application. On 16 July 2015 AKS's attorney replied saying that any variation/amendment to the Court's direction order would have "*to be achieved*" by the Courts. The Intervenors' attorney replied on the same day indicating that before his clients could apply for directions they needed to become parties and he again invited consent to the application. He indicated that the intervenors would ask the Court to make the order at the upcoming mention hearing if agreement could be reached but, if opposed, they would be:

> "*compelled to prepare a much more comprehensive application and seek a longer hearing at which a contested application can be dealt with.*"

7. Despite the content of the email exchanges on 16 July 2015, on 17 July 2015 AKS's attorney wrote to the Court indicating that she did not understand on what basis Counsel for the proposed intervenors was requesting dates for a mention hearing. On 17 July 2015 AKS's attorney sent the Intervenors' attorney an email in which she said that their clients:

> "*had been previously provided with an opportunity to be joined as parties*" and had "*neglected and/or refused to do so*" and that "*as the pleadings have been closed*" it was "*a matter for the Court.*"

8. On 17 July 2015 the Intervenors' attorney again wrote to AKS' attorney and he acknowledged that it was a matter for the Court as to whether his clients could be joined, but reiterated his request for an indication whether the application was going to be opposed. He understandably indicated that he sought this clarification as it would affect the time estimate for the hearing, as well as the detail required in the affidavit in support of the application.



9. On 10 August 2015 JS's attorney provided his written consent to the application being made by the Intervenors.

10. On 3 September 2015 the Intervenors' attorney again wrote to AKS's attorney. He drew attention to the above-mentioned email exchange and he specifically mentioned the email of 17 July 2015. He indicated that no response had been received to that email and requested an immediate reply. He went on to indicate that, if a reply was not received within seven days, the Summons and supporting affidavit would be prepared on the basis that the application was opposed and that a one-hour hearing would be requested. Importantly he indicated that:

> "*We shall draw the attention of the court to this letter as appropriate in relation to costs.*"[2]

11. On 14 September 2015 an email was sent by the Intervenors' attorney indicating that the letter of 3 September 2015 had not been replied to and that, if no reply

[2] My emphasis by underlining

was received by close of business, the application would be prepared and filed later in the week.

12. Despite the content of the communications from the Intervenors' attorney and her responses to the same, the attorney for AKS stated in an email sent on 15 September 2015 that she was "*very surprised*" that the application was "*only now*" being prepared. She reiterated the agreed and uncontroversial view that it was a matter for the Court whether RS and HS would be permitted to intervene and went on to contend that an explanation would have been given as to why they had not chosen to be joined when "*they were provided with that opportunity*" by the Court. She also stated in the email that she would only advise AKS about whether a response to the application was necessary or not after the Intervenors had provided the above explanation to the Court. I should make clear that the only indication I gave was at the 1 May 2015 mention hearing, at which the Intervenors were not in attendance, when I requested both parties to consider whether or not to invite their respective parents to apply to join as each party had stated that these third parties may have an interest in the matrimonial home due to their financial investment into the property.

13. Having regard to the content of the received 15 September 2015 communication, the attorney for the Intervenors indicated that a detailed application would now have to be made, with a two-hour time estimate. He indicated that, as the previous

requests for dates to avoid had not been provided, unless they were received by the close of business on that day, he would be filing the Intervenors' application without those dates. In the letter he stated that:

> *"We will draw our exchange of correspondence to the Court at the appropriate time and seek an order for indemnity or wasted costs*[3]."

14. On 27 September 2015 the Summons was filed with a Listing Form. In the Listing Form, under the heading "legal issues to be argued" reference was made to Grand Court Rules ("GCR") O.15, r.6(2)(b)(i) and to whether the Court should *"...exercise its discretion to allow the Applicants to intervene."* [4] Due to difficulties arising out of the parties' dates to avoid the matter could not be listed for a convenient date prior to 3 February 2016.

15. On 23 December 2015 the Intervenors' attorney wrote to AKS' attorney to provide service of their Summons, an affidavit in support from each Intervenor and a skeleton argument. In the letter the attorney stated:

> *"We urge your client to reconsider her position and confirm that she does not intend to contest our clients' application so that unnecessary costs of preparing hearing bundles and attending the hearing on 3 February 2016 are not incurred. If your client will now confirm that she does not object to our clients' application, we*

[3] My emphasis by underlining.
[4] My emphasis by underlining.

propose preparing a consent order and inviting the court to deal with the occasion administratively."

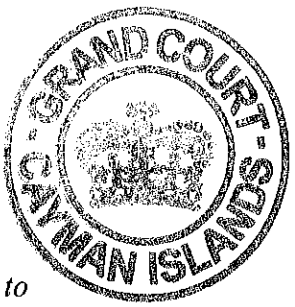
16. Regrettably the application remained contested and a substantive hearing on the issue was required on 3 February 2016.

The Orders Made on 11 February 2016

17. I found that jurisdiction of the Court to order a third party to intervene in ancillary relief proceedings could not be grounded upon GCR O.15, r.6(2). I went on to find that the Court exercising its inherent jurisdiction can permit a third party to intervene in such proceedings and I made an order permitting RS and HS to intervene.

Nature of the Costs Hearing

18. At paragraph 31 of the Judgment I stated that if there was an issue as to costs related to the application that the parties were provided the opportunity to either provide written submissions or consult with the Listing Officer to fix a cost hearing. On 8 March 2016 Written Submissions on Costs prepared on behalf of AKS were filed. On 9 March 2016 Written Submissions on Costs prepared on behalf of RS and HS were filed. No submissions on the issue of costs have been received from JS. No party has applied to Listing to fix a costs hearing. I have, therefore, only considered the above-mentioned Written Submissions on the issue of costs.



The Law in Relation to the Awarding of Costs

19. GCR Order 62, r.4(2) provides that:

> *"The overriding objective of this order is that a successful party to any proceedings 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."*

20. GCR Order 65, r.4 (5) provides that:

> *"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 that case some other order should be made as to the whole or any part of the costs."*

21. In ***DJ v BJ & RK*** FAM 66 of 2014 (30 October 2015) I considered and applied the Ruling of Sir John Chadwick, President in ***Roy Michael McTaggart v Mary Elizabeth McTaggart*** 2015 (1) CILR 123). In that important decision the President of the Court of Appeal gave guidance about the approach to be taken in relation to costs in matrimonial proceedings. Although ***McTaggart*** was a "big-money case" the majority of the principles outlined by him are applicable to all ancillary cases. At paragraph 5 the President referred to his earlier judgment in the same matter (2011 (2) CILR 366) in which he stated at paragraph 106:

> *"Put shortly, the position, here, is that costs in matrimonial proceedings – as in other proceedings – are governed by the*

Grand Court Rules; and, in particular by GCR O.62, r. 4, which requires (at sub-rule (3)) that:

> *'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 the costs."*

22. Chadwick P. went on to refer to what he had stated at paragraph 107 in the earlier judgment, namely that:

> *"...The general rule in ancillary relief proceedings (in England and Wales) is that the court will not make an order requiring one party to pay the costs of another party. <u>But there has been no corresponding change in the rules applicable in this jurisdiction.</u>*[5] *The position remains that, 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 some special circumstances)."*

23. The approach to be adopted in relation to GCR Order 62, r.4(2) & (5) is that of Chadwick, P. found at paragraph 23 in ***McTaggart*** where he stated that:

> *".... <u>unless and until there is a change to the relevant rule in this jurisdiction,</u>* [6]*in awarding costs in ancillary relief proceedings courts here should give effect to the provisions of GCR, O.62 r.4 – that, generally, a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by*

[5] My emphasis by underlining.
[6] My emphasis by underlining.

him in conducting that proceeding and in an economical, expeditious and proper manner."

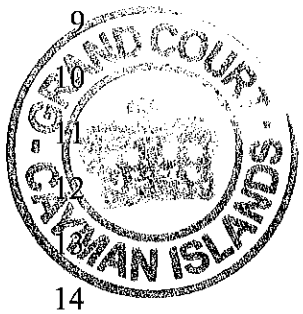
24. Accordingly, echoing the President's approach, I found in ***DJ v BK*** that GCR O.62 provides a code for dealing with the entitlement to costs, that it governs costs applications in matrimonial proceedings and that "*any power to make an order for costs under the Law must be read in conjunction with that order.*" At paragraph 26 I reminded myself that GCR Order 62, r.4(2) provides that no party to any proceedings is entitled to recover any costs of those proceedings from any other party to the proceedings except under an order of the Court.

25. Significantly at paragraph 24 in ***McTaggart*** Chadwick P. added:

> "*....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 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" – (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.*"

26. Chadwick P. went on to say at paragraphs 25 and 26:

"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 referred by para. (e) and a power to make an order for costs, conferred by para. (g) - must be exercised with regard to the direction, in s.19 of the 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."



27. Ms. Brooks referred, in her written submissions on costs, to the judgment of Henderson J. in ***G v G*** (2010 (1) CILR 365) and the judgment of Quin J. in ***DLF v DKT*** (2011 (2) CILR 273) in which the former case was reviewed by Quin J. It is important to note that both of these Grand Court judgments predate the Court of Appeal decision in ***McTaggart***. The approach adopted by the President, outlined at paragraph 25 herein, is consistent with Henderson J.'s view expressed at paragraph 10 in ***G v G*** that:

"The presumption that costs follow the event can be displaced much more easily in matrimonial cases than in other civil cases, the discretion of the court regarding costs is far wider than in other types of civil proceedings."

However the adoption of the English approach that there is a starting point of no order for costs advocated by Quin J. at paragraph 18 in ***DLF v DKT*** is not consistent with the views of the President which are set out in paragraph 22 above. The President clearly indicated that there had been no change in the Rules applicable in Cayman which would support such an approach to costs.

28. The fact that a case is not a 'big-money case' or one involving more substantial assets does not necessarily mean that an order for costs cannot be made in favour of a successful party. The limited size of the assets would be one of the factors to be taken into account when considering the division of the assets, how a costs order would affect a fair distribution of any available assets and whether that distribution will meet the needs of any children and the parties. It would be one of the factors that the Court could consider when exercising its wide discretion as to whether or not to make a costs order. It is clear that even if a party is viewed as being successful in ancillary relief proceedings, the Court is not compelled to make a costs order in his favour as it has a discretion whether or not to make any order for costs and even if it deems appropriate to make such an order it need not

order that they follow the event if having regard to the circumstances of the case it finds that some order should be made in relation to the costs.

29. Costs can be made prior to decree and that includes, in principle, for hearing about the joinder of third-party intervenors. Proceedings under Order 62, r.3:

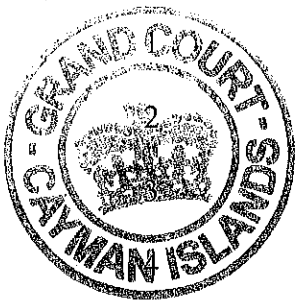
> *"includes any cause or matter or any step in any cause or matter and any appeal and any step in any appeal."*

Having found at paragraph 27 in ***DJ v BK*** that it was clear under O. 62, r. 3 that a costs order in divorce matters can be made includes interlocutory proceedings I went on to note at paragraph 29 that:

> *"The Court, when exercising its statutory power pre-decree to make a costs order, is not prejudging the merits of the grounds for the decree or the final ancillary relief orders. The effect and nature of a costs order made at the interlocutory hearing may well still be one of the factors considered by the Court at the final ancillary relief hearing when exercising its statutory duty under the Law."*

AKS's Position

30. Ms. Brooks opposes the application for costs made by the Intervenors, whether it be on the standard or indemnity basis. It is submitted that the appropriate order should be that "*the costs of the intervenors' application should be in the cause.*" It is suggested that only at the end of the ancillary relief proceedings will the Court be able to ascertain the strength or weaknesses of the Intervenors' claim and



determine what percentage of the net proceeds of sale from the former matrimonial home will be available to be distributed to meet the needs of the parties.

31. Ms. Brooks, although not seeking to rely upon delay at the intervention hearing, contends that the Court should now have regard to the passage of time from the directions hearing on the 1 May 2015 to the date of the filing of the application. As already indicated herein, at the mention hearing I only highlighted that the parties may wish to consider whether to invite either/both sets of parents to be joined as parties due to their respective contentions about parental financial contributions to the matrimonial home. Having had an opportunity to conduct the review of the correspondence between the attorneys, as set out above herein, any submissions made about the purported delay would not have affected my decision to permit joinder. In fact it is evident that a significant contributing factor to the delay is AKS's failure to promptly provide dates to avoid and to provide a helpful and timely answer about whether she intended to oppose an application made to intervene. The limited reply given on more than one occasion that it was "*a matter for the court*" was unhelpful because, although clearly an order would be required from the Court, a judge may have been willing to approve a properly signed consent order administratively or at a short hearing. An applicant making such an application was entitled, and would be expected, to seek a proper indication from the other party about their position taken in relation to the

application because the degree of preparation required would then be tailored by him around that position with the aim of obtaining a timely order in the most cost-effective manner. A delay of around six weeks for overseas litigants to retain local attorneys is not an inordinate delay, especially in a case where neither party had obtained a hearing date for final hearing.

32. If there are clearly third-party issues of the nature seen in this case there exists an obligation on either party to invite the Court to consider at the earliest opportunity whether a party should be invited to join. I say this because of Lord Justice Brightman's common sense observations in ***Edna Evelyn Tebbutt v Haydn Sandy Haynes-Susan Haynes*** [1981] 2 All E.R. 238 which, although set out at paragraph 6 in my Judgment, I see merit in repeating herein:

> *"It is fundamental to the section 24 jurisdiction that the judge should know over the property he is entitled to exercise his discretion. If there is a dispute between a respondent spouse and a third party as to the ownership of a particular item of property which stands in the respondent spouse's name, that dispute must be resolved before the judge can make an effective final order under section 24. There are only two ways of resolving such a dispute. Either the Family Division proceedings must be adjourned pending the trial of the claim in other proceedings, or the dispute must be decided in the section 24 proceedings by allowing the third party to intervene."* [7]

[7] My emphasis by underlining.

33. Ms. Brooks contends that the Skeleton Argument submitted on behalf of the Intervenors made it *"clear"* that the application was sought on the basis of the provisions in O.15, r.6 and not on the inherent jurisdiction of the Court. It is submitted that, as the Court ruled that jurisdiction could not be grounded on O.15, r.6 and as it was the "*reasoning and research of the court*" about the inherent jurisdiction that resulted in the Intervenors being joined, the Intervenors had not been successful in their arguments and should not be regarded as being the successful party.

34. It is also submitted by Ms. Brooks that this may be the first opposed case in the Family Division of the Grand Court where the Court had to rule on whether it had jurisdiction to permit third parties to intervene in ancillary relief proceedings. It is suggested that as all the previous orders permitting intervention had been made by consent this meant that a ruling was necessary, in the general public interest, to provide clarification and proper guidelines.

35. Although there was clearly an issue as to the jurisdiction to make orders to intervene pursuant to O.15, r.6(2) in ancillary relief proceedings, it is trite law that the Court has the power to make an order for third parties to intervene under its inherent jurisdiction.

The Intervenors' Position

36. The Intervenors apply for an order for their costs. They contend that they have been successful in their application and that there is no reason to depart from the rule that costs should follow the event as, from 16 July 2015, the application should not have been opposed and the contested hearing avoided. The Intervenors apply for costs to be assessed on the indemnity basis if not agreed as AKS and/or her attorney have been "*unreasonable, improper, and/or negligent*". Rather unusually, despite the fact that no formal application for a wasted costs order is made against AKS's attorney, the Court is invited by Mr. Dors to consider making such an order of its own motion. For reasons I will provide later herein, I will not be making a wasted costs order or any costs order on an indemnity basis.

37. It is rightly contended in Mr. Dors' Written Submission on Costs that it should have been clear to AKS and her attorney that the only appropriate course was for JS's parents to be permitted to intervene if they sought to do so. Both parties recognised, at the hearing on 1 May 2015, the existence of a substantial issue concerning the effect of the intervenors' financial contribution to the former matrimonial home. It is rightly submitted by Mr. Dors that AKS's attorneys should have been aware of the general principles surrounding third parties' intervention in such cases espoused by me at paragraph 38 in the reported decision of ***B v B*** [2012] (2) CILR 124.

38. Mr. Dors highlights AKS's failure to give a timely indication about her position in relation to the application and/or to outline any basis for an objection to the application, save to state the obvious point that leave was a matter for the Court. The case authorities clearly show how the Courts feel it necessary to permit intervention for the issues to be properly dealt with. It is submitted that the objections emerging from AKS' affidavit were based on a contention that there had been inordinate delay on behalf of the intervenors and that they had "*refused*" to be joined in the proceedings at the hearing on 1 May 2015.[8] Mr. Dors drew to the Court's attention that, despite there being pre-hearing correspondence between the parties, the jurisdiction issue was only raised for the first time by AKS in her Skeleton Argument dated 2 February 2016 which was provided to him on the day before the hearing.

39. In her Skeleton Argument it was rightly noted by Ms. Brooks that no basis had been given in the Skeleton Argument prepared on behalf of the Intervenors for a submission that GCR O.15, r.6 applied in matrimonial proceedings. In her Skeleton Argument it was also submitted that no authorities had been provided by the Intervenors in support of any assertion that the Court had an inherent jurisdiction to permit proposed intervenors to join. On the other hand, no authorities were cited in her Skeleton Argument to show the Court did not have such jurisdiction.

[8] The intervenors were not in attendance at the 1 May 2015 hearing.

40. Mr. Dors indicates that he did not deal with the issue of jurisdiction in his Skeleton Argument which had been filed much earlier, namely on 22 December 2015, because the case authorities make clear that the Court had jurisdiction to join intervenors. Importantly, on the day of the hearing, before coming into Court, Mr. Dors provided AKS' attorney with a copy of the reported decision of the Chief Justice in ***Rodriguez v Ebanks and R.L Ebanks Intervening*** [2014 (1) CILR 264]. It should have been clear to anyone reading that case that Chief Justice Smellie expressed a clear view that the Court has the power to add a third party as intervener in its inherent jurisdiction. At paragraph 15 in my Judgment I rejected Ms. Brooks submission that little weight should be placed on the Chief Justice's remarks and indicated that I was satisfied that the parties must have conceded that the Court had the jurisdiction at the very least under the inherent jurisdiction. Apart from the fact that there is no legal basis to support Ms. Brooks' submission that the inherent jurisdiction could not be exercised in a case where a proposed intervenor can still bring separate proceedings in relation to the alleged beneficial interest, such a contention is unattractive as it runs counter to the Court's goal to deal with every matter in a just, expeditious and economical way.

41. I was concerned at the hearing that ***Rodriguez*** appeared to be a case in which Ms. Brooks had been involved as an attorney. Reference is made in the Judgment to submissions made by her to the Court and one would have expected a copy of the Judgment to have been provided to her, even if her client was deceased. If

Counsel had been aware of the decision she would have been obligated to draw it to the Court's attention even if unfavourable to her case. Ms. Brooks told the Court that she was not aware of the decision until Mr. Dors had shown it to her, as she played no part in the later hearing. I am content to accept what Ms. Brooks says in that regard, however, it is a reported decision, and the Court is entitled to expect both parties to be aware of it and also of the relevant part of the White Book (Note 15/6/10). In any event since a copy of the case was provided to Ms. Brooks prior to the parties' coming into Court, it should have then become clear that the Court did have the jurisdiction to order intervention. Both parties indicated that they were aware that the Grand Court had made orders permitting intervention in the past and in fact Ms. Brooks disclosed that she had been Counsel in one of those cases. It matters not whether that order was made by consent or not, for even if the parties agree to an order being made, the Court must still have the jurisdiction to enable it to make the order. The power under the inherent jurisdiction issue was not a novel point and is one that the parties should have been aware of even at the time of their written communications exchanged pre-hearing.

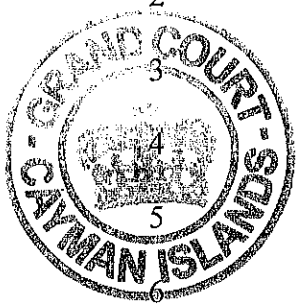
Conclusion – Principle of Costs

42. Although the Intervenors did not persuade the Court that jurisdiction could be grounded on GCR O.15, r.6 I am satisfied that they were the successful party. The Court made the order that they sought, namely to grant them leave to intervene. A

hearing was necessary as that application was opposed. The fact that the Skeleton Argument, filed by the Intervenors over two months before the hearing, did not contain submissions about the inherent jurisdiction did not mean that they were not the successful party. It was clearly a potential issue, as it was highlighted in AKS's Skeleton Argument filed on the day before the hearing. Mr. Dors then sought to address that belatedly raised issue by producing the case of ***Rodriguez*** which was on point and which both parties should have been aware of. The fact that during the hearing I drew the parties attention to the Note on point contained in the White Book which I relied upon in the Judgment does not mean that the Intervenors should not be regarded as being the successful party. Having reviewed the exhibited inter-parties communications, in seeking the order to intervene I am satisfied that the intervenors have acted in an economical and proper manner.

43. Accordingly I am satisfied that AKS should pay the Intervenors' costs of the application. As is appropriate in matrimonial matters, and as I intend the Intervenors to have the cost of this pre-decree application irrespective of the outcome of the substantive action, I order costs in any event in which case taxation will be deferred until the conclusion of the substantive action. It would only be in exceptional circumstances to simply order *"Intervenors' costs"* thereby entitling an immediate taxation.

44. The Intervenors' attorneys are directed to produce a schedule of those costs at the substantive hearing. Having determined what interest the Intervenors have in the former matrimonial home, the Court will have to then have regard to AKS's costs liability when considering how to divide the available assets in such a way to meet the child of the marriage and the marital parties' needs.



Indemnity Costs

45. A further issue for me to determine is whether costs should be on the standard or indemnity basis. AKS was opposed to any cost order at all being made against her, but also submitted that there was no basis established for the exercise of my discretion to award indemnity costs.

46. The general rule in litigation is costs follow the event and that the successful party will be awarded costs on a party and party basis. It is recognised that this can leave the successful party out of pocket. The gap between the amount of costs in fact paid by a successful litigant and the amount of party and party costs which are recoverable can be substantial.

47. As highlighted by Henderson J. in ***Sagicor General Insurance (Cayman) Limited and another v Crawford Adjusters (Cayman) Limited*** Cause No. 78 of 2006 GCR O.62 r.4(11) provides an alternative basis upon which costs may be ordered. The rule provides in respect of costs ordered on an indemnity basis that:

"The Court may make an inter-partes order for costs to be taxed on the indemnity basis only if it is satisfied that the paying party has conducted the proceedings, or that part of the proceedings to which the order relates, improperly, unreasonably or negligently."

48. The discretion under the rule is not fettered or circumscribed, and it must be exercised judicially in the light of the particular facts of each case. There are many civil cases which have considered the appropriate principles to be applied in exercising the discretion to award costs on the basis other than party and party. It is accepted that something special or unusual must be demonstrated in order to justify a departure from the ordinary costs order.[9] These include where a losing party has misconducted itself in relation to the proceedings, where the institution of the proceedings was plainly unreasonable or where the proceedings were issued for multi-collateral purpose.

49. The award of costs on indemnity basis is generally reserved to cases where the Court wishes to indicate its disapproval of the conduct of the paying party. In the words of **Halsbury's Laws, 4th Edition (2007) Volume 10**, para 23, Note 8:

"Indemnity costs may be awarded against the party whose conduct has been unreasonable, even though the conduct could not properly be regarded as lacking moral probity or deserving moral condemnation: ***Reid Minty (A Firm) v Taylor*** *[2002] 2 All ER 150."*

[9] ***Billson v Residential Apartments Ltd*** [1992] 1 AC 494.

50. It is right that I have been critical of AKS's failure to promptly provide dates to avoid. I have also highlighted my concern about the failure to give an appropriate reply to the Intervenors' attorney's various requests for an indication about whether the application was opposed, and if it was, upon what basis. I have accepted Ms. Brooks' statement that she could not recall the ***Rodriguez*** judgment.

51. I note that a formal warning of an intention to claim indemnity costs can make the awarding of indemnity costs more likely. This is illustrated by the Australian case of ***Huntsman Chemical Co. Aust. Pty Ltd v International Pools Aust. Pty Ltd*** (1995) 36 NSWLR 242. The attorney for the Intervenor did give two written formal costs warning in the matter before me[10], and these warnings which were not heeded formed a part of my consideration when making a costs order against AKS in principle.

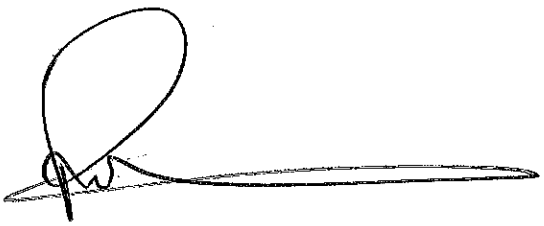
52. The conduct of AKS as a litigant in this case has not been sufficiently unreasonable or unmeritorious so as to justify departure from the ordinary rule as to the basis of assessment of costs. Indemnity costs are rarely ordered in matrimonial matters, especially when the assets are not substantial. The reasoning for this is that any such order may reduce any capital award in such a way that it prevents the Court being able to properly conduct its duty pursuant to s.19 of the

[10] The second warning contained an indication that cost on the indemnity basis or wasted costs order may be applied for.

Matrimonial Causes Law (2005 Revision) and make a fair and just order that meets firstly the child's , then the husband's and wife's needs.

53. Accordingly, the cost order in paragraph 43 above is for costs on the standard basis.

54. This is not a case in which it would be suitable to make any orders for wasted costs on the Court's own motion.



The Hon. Justice Richard Williams
JUDGE OF THE GRAND COURT