

1 THE GRAND COURT OF THE CAYMAN ISLANDS
2 FAMILY DIVISION

3
4 CAUSE NO: FAM 66 OF 2014

5 BETWEEN:

6 DJ

Petitioner

8 AND

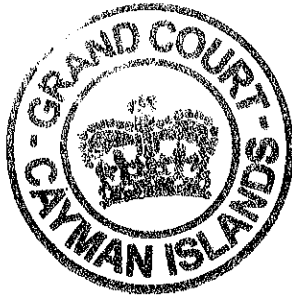
9 BJ

Respondent

12 AND

13 RK

Co-Respondent



17 Appearances:

Mr. David McGrath for the Petitioner

Mrs. Karin Thompson for the Respondent

20 Before:

Hon. Mr. Justice Richard Williams

22 Heard:

21 October 2015

24 Draft Judgment Circulated: 28 October 2015

26 Date of Judgment:

30 October 2015

29 HEADNOTE

30 *Family Law – Leave to appeal refused to husband appealing a Grand Court Judge’s costs order*
31 *made prior to the proving of the divorce petition – Jurisdiction of the Grand Court to make*
32 *costs orders in matrimonial proceedings before the petition is proved - Test to be applied by the*
33 *Court when considering applications for leave to appeal*

36 JUDGMENT

38 1. At the end of the full day hearing on 4 September 2015 I delivered an Ex
39 Tempore Judgment in relation to DJ, the Petitioner wife’s, application to vary



1 the Chief Justice's July 2014 Order which she had brought by her Summons
2 filed on 1 June 2015. The parties were then asked if they wished the Court to
consider any further issues. Mr. Fee, on behalf of the wife, made an application
for BJ, the Respondent husband, to pay his client's costs of the hearing. Mrs.
Thompson, on behalf of the husband, took up the afforded opportunity to make
submissions in relation to her client's opposition to the application. From my
7 recollection and from reviewing my notes and the content of my Ex Tempore
8 Judgment as to costs, I am satisfied that Mrs. Thompson did not at the time
9 submit that the Court did not have jurisdiction to make a costs order at that stage
10 of the proceedings. I will refer to the parties, for convenience, as "the husband"
11 and "the wife." The Co-Respondent was not in attendance at the hearing.

12
13 2. Paragraph 5 of the Order¹, prepared to reflect the content of my Judgment,
14 ordered the husband, to pay 50% of the wife's costs of preparation for and
15 attendance at that hearing. The order stated that costs were payable on the
16 standard basis and were to be taxed if not agreed.

17
18 3. At paragraph 42 of my Ex Tempore Judgment, when dealing with the costs
19 application, I misstated that the powers of the Court to make the orders arose
20 under s.21 of the Matrimonial Causes Law (2005 Revision) ("the Law"). I added
21 that this section must be read in conjunction with GCR Order 62, r.4 and that the
22 governing rule is that costs will follow the event.

¹ Paragraph 5 has been amended under the slip rule to reflect that the Order for costs was made against the Respondent husband rather than the Petitioner wife – no issue was taken by either party as to that amendment or my considering this application for leave for that amendment.

1 4. In my judgment I noted that the husband had been warned at the outset of the
2 hearing that his failure to provide an affidavit, despite knowing about the
3 Summons and the contents of the wife's latest affidavit since June 2015, may
4 have cost implications. The absence of an affidavit filed by the husband resulted
5 in him having to give detailed oral evidence in chief and it hindered the
6 narrowing down of any issues prior to the hearing. This coupled with my finding
7 that the wife was, on the whole, the successful party led to the order for costs. I
8 required the husband to pay only 50% of the costs because he was unsuccessful
9 in all but a few minor areas and because the hearing was also used for wider
10 case management of the proceedings.

11

12 5. This is a hearing of the husband's application, brought by Summons, for leave to
13 appeal paragraph 5 of my Order. The husband's Notice of Appeal sets out the
14 following grounds;

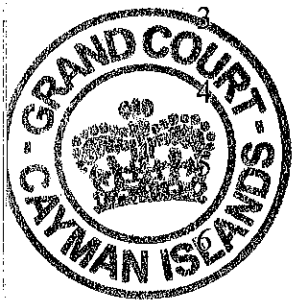
15 (i) The Court had no jurisdiction to make the order for costs;

16 (ii) The power conferred upon the Court to make an order for costs conferred
17 by s.21(e) of the Law is one which the Court, shall as appropriate, only
18 make at the hearing of the final ancillary orders (at the time of
19 pronouncing a Decree); and

20 (iii) The powers conferred upon the Court to make orders pending suit are
21 specifically set out in s.20 of the Law.

22





1 6. Although three grounds are set out in the notice they amount to one ground,
2 namely that the Court has no jurisdiction to make orders for costs on an
3 interlocutory basis prior to the Decree, as its powers are limited to the making of
4 orders set out at s.20 of the Law. It is contended by the husband that in
5 Matrimonial Law proceedings, orders for costs can only be made pursuant to
6 s.21(e) of the Law, that no such power is contained in s.20 and therefore no
7 costs orders can be made prior to the proving of the Petition or Cross-Petition.

8
9 7. At the outset of this hearing the wife rightly conceded and the husband
10 contended that the Court had misstated in the Ex Tempore Judgment that a
11 power to make a costs order at this stage of the proceedings arose under s. 21 of
12 the Law. The parties sensibly agreed that it was not this erroneous statement in
13 the judgment that was the subject of the appeal, but it was whether the Court had
14 absolutely no jurisdiction derived from any source to make that order for costs at
15 that stage of the proceedings.

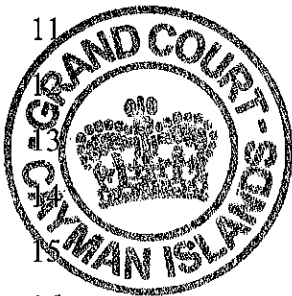
16
17 8. It is clear from the grounds of appeal that it is the issue of jurisdiction and not
18 the fairness or appropriateness of the terms of the costs order made in the factual
19 circumstances before the Court that the husband seeks to challenge. This means
20 that I need only conduct a brief review of my findings made on that day.

21 9. This matter involves a short marriage, the parties being married on 17 February
22 2012. The male child of the marriage was born on 4 July 2012. The wife
23 petitioned for divorce on 15 April 2014. On 30 April 2014 the husband filed his

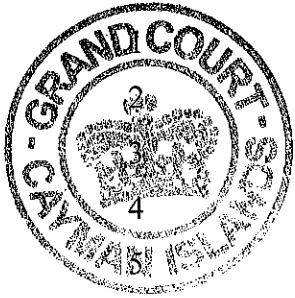
1 Answer and Cross-Petition. Thereafter, unfortunately, the matter has already
2 come before the Grand Court on six occasions.

3
4 10. At the hearing on 14 November 2014 I expressed disquiet about the nature of
5 and the number of applications being made and the fact that the divorce
6 remained a contested one. With this in mind, I stated the following in the Ex
7 Tempore Ruling given on that date:

8 *“Sadly, the character of this case is already forming, and is not an*
9 *attractive one. It is taking on the characteristics of the type of case*
10 *that drains the sanity of the parties and all involved as well is the*
11 *finances and bank accounts of the parties. Of course, it is a matter*
12 *for the parties whether they feel they wish to waste their money,*
13 *and the money (which should be for) the benefit of the child,*
14 *litigating. At the end of the case I will hand to them (a) recent*
15 *news article from this week’s Guardian newspaper and legal*
16 *journal. I do hope that they will consider (and) take on board the*
17 *very recent comments of Mostyn J expressed therein, where he*
18 *laments (the) wasting of money in drawn out divorce proceedings.*
19 *Unfortunately, there appears to be no formal judgment from this*
20 *recent decision available at this time. However, I also provide the*
21 *parties with a copy of the case which their attorneys will be well*
22 *aware of, **KSO v MJO & Ors**². In **KSO** Munby J, the President of*
23 *the Family Division in England, set out concluding observations at*
24 *paragraph 76 to 81 in which he made very clear his great concerns*
25 *about escalating costs in divorce cases. I share his view that any*
26 *money that the parties may have (would be) better used for their*
27 *futures and the future of their child. I hope when they leave this*
28 *hearing, they will carefully consider these materials especially, as*



² [2008] EWHC 3031 (Fam).



at the moment we have a contested amended petition and cross petition, contested preliminary hearing on the issue of pre-nup agreement and appear to be embarking on very lengthy and expensive ancillary relief proceedings."

6 Due to my concern about the escalating costs I then ordered that, for any hearing
7 listed for 30 minutes or more, both parties were to provide the Court with a
8 schedule setting out their costs/fees to date. I hoped that the schedules would, at
9 each stage of the hearing, inform the husband and wife about the escalating level
10 of the costs. This information should assist them in deciding the appropriate way
11 to litigate the matter and to determine whether the costs being incurred were
12 proportional to the available assets.

13

14 11. At paragraph 6 of my Ex Tempore Judgment given on 4 September 2015 I noted
15 that the parties had:

16 *"...informed me that, following negotiations this morning between*
17 *the parties, they have sensibly agreed that the divorce Petitions*
18 *should move along on an uncontested basis. With this in mind, a*
19 *draft Amended Petition is to be prepared. The husband and wife*
20 *have signed a draft copy of the Amended Petition today, to reflect*
21 *their agreement. Once the Amended Petition has been drafted it*
22 *should be served on the Co-Respondent. Thereafter, if an order is*
23 *filed, signed by all three parties, I will administratively grant leave*
24 *to amend the Petition in those terms."*

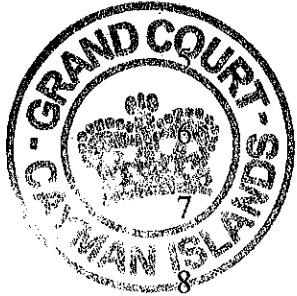
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26 Most regrettably the above welcome news given at the hearing has not come to
27 fruition. Costs still escalate, with the case still proceeding as a contested divorce.

1 Mrs. Thompson indicates that the reason for the divorce remaining contested is
2 the position being taken by the Co-Respondent.

3

4 12. It is with this concerning background that I now consider the husband's
application for leave to appeal. It is rightly agreed by all of the parties that there
is no prima facie right of appeal and therefore the husband must seek leave to
appeal.



9 **The Husband's Case**

10 13. The submissions made in support of the husband's application are primarily
11 contained in the Written Submissions prepared by Mrs. Thompson dated 21
12 October 2015.

13

14 14. It is submitted therein that the jurisdiction of the Court to make costs orders is
15 conferred by s.s.10, 19 and 20 of the Law. Importance is placed upon the fact
16 that the Law has moved away from the two-stage approach of granting a decree
17 nisi and then a decree absolute and been replaced with a single decree which
18 may only be granted following the proving of the contents of the petition and the
19 making of the appropriate orders set out in s.21 of the Law. It is submitted that
20 the powers of the Court, including the power at s.21(e)³ of the Law to make
21 costs orders, would only arise after the Court has proved the wife's Petition or
22 the husband's Cross-Petition. It is submitted that until the Petition/Cross-Petition

³ The Law contains two s.21(e) - the section that relates to costs contains a typographical error made by the draftsman and should be s.21(f).



is/are proved the jurisdiction of the Court to make orders of an interim nature is limited to those which are expressly conferred by s.20 of the Law as read in conjunction with s.s.10, 13, 19 and 20 of the Law.

4

5 15. It is submitted on behalf of the husband that there existed no jurisdiction for the
6 Court to make any costs order at all at the hearing on 21 October 2015 because
7 the Petition or Cross-Petition had not been proved and s.20 does not provide the
8 power to the Court to make orders for costs at that stage of the proceedings.

9

10 **The Wife's Case**

11 16. The bulk of the wife's submissions in support of her contention that the
12 husband's application for leave to appeal is misconceived are set out in the
13 Written Submissions prepared by Mr. McGrath dated 20 October 2015.

14

15 17. The submissions set out the correct test to be applied when considering an
16 application for leave to appeal. The test is stated by Sanderson J. in *Telesystem*
17 *International Wireless Inc and another v CDC/Opportunity Equity Partners*
18 *LP & three others* [2001] CILR Note 21 and repeated more recently by Quin J.
19 in his judgment dated 24 May 2010 in the matrimonial case of *Maria-*
20 *Costatanza Lindsay Fear v Richard David Fear* D129/2005, namely: "Does the
21 appeal have a real prospect of success?" Mr. McGrath drew to my attention that
22 Lord Woolf MR in *Swain v Hillam*, the Times 4 November, 1999, EWCA
23 (Civil Division) commented that real prospect of success means the prospect

1 must be realistic rather than fanciful. I believe that Mrs. Thompson does not
2 challenge this established test.

3
4 18. Mr. McGrath referred to the Practice Direction (Court of Appeal, Civil Division:
5 Leave to Appeal and Skeleton Arguments) 23 November 1998 TLR. I share his
6 view that this English Practice Direction is not binding on this Court, but the
guidance from the then Master of the Rolls is helpful. In the Practice Direction
Lord Woolf reiterates that the relevant basis for first instance courts deciding
whether to grant leave was that leave would be given unless an appeal would
have no realistic prospect of success and that a fanciful prospect was
insufficient.

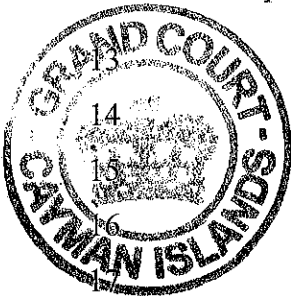


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12
13 19. Leave to appeal may also be granted in exceptional circumstances, even though
14 a case has no real prospect of success, when the point at issue raises a question
15 of public interest that should be examined by the Court of Appeal. Although the
16 point being argued by Mrs. Thompson appears to be a novel one, the principle
17 does not apply to the present case, especially as the costs of the appeal would far
18 exceed what is at stake. Neither party has sought to persuade me that exceptional
19 circumstances exist as there is an issue of public interest which should be
20 examined by the Court of Appeal. When I reach this conclusion, I am mindful
21 that Mrs. Thompson did state that:

22 *"The mere fact that this application for leave which was listed for*
23 *30 minutes has taken the better part of two hours raises issues as*
24 *to whether this area of the law requires full consideration."*

1 20. Mr. McGrath submits that the husband is wrong to submit that the powers set
2 out at s.20 of the Law are the only powers available to the Court at this stage of
3 the proceedings. It is submitted that the Court has all of its general statutory
4 powers and its powers exercisable under its inherent jurisdiction.

5
6 21. It is further submitted that the Court has all of the powers of the Court of
7 Chancery in England and Wales as s.3 of the Law provides that the Court has
8 power to pronounce and enforce the decrees listed in the section and “*in*
9 *addition has all the powers of the Court of Chancery in England.* S.51 Supreme
10 Court Act 1981 provides the High Court with the power to make orders for costs
11 in civil proceedings subject to any necessary modifications to practice and
12 procedure in matrimonial proceedings before that Court. S.51(1) provides:

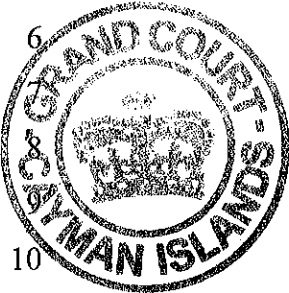


13 *“Subject to the provisions of this or any other Act and to rules of*
14 *court, the costs of and incidental to all proceedings in the Civil*
15 *Division of the Court of Appeal and in the High Court, including*
16 *the administration of estates and trusts, shall be in the discretion of*
17 *the court, and the court shall have full power to determine by*
18 *whom and to what extent the costs are to be paid.”*

19

20 22. Mr. McGrath relies upon s.24 of the Judicature Law (2013 Revision) which
21 provides the same general power to the Court to make costs orders as that given
22 by s.51 of the Supreme Court Act 1981. This section provides the Grand Court
23 with the power and discretion to make costs orders in all civil proceedings. As
24 family proceedings within the Family Division fall within the Grand Court’s

1 general jurisdiction, it is submitted that the power to make orders for costs under
2 s.24 extends to proceedings brought under the Law. S.24 provides:



3
4 24(1) *Subject to the provisions of this or any other Law and to*
5 *rules of court, the costs of and incidental to all civil*
6 *proceedings in -*

7 (a) *the Court of Appeal; and*

8 (b) *the Grand Court,*

9 *shall be in the discretion of the relevant court.*

10 (2) *Without prejudice to any general power to make rules of*
11 *court, such rules may make provisions for regulating*
12 *matters relating to the costs of those proceedings including,*
13 *in particular, the entitlement to costs, the taxation of costs,*
14 *the powers of taxing officers and the powers of judges to*
15 *review decisions of taxing officers.*

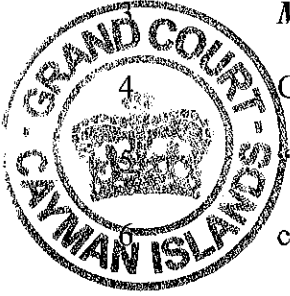
16 (3) *The court shall have full power to determine by whom and*
17 *to what extent the costs are to be paid.*

18 (4) *In any criminal or civil proceedings, the court may*
19 *disallow or (as the case may be) order the attorney-at-law*
20 *or foreign lawyer concerned to meet the whole of any*
21 *wasted costs or such part of them as may be determined in*
22 *accordance with the rules of court.*

23 (5) *Costs, including wasted costs, may be awarded to or*
24 *against the Crown.*

25 (6) *.....”*

26
27
28 23. GCR Order 62, r.4, which was referred to in the Ex Tempore Judgment,
29 provides a complete code to dealing with entitlement to costs. Interestingly, the
30 bulk of the GCRs do not apply to any proceedings governed by the Matrimonial



1 Causes Rules (2005 Revision) (“the Rules”), but GCR Order 1, r. 4 specifically
2 provides that the exclusion does not apply to Order 62. In the case of *Roy*
Michael McTaggart v Mary Elizabeth McTaggart CICA 14 of 2010, Sir John
4 Chadwick, President ruled upon the approach to costs in what are often termed
“big-money” ancillary cases. In that important judgment the President made it
clear that costs in all matrimonial proceedings are governed by the Grand Court
7 Rules and in particular by GCR Order 62, r.4 and that any power to make an
8 order for costs under the Law must be read in conjunction with that order.

9
10 24. GCR Order 62, r.4(1) provides that the rule shall have effect unless otherwise
11 provided by any Law. I note that, although s.21 of the Law provides that the
12 Court shall, as appropriate, make orders for costs at the time of pronouncing a
13 decree, nowhere in the Law is there a provision that excludes the Grand Court’s
14 general power to make costs at any of the time. GCR Order 62, r.4(2) states that:

15 *“The overriding objective of this order is that a successful party to*
16 *any proceedings should recover from the opposing party the*
17 *reasonable costs incurred by him in conducting that proceeding in*
18 *an economical, expeditious and proper manner unless otherwise*
19 *ordered by the Court.”*

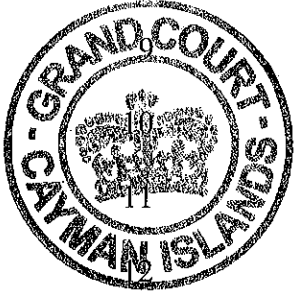
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21 GCR Order 65, r.4(5) provides that:

22 *“If the Court in the exercise of its discretion sees fit to make any*
23 *order as to the costs of any proceedings, the Court shall order the*
24 *costs to follow the event, except where it appears to the court that*
25 *in the circumstances that case some other order should be made as*
26 *to the whole or any part of the costs.”*

1 25. When one carefully reviews the Law it is clear that although s.20 does not
2 mention costs, there is no clause that displaces any general power the Grand
3 Court has to award costs at any stage of any proceedings.
4

5 **Conclusion**

6 26. The GCR's ordinarily do not apply to any proceedings which are governed by
7 the Rules. GCR Order 1, r.2(4) importantly provides that Order 62 (costs) is an
8 exception and therefore applies. 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. Proceedings
under the Order 62, r.3:



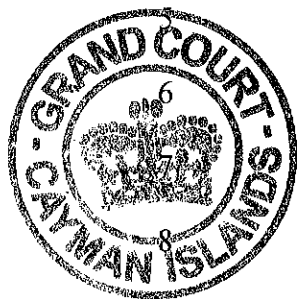
13 *“includes any cause or matter or any step in any cause or matter*
14 *and any appeal and any step in any appeal.”*

15 27. The Grand Court's discretion as to costs is a statutory discretion conferred by
16 the Judicature Law (2002 Revision) and it remains a broad one in Matrimonial
17 proceedings. Order 62, r.1(2) provides that the discretion under s.24 of the
18 Judicature Law (2002 Revision) shall be exercised subject to and in accordance
19 with Order 62. It is clear under Order 62, r. 3 that proceedings for which a costs
20 order can be made includes interlocutory proceedings.
21

22 28. In *Darrell Hines v Esther Hassett* D11 of 2006 Henderson J. was asked to rule
23 on the issue of whether the Grand Court had jurisdiction to order the parties in
24 matrimonial proceedings to make disclosure, including financial disclosure,

1 prior to proving of the petition. Although there was no express power in s.20 to
2 order disclosure, in his judgment dated 7 December 2006, Henderson J. ordered
3 disclosure and referred to Rule 16 of the Rules which governs the making of
4 directions. The Learned Judge found that there was nothing in the Law or the
Rules which prevented the Court from making disclosure orders prior to the
6 proving of the petition. Henderson J. was not persuaded by a submission that
there had been a traditional approach to ordering financial disclosure only after
the provision of the petition stating that it "*was not suited to modern conditions
and the reasonable expectations of the litigants in this Court.*" He said he would
9 not accede to the submission "*unless the express terms of the Law and the Rules
10 require such a finding.*" Importantly, although the petition had not been proved,
11 Henderson J. felt unfettered by the terms of s.20 and went on to consider the
12 question of costs. In his judgment Henderson J. gave his brief reasons as to why
13 why he was ordering both parties to bear his or her costs of the interlocutory
14 application.
15
16

17 29. The Grand Court has a duty to actively case manage matrimonial proceedings at
18 each and every stage of the proceedings. This proposition is just as applicable
19 prior to the proving of the petition as it is after. The Court must ensure that its
20 directions and interim financial orders are being complied with and that only
21 appropriate applications are brought. If they are not, then the parties must
22 recognise that there may be costs implications. The Court, when exercising its
23 statutory power pre-decree to make a costs order, is not prejudging the merits of





1 the grounds for the decree or the final ancillary relief orders. The effect and
2 nature of a costs order made at the interlocutory hearing may well still be one of
3 the factors considered by the Court at the final ancillary relief hearing when
4 exercising its statutory duty under the Law.
5

6 30. The husband has not satisfied me that his appeal against paragraph 5 of my
7 Order has a real prospect of success and I dismiss his Application for Leave to
8 Appeal. When reaching this conclusion, in light of my sentiments expressed at
9 paragraphs 10-12 above, I remind myself of the forceful guidance given by the
10 President of the Court of Appeal in his postscript in *B v B* 2014 (2) CILR 234
11 where he shared my concern about how the assets were being consumed by the
12 manner in which the parties were litigating the case. The President echoed the
13 observations of Lord Hoffmann and Lord Hobhouse of Woodborough in
14 *Piglowska* [1999] 2 FLR 763, that is important not to lose sight of the principle
15 of proportionality. The President then went on to state at paragraph 66:

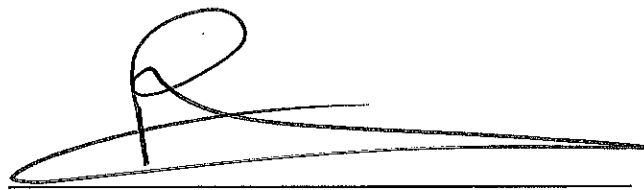
16 *“This appeal was brought with the leave of the judge. I should not*
17 *be taken to criticise the judge for his decision to grant leave; it*
18 *may be that he thought that there was a perceived tension between*
19 *observations in Payne—which had been consistently applied by the*
20 *courts in this jurisdiction—and the more recent guidance given by*
21 *the Court of Appeal in Re F which required consideration or*
22 *resolution by this court. But if there were a need for this court to*
23 *address a point of principle, it was unfortunate that that need*
24 *arose in a case where litigation costs—which the parties could ill-*
25 *afford—had already had an effect on the father’s ability to meet*
26 *maintenance orders which had been made against him. In my view,*

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judges should be slow to grant leave to appeal in cases of this nature."

Costs of the Leave to Appeal Application

31. If costs cannot be agreed, I will afford the parties an opportunity to file written submissions on costs within 14 days of this perfected judgment. I will thereafter provide the parties with a brief written ruling on costs.



**Honourable Mr. Justice Richard Williams
JUDGE OF THE GRAND COURT**

