IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA 14 of 2010

BEFORE

The Rt Hon Sir John Chadwick, President
The Hon Elliott Mottley, Justice of Appeal
The Rt Hon Sir Anthony Campbell, Justice of Appeal

ON APPEAL FROM THE GRAND COURT
Cause No D75 of 2002

BETWEEN

ROY MICHAEL McTAGGART

Petitioner/Appellant

-and-

MARY ELIZABETH McTAGGART

Respondent

Mr Delroy Murray instructed by Karin M Thomson for the Appellant, Roy Michael McTaggart
Mr David McGrath of Samson & McGrath for the Respondent, Mary Elizabeth McTaggart

Hearing date: 19 November 2012
Judgment: 12 February 2015

RULING ON COSTS

Sir John Chadwick, President:

1 On 29 November 2011 this Court handed down judgment in an appeal from an order made on 28 June 2010 by Justice Foster QC in ancillary relief proceedings between Roy Michael McTaggart and his former wife, Mary Elizabeth McTaggart. On 19 November 2012 the matter came back before the Court for a ruling on costs. Although the parties are no longer married to each other, it is convenient to refer to them in this Ruling, as the Court did in its judgment, as "the Husband" and "the Wife".

The issue for determination

2 The judge made no order in respect of the costs of the ancillary relief proceedings in the Grand Court. In his judgment he had said that his inclination was "to make no further order as to the costs of and incidental to this matter and to leave matters pertaining to the parties' respective costs and contributions thereto as they currently lie"; but that, if agreement as to costs could not be reached, he would hear further argument. In the event, there was a further hearing as to costs at which (it seems) each party advanced arguments as to the proper approach in a "big money" case. This Court was told that the judge gave no reasoned judgment in response to those arguments; but the terms of his order suggests that (on the question of principle) he preferred those advanced on behalf of the Husband, who was contending for "No order".

3 Paragraph 9 of the judge's Order of 28 June 2010 was in these terms:

> "9. No order in respect of the costs of and incidental to these ancillary proceedings, the contribution to account of [the Wife's] costs totalling CI$82,000 paid by [the Husband] shall not be refunded to him and matters in relation to costs shall be left as they currently lie."

As the paragraph indicates, the Husband had advanced monies (2 x US$50,000, equivalent to CI$82,000) to the Wife during the course of the proceedings in order that she could pay for legal representation. There was some dispute between the parties as to whether that sum was advanced on account against the final award that the judge could be expected to make in favour of the Wife; or against whatever award of costs the judge might make in her favour. In the circumstances that the judge was making no order for costs (so that there was no costs order against which the advance could be set off) he must be taken to have intended to make it clear that the Wife was not to repay the advance to the Husband, nor to give credit for CI$82,000 against the lump sum payment that he was awarding to her in respect of her ancillary relief claim.

4 Each party appealed from that paragraph of the judge's order. The Husband, by his notice of appeal filed on 27 July 2010, sought an order that paragraph 9 be set aside:

> ". . . to the extent necessary to provide that [the Wife] shall be indebted to [the Husband] in the sum of CI$82,000.00 and/or shall give credit to [the Husband] in this sum in respect of his liability to pay [the Wife] any lump sum or sums".

The Wife, in her notice of cross-appeal filed on 11 August 2010, sought an order that the Husband pay her costs "both of the appeal and at first instance".

5 At paragraph 105 of the judgment which I handed down on 29 November 2011 (with which the other members of the Court agreed), I observed that it was clear from the very comprehensive analysis advanced on behalf of the parties in their respective skeleton arguments that the proper approach to costs in "big-money" cases, in this jurisdiction, was contentious and needed to be resolved. I went on to say this:

> "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 Order 62, rule 4, which requires (at sub-rule (3)) that:
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> > '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.'
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> The effect of a requirement that 'costs follow the event' – although not, at the time, directly applicable in matrimonial proceedings in England and Wales (see RSC Order 62 rule 3(5)) – was considered at some length by Lady Justice Butler-Sloss in *Gojkovic v Gojkovic* [1991] 3 WLR 621. She concluded that the general principle was that if, after contested proceedings, a party obtains an order which is more beneficial to him or her than an offer made by the other party under the *Calderbank* procedure, then the other party should pay the costs of the proceedings: conversely, if a party fails to obtain an order which is more beneficial than that which could have been accepted under the *Calderbank* procedure, then that party must expect to pay the costs of the offeror from the date of the offer.
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> 107. The position in England and Wales has moved on since *Gojkovic*. The position, now, is governed by rule 28.3 of the Family Procedure Rules 2010; which, in effect, restates the amendments to rule 2.71 of the Family Procedure Rules 1991 introduced by the Family Proceedings (Amendment) Rules 2006, SI 2006/352. The general rule in ancillary relief proceedings is that the court will not make an order requiring one party to pay the costs of another party. But there has been no corresponding change in the rules applicable in this jurisdiction. 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). Nevertheless, it is said on behalf of the Husband, that the practice, here, has been to recognise that the *Gojkovic* approach is no longer apt in the light of the "seismic changes" made to ancillary relief claims in *White v White*. The wife contends, on the other hand, that, unless and until there is a change to the relevant rule in this jurisdiction, the courts here should continue to follow the guidance in *Gojkovic*.
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> 108. As I have said, these issues will need to be resolved. But they have not been the subject of oral argument on this appeal. The parties took the view – sensibly, as it seems to me – that they would prefer to await the outcome on the substantive points before addressing questions of costs. Accordingly those issues must be stood over for further argument if the parties are unable, after consideration of our judgments on the substantive points, to agree what the

> appropriate orders for costs should be, both in the Grand Court and in this Court."

6 In the hope that it might assist the parties to agree what the appropriate orders for costs should be, I added the following observations:

> "109. First, that in any further consideration of where the burden of costs should lie, this Court is likely to regard as significant (i) that, in the result, the Wife has been awarded substantially more than the Husband's second *Calderbank* offer ($6,809,913), made on 7 January 2010, (ii) that the Husband was willing to concede, on this appeal, that an amount be awarded to the Wife which was close to what she had indicated, in her second *Calderbank* offer ($7,631,404) made on 9 January 2010, she would have accepted before trial, and (iii) that the effect of our judgments in this Court is that we hold that the order which the judge should have made would have been slightly more favourable to the Wife than the amount that she would have accepted under her second *Calderbank* offer. Second, that the amount of the additional capital sum which should be paid to the Wife in order that she can meet her expenses without having to draw on her capital is, of course, closely linked to the amount of the capital which (following the division of the matrimonial property and the payment of the balance sum required to give effect to the principle of equality) she will have available for investment. If the burden of costs which she 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."

7 At paragraph 110 of my judgment, I expressed the Court's conclusions as to the proper disposal of the appeal:

> "110. For the reasons that I have set out, I would direct that the list of matrimonial assets in the Schedule of Assets to the order of 7 July 2010 be amended in the respects described in paragraph 91 of this judgment. I would set aside paragraphs 6 and 7 of that order. And, subject to further consideration in the light of the decision to be made by this Court (or agreement reached between the parties) as to costs , I would vary paragraph 5 of the order by substituting for the figure of $3,912,789, which there appears, the figure of $4,680,820. By way of explanation I should add (i) that the figure of $4,680,820 is the aggregate of the balancing payment required to give effect to the principle of equality ($2,680,820) and an additional payment of $2,000,000 required to meet fully the section 19 factors and (ii) that the aggregate amount of the award, after taking account of the assets to which the Wife will be entitled under the Schedule of Assets as varied and paragraphs 1 to 4 of the order ($2,965,877), is $7,646,697. Given the way the parties' own assessments of . . . the Wife's claim to ancillary relief has developed up to and following trial, it seems to me that an award of some $7.65 million in this case is probably about right."

8 The order which this Court made on 8 December 2011 gave effect to the second of the observations which I had made in paragraph 109 of my judgment; and to the second sentence of the conclusions set out in paragraph 110. Paragraph 2 of the Order of 8 December 2011 is in these terms:

> "2. That subject to any further order that may be made following the determination(or compromise) of the appeal and cross-appeal on the issue of costs, paragraph 5 of [the judge's order of 28 June 2010] be varied by substituting for the figure of $3,912,789.00 the figure of $4,680,820."

9 The hope that the observations which I made in paragraph 109 of the judgment handed down on 28 November 2011 might assist the parties in reaching agreement as to what the appropriate orders as to the costs of the ancillary relief proceedings should be proved ill-founded. The issue came back before this Court for further argument on 19 November 2012. In addition to oral submissions made at that hearing, the Court had the assistance of written submissions lodged on behalf of the parties.

10 As I have said, in his notice of appeal filed on 27 July 2010, the Husband sought an order that paragraph 9 of the judge's order be set aside "to the extent necessary to provide that [the Wife] shall be indebted to [the Husband] in the sum of CI$82,000.00 and/or shall give credit to [the Husband] in this sum in respect of his liability to pay [the Wife] any lump sum or sums". That remained the Husband's position (at least, formally) until the appeal came back before this Court on 19 November 2012 on the hearing to determine the outstanding issues as to costs raised by the Husband's appeal and the Wife's cross-appeal. But, at the outset of that hearing, counsel for the Husband informed the Court that the Husband's appeal from paragraph 9 of the judge's order was no longer pursued. The Husband was content – on the basis that the judge's order that there be no order for costs of the ancillary relief proceedings was left undisturbed – that the Wife should not be required to re-pay, or bring into account, the monies (equivalent to CI$82,000) that he had advanced to her during the course of the proceedings in order that she could pay for legal representation. On the other hand, as I shall explain, the Wife was content to bring that sum into account against the costs which she had incurred.

11 In those circumstances, there were no outstanding issues on the Husband's appeal for determination by this Court at or after the hearing on 19 November 2012. The only

outstanding issues for determination were those raised by the Wife's cross-appeal against paragraph 9 of the judge's order.

The Wife's submissions

12 In the written submissions, dated 12 November 2012, which were lodged on her behalf, the Wife relies on the observations which I had made in paragraph 109 of my judgment of 28 November 2009. It is said that those observations provide two discrete bases for the conclusion that the Wife should be entitled to receive her costs of the ancillary relief proceedings. First, it is said that that conclusion follows from "the application of ordinary and mandatory principles on costs in ancillary relief proceedings i.e. Order 62, *Calderbank, Gojkovic et al*". Second, it is said that "the investment return method which the Court adopted in order to quantify the needs/compensation component of her entitlement (paragraphs 98-100 of its judgment) means that the diminution of her investment fund by the amount needed to pay her costs will necessarily result in the Court's calculation being inaccurate."

13 The "ordinary and mandatory principles on costs in ancillary relief proceedings" on which counsel for the Wife relies as the first of her two bases for the conclusion that the Wife should be entitled to receive her costs in the present case are to be found in the judgment of Lady Justice Butler-Sloss (with whom the other member of the Court, Lord Justice Russell, agreed) in *Gojkovic v Gojkovic* [1992] Fam 40. In that judgment Lady Justice Butler-Sloss posed the question (*ibid*, 56):

> "What are the principles governing costs in applications for financial relief in the Family Division and, in particular, in cases where open offers and *Calderbank* offers are made? In particular, what is the starting point of entitlement to costs?"

After pointing out that Order 62 rule 3(3) of the Rules of the Supreme Court – which is in the same terms as what has become GCR 62.4(5) – had no application to proceedings in the Family Division of the High Court of England and Wales, she went on to say this:

> "However, in the Family Division there still remains the necessity for some starting point. That starting point, in my judgment, is that costs prima facie follow the event (see *per* Cumming-Bruce L.J. in *Singer (Formerly Sharegin) v. Sharegin* [1984] F.L.R. 114, 119) but may be displaced much more easily than, and in circumstances which would not apply, in other Divisions of the High Court. . . . In applications for financial relief the applicant (usually the wife) has to make the application in order to obtain an order. If the financial dispute can be resolved it is usual, and normally in the interests of both parties,

> that the applicant should obtain an order by consent; and if money is available and in the absence of special circumstances, such an agreement would usually include the applicant's costs of the application. If the application is contested and the applicant succeeds, in practice in the Divorce Registries around the country where most ancillary relief applications are tried, if there is money available and no special factors, the applicant spouse is prima facie entitled to, and likely to obtain, an order for costs against the respondent. . ."

She pointed out that

> "In the vast majority of cases, where one party is or both parties are legally aided, and where the assets are insubstantial or at least inadequate for the needs of the family, the question of who pays the costs may be academic."

But she said this (*ibid,* 57):

> "There is, however, a minority of cases, of which the present appeal is an example, where the assets are substantial and an order for costs can (if appropriate) be made. In such cases the parties are likely to negotiate, and such negotiation, which may lead to a settlement, is much encouraged by the courts."

After referring to the "useful practice", adopted in family (and other) proceedings, of pre-trial negotiation by use of the *Calderbank* letter – which, as she explained took its name from observations of Lord Justice Cairns in *Calderbank v. Calderbank* [1976] Fam. 93 – Lady Justice Butler-Sloss observed (*ibid* 58-59):

> "Later decisions referring to the effect of a *Calderbank* offer have accepted, in my view, the basic assumption as expressed by Cairns L.J. that if an applicant spouse failed to exceed the sum offered, prima facie she/he would pay the costs after the date of communication of the offer. . . .
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> In *Singer v. Sharegin* [1984] F.L.R. 114 Cumming-Bruce L.J., at pp. 119-120, considered the impact of the costs of litigation upon the assets available and the usefulness of the estimates provided by the parties' solicitors. He said:
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> > '. . . the estimates enable the judge to work out the possible beneficial effect of hypothetical orders and he can proceed on the basis that the party costs will be paid by the respondent unless the respondent has protected himself or herself by a *Calderbank* offer. Then if the applicant has refused what the judge regards as a reasonable offer, [she] must face the consequences of his refusal by paying both [her] own costs and the costs of the respondent in so far as they accrued after a reasonable period for consideration of the offer. When all this has been explained by the solicitors to their clients, their understanding of the financial risks should have a salutary effect in persuading the respondent to offer, and the applicant to accept, a reasonable compromise sum.'
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> Oliver L.J. in *Cutts v. Head* [1984] Ch. 290, in which the practice was extended to the Chancery Division, explained, at p. 306, the nature of the public policy upon which the rule rests, and added:
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> > 'As a practical matter, a consciousness of a risk as to costs if reasonable offers are refused can only encourage settlement whilst, on

> the other hand, it is hard to imagine anything more calculated to encourage obstinacy and unreasonableness than the comfortable knowledge that a litigant can refuse with impunity whatever may be offered to him even if it is as much or more than everything to which he is entitled in the action.'
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> It is therefore clear that *Calderbank* offers require to have teeth in order for them to be effective."

Lady Justice Butler-Sloss went on to point out that there were many reasons which might affect the court in considering costs; and that it would be inappropriate, and indeed unhelpful, to seek to enumerate and possibly be thought to constrain in any way, that wide exercise of discretion. But, as she said (*ibid*, 59) 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. And, at page 60, she said this:

> "The concept expounded by the judge of no order for costs where both parties have been reasonable in their approach to the dispute is not, in my judgment, one of general application in the Family Division, save in children cases, and is certainly not one of general application in *Calderbank* offers."

14 In support of her submission that the application of those "ordinary and mandatory principles" leads to the conclusion that she should have her costs in the present case the Wife relies on the progression of offer and counter-offer through successive *Calderbank* letters (of which there were two from the Husband and two from the Wife) and the offer made in the Husband's submissions to this Court on 12 March 2011, shortly before the hearing of the substantive appeal. On the basis of her analysis of those offers and counter-offers, the following propositions are advanced on behalf of the Wife: (i) that the principle (now expressed in GCR 62(5)) that costs follow the event is mandatory unless "it appears to the Court that in the circumstances of the case some other order should be made . . ."; (ii) that the award made by this Court in favour of the Wife is substantially more than any offer made to the Wife by the Husband (it is said that this "ultimately" is the most important point); (iii) that the award made by this Court in favour of the Wife is slightly more favourable than the amount that she would have accepted under her second "clean break" *Calderbank* proposal; (iv) that the amount which the Husband conceded that the Wife should receive was "close to but just less than the award made by this Court; and (v) that the Wife has "beaten" the Husband's highest offer and her own offer and "there can

therefore be no basis to depart from the ordinary and mandatory rule that [the Husband] pays her costs". Although it is said (under proposition (ii)) that the fact that the award made by this Court in favour of the Wife is substantially more than any offer made to the Wife by the Husband "ultimately" is the most important point, it is further submitted that, while not the most relevant factor in the application of the *Gojkovic* principles, "the most telling and persuasive comparison is between the Court's award [CI$7,646,697] and the Wife's 9 January 2010 *Calderbank* [CI$7,631,404]". In summary it is said (at paragraph 15 of the written submissions lodged on behalf of the Wife) that:

> "15. If parties are to be encouraged by the Courts to engage in meaningful, reasonable and commercially sensible negotiations and to make and accept reasonable proposals to settle financial issues then the *Calderbank* must 'have teeth'. On the basis of the irrefutable propositions enumerated above we respectfully submit that this is a paradigm case for the award of [the Wife's] costs."

15 In support of the second of the grounds advanced – "the Economic Argument for Costs" – the Wife relies on a schedule of costs to establish that her unrecovered costs (after giving credit for CI$82,000 advanced to her by the Husband during the course of the proceedings) are CI$334,840. It is submitted that this Court has held, at paragraph 99 of its judgment of 29 November 2011, that in order to satisfy the needs and compensation strands of her entitlement, the Wife required an additional investment fund of CI$2,000,000. It is said that, if CI$334,840 of her resources is not available for investment (because it has been applied to the payment of her liability for the costs which she has had to incur in the ancillary relief proceedings), then the Court has under-assessed the amount of the additional investment fund which is required to satisfy the needs and compensation strands of her entitlement. This outcome, it is submitted (correctly), was recognised as a possibility by the Court when I observed, at paragraph 109 of my judgment of 29 November 2011, that 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.

The Husband's submissions

16 As I recorded in my judgment of 29 November 2011, it was contended on behalf of the Husband at the substantive hearing of the appeal, that the practice, in this

jurisdiction, has been to recognise that the *Gojkovic* approach is no longer apt in the light of the "seismic changes" made to ancillary relief claims in *White v White* [2001] AC 595. But there is no reference to that contention in the written submissions, dated 15 November 2012, which were lodged on behalf of the Husband in advance of the further hearing on 19 November 2012; and it is inconsistent with the observations of Justice Henderson in *G v G* [2010] 1 CILR 365, to which reference is made in those written submissions. In his judgment in that case Justice Henderson said this (*ibid,* 373):

> "I accept that the approach to *Calderbank* letters in matrimonial litigation described at length in *Gojkovic* is applicable in the Cayman Islands. It is appropriate, however, to emphasize some of the important points which emerge from that judgment:
> (a) 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;
> (b) ordinarily, it will be appropriate to award costs only where the assets are 'substantial';
> (c) the behaviour of a party, including in particular a failure to disclose material documents, can be a significant factor in a costs application; and
> (d) A party receiving an offer of settlement is entitled to 'a reasonable time to consider it' – last minute offers to which no response is received will not necessarily result in an award of indemnity costs."

As I understand the position adopted by the Husband at the further hearing, the contention that the practice, in this jurisdiction, has been to recognise that the *Gojkovic* approach is no longer apposite was not pursued.

17 In the written submissions, which were lodged on his behalf, the Husband contends that it was open to the judge to decide, as a matter of discretion "pursuant to the powers conferred upon [him] by section 21(e) of the Matrimonial Causes Law (2005 Revision)", to make no order in respect of the costs incurred in the ancillary relief proceedings; and that this Court has no basis on which to vary or disturb that order. The Court was reminded of the observations of Georges, Justice of Appeal, in *Lhasa Investments Ltd v ICIC* (1994-95) CILR 293:

> "It should be borne in mind that the Court of Appeal is only entitled to intervene and interfere in limited circumstances with the decision of a judge of first instance based on the exercise of discretion. It must be shown that (a) the trial judge had misdirected himself with regard to the principle in accordance with which the discretion had to be exercised; (b) he had taken into account matters which he ought [not] to have taken into account or failed to take account of the matters which he ought to have taken into account; or (c) the

> decision was plainly wrong. The appellate tribunal should not merely substitute its views for those of the trial judge."

Those observations, it is said, provide a salutary starting point, because they set out the hurdles that the Wife will have to surmount in order to persuade this Court to make the orders that she seeks.

18 It is not easy to understand what reliance the Husband seeks to place on section 21(e) of the Matrimonial Causes Law. Section 21 of the Law is in these terms (so far as material in the present context):

> "21. At the time of pronouncing a decree under this Law, the Court shall, as appropriate, make orders for –
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> . . .
>
> (e) making financial provision from the property of either spouse for the children of the marriage and for the other spouse.
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> . . .
>
> (g) costs"

It may be that the intention was to refer to paragraph (g) of section 21; and that the reference to paragraph (e) is erroneous. It is pointed out on behalf of the Husband that the powers under section 21 of the Law are to be exercised "as appropriate".

19 It is accepted on behalf of the Husband that the power of the court to make an order as to costs under the Matrimonial Causes Law must be read in conjunction with Order 62, rule 4 of the Grand Court Rules 1995 (as revised). GCR 62.4(1) required that that rule should have effect "unless otherwise provided by any Law". GCR 62.4(2) is in these terms:

> "4(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."

and GCR 62.4(3), as it was at the relevant time, required that:

> "4(3) 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 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."

And it is accepted that guidance as to way in which "the costs follow the event" principle should be applied in ancillary relief proceedings is to be found in the judgment of Lady Justice Butler-Sloss in *Gojkovic* [1992] Fam 40, at pages 56-60.

20 In substance, as it seems to me, the Husband's response to the Wife's cross-appeal as to costs is that the judge was entitled to make the order that the costs of the ancillary relief proceedings should lie where they fell – based on "the wide discretion afforded to the Court to depart from the starting point of 'winner takes all' on the facts of the particular case"; and that there is no proper basis for this Court to interfere with that order.

The approach to the award of costs in "big money" cases which is to be adopted in this jurisdiction

21 As I have said, the contention advanced on behalf of the Husband at the hearing of the substantive appeal – that the practice, in this jurisdiction, has been to recognise that the *Gojkovic* approach is no longer apt in the light of the "seismic changes" made to ancillary relief claims in *White v White* - was not pursued at the further hearing on 19 November 2012. But, if and so far as that practice has been adopted in "big money" cases, it is appropriate that this Court should take the opportunity to state that it should not be followed. Whatever may now be the position in family proceedings in England and Wales, the position in this jurisdiction remains that set out in GCR 62.4: 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).

22 The view that the appropriate starting point in "big money" cases should no longer be "costs follow the event" but "costs lie where they fall" is founded, I think, on remarks made by Mr Nicholas Mostyn QC, sitting as a Deputy Judge of the Family Division in *GW v RW* [2003] 2 FCR 289, 316. Mr Mostyn QC had said this (*ibid,* [85] and [86], [92] and [93]):

> "85. It is very easy to see why in an era where the wife's claim was perceived to be *against the husband's money* for a sum necessary to meet her reasonable requirements, costs should, prima facie, follow the event. Her position was comparable to that of an ordinary civil claimant. It is much more difficult to apply the analogy in the post *White v White* [2001] 1 AC 596 era where the court's function is (per Thorpe LJ in *Cowan v Cowan* [2002] Fam 97, 122, para 70) to determine the parties 'unascertained shares' in the pool of assets that is the fruit of the marital partnership.
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> 86. In this case I have ascertained W's share in this pool to be 40% and H's to be 60%. In such circumstances what is the event that the costs are supposed to follow? It is an intellectual concept with which I find it hard to grapple . . . This is a submission that is often made: 'the wife has had to come to court to

> get her money'. But surely the husband has equally had to come to court to get his? Each party has had to come to the court to obtain an order which fairly disposes of the issues between them.
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> . . .
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> 92. In my judgment, a safer starting point nowadays in a big money case, where the assets exceed the aggregate of the parties' needs, is that there should be no order as to costs. That starting point should be readily departed from where unreasonableness by one or other party is demonstrated. This approach is I believe consistent with the spirit of the judgment of Butler-Sloss LJ in *Gojkovic v Gojkovic* when due allowance is made for the seismic shift in the law since that decision was given. . . .
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> 93. It may also reduce the extent of satellite costs assessment litigation, which itself can be protracted and acrimonious, and which prolongs the agony between the parties."

23 In *Norris v Norris, Haskins v Haskins* [2003] EWCA Civ 1084; [2003]1 WLR 2960 that approach was rejected. Dame Elizabeth Butler-Sloss, who had, by then, become President of the Family Division, while recognising that the new rules which had been introduced in respect of costs in family proceedings in England and Wales gave rise to difficulties of interpretation and application, observed (*ibid*, [23]) that: "The court is nevertheless obliged to apply the rules unless and until they are amended". Lord Justice Thorpe took the same view (*ibid,* [63]): "The court must continue to determine costs applications in accordance with the rules". In my view the wife is correct to contend that, unless and until 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 62.4 – that, generally, 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 – and, in applying the principle that "costs follow the event", should follow the guidance in *Gojkovic*.

24 Nevertheless it is important to keep in mind (i) that GCR 62.4 recognises 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 (ii) 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 section 21 of the Matrimonial Causes Law – and, in particular, the power to make an order for the disposition of matrimonial property conferred by paragraph (b) of that section, the power to make financial provision for one spouse out of the property of another conferred by paragraph (e) and the power to make an order for costs conferred by paragraph (g) - must be exercised with the regard to the direction, in section 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, as it seems to me, that – in exercising its powers under section 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 section 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: (i) it can vary the proposed order under section 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 – or (ii) it can leave the order under section 21(b) in the form proposed and make an order under section 21(e) for a payment by the husband to the wife which includes a sufficient sum to meet that need or (iii) 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 section 21(b), he (or, more usually she) will be seeking an order under section 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 section 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: (i) it can vary the proposed order under section 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 (ii) 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 paragraphs (b) or (e) of section 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 QC in *GW v RW* (*supra*, at [93]) as 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." The same concern was expressed in the letter from the Senior Costs Judge to which Dame Elizabeth Butler-Sloss, President, referred in her judgment in *Norris v Norris, Haskins v Haskins* (*supra,* [30]). He wrote:

> "Whereas in non-family civil proceedings the resolution of the substantive dispute frequently takes the heat out of any animosity between the parties, and enables settlement of the costs to be achieved in a significant number of cases, in family proceedings that animosity, which is in any event likely to be at a very high level, continues unabated during the assessment proceedings. The successful spouse on one side vows to bleed the other dry of every penny if at all possible, whilst the paying spouse goes out of his or her way to deny the other the possibility of any recovery. The number of settlements in assessments arising out of family proceedings is very low. . . .
>
> The level of venom in detailed assessment in family proceedings is such that I am firmly of the view that the removal of costs as an area of conflict would have an overall beneficial effect. . . ."

If the court is in a position to make provision for the costs of a successful applicant by way of an adjustment to the substantial order which it is minded to make under

section 21(b) of or 21(e) of the Law – and so avoid a contested cost assessment – then it should give serious consideration to doing so.

29 I appreciate that there will be cases in which, for practical reasons, that course will not be possible. But the parties should assist the court by providing schedules of their costs in advance of the making of the substantive order; and by informing the court whether there have been *Calderbank* letters (without disclosing the contents of those letters in advance of the judge's decision on the substantive issues) which the judge will be asked to take into account. And it would be open to the judge to make an order in terms similar to paragraph 2 of the order made by this Court in these proceedings on 8 December 2011; leaving open the possibility of an adjustment to the order which he would otherwise have made in the light of a failure of an applicant to a obtain a result more favourable than that which he or she could have obtained by accepting an offer to compromise.

The disposal of the Wife's cross-appeal

30 I accept the submission, advanced on behalf of the Husband, that an appellate court should be slow to interfere with the trial judge's decision on costs; but the submission carries little weight in the circumstances (i) that – as recorded in the Husband's written submissions dated 15 November 2012 – the judge made what was taken to be "a purely gratuitous remark" at conclusion of the hearing before him on 28 June 2010 that "based on the established principles and governing case law he would make no order in respect of the costs of and incidental to these proceedings" and (ii) that the judge gave no other reasons to explain why he reached the decision to make no order as to costs. As those written submissions dated 15 November 2015 recognise "it would have been helpful if a statement of the judge's reasons for making the order contained in paragraph 9 of the final Ancillary Order had been lodged in the manner prescribed by section 19(4) of the Court of Appeal Law (2006 Revision)". If the judge did, indeed, take the view that, in making the order that he did, he was applying "established principles and governing case law", he was, in my view, plainly wrong. If he made the order for some other reason, this Court is left in ignorance of that reason. This is a case in which this Court is required to take its own view as to where the costs of the proceedings in the Grand Court should fall.

31 In my view, provision ought to have been made for the Wife's costs of the proceedings in the Grand Court. She was successful in her application for financial provision by way of ancillary relief. In those circumstances the starting point was that costs should follow the event; and there was no reason to deprive her of costs on the grounds of any unreasonable refusal of an offer to compromise made by the Husband. As her counsel points out, correctly, the order which she obtained was in excess of any offer made by the Husband in either of the *Calderbank* letters sent on his behalf.

32 At paragraph 93 of my judgment of 29 November 2011, I explained that, taking into account the assets which were to be allocated to the Wife under the schedule to the judge's order (as varied by paragraph 1 of the order to be made by this Court on 8 December 2011) and the balancing payment which must be made to her by the Husband in order to give effect to the equality principle, she would have in excess of CI$3,350,000 of capital available for investment. If invested to produce a return of 3.75% per annum – a rate suggested by the Husband and not challenged – she could derive an income from that capital of some $125,625 per annum. At paragraph 94 of that judgment I pointed out that, in assessing the Wife's needs the judge took the view that an income of $216,000 per annum or thereabouts would "enable [her] to live to the standard that she has and does"; and that I was not persuaded that the judge was wrong to adopt the figure that he did. On the basis of those figures her income shortfall – that is to say, the difference between what she needed in order to live to the appropriate standard and the income that could be derived from investing her capital – was CI $90,375. I went on to say this (at paragraphs 98 and 99 of my judgment):

> "98 The judge should . . . have asked himself what further capital sum was required in order to provide an income which would make up the difference ($90,375 – but, say $100,000) between what she needed to cover her expenses and what the return on her capital would provide.
>
> 99. The capital sum required in order to provide an income of $100,000 per annum (assuming it were invested to return 3.75%) would be some $2.67 million. But that would assume, of course, that the whole of that additional capital sum were preserved intact; and not drawn upon to meet income needs. On the basis that the additional capital sum should be amortised – because it is being provided to meet income needs during the life of the Wife, not to provide additional capital which will form part of her estate – the figure would be substantially less. Adopting (and adjusting) the figures in the Husband's skeleton argument (at paragraphs 106 and 138), which have not been challenged, the additional sum (on a *Duxbury* basis) would be $2 million (assuming 3.75% real growth)."

At paragraph 100 I concluded that:

> "100. . . . (i) that disposition of the matrimonial property in equal shares – or an equivalent order which gives effect to the principle of equal division of the matrimonial property by incorporating a balancing payment – will not give full effect to the section 19 factors in the present case (because it will not take proper account of the principles of need and compensation); and (ii) that full effect can be given to those factors by the payment by the Husband to the Wife of an additional capital sum out of his non-matrimonial assets (which are more than sufficient for that purpose)."

By paragraph 2 of the order which it made on 8 December 2011, this Court gave effect to that conclusion by substituting CI$4,680,820 - being the aggregate of the balancing payment (CI$2,680,820) required to give effect to the principle of equality and the additional capital sum (CI$2,000,000) required to meet fully the section 19 factors - for the lesser figure (CI$3,912,789) which had appeared in paragraph5 of the judge's order of 28 June 2010.

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 paragraph 5 of the judge's order of 28 June 2010 (as varied by the order made by this Court on 8 December 2011).

34 As I have said, the Wife relies on a schedule of costs to establish that her unrecovered costs (after giving credit for CI$82,000 advanced to her by the Husband during the course of the proceedings) is CI$334,840. Part of that sum (CI$156,635) is attributable to her costs in this Court: her unrecovered costs of the proceedings in the Grand Court are CI$178,205. The effect is to reduce her assets for investment from CI$3,350,000, or thereabouts, to about CI$3,200,000; to reduce the income that she could derive from those assets from CI$125,625 to CI$120,000; and to increase the income shortfall from CI$90,375 to CI$96,000. The question, then, is what additional capital sum is needed to provide an income which would make up that income shortfall. The answer is found at paragraph 99 of my judgment of 29 November 2011. The additional capital sum of CI$2,000,000 is sufficient (on a *Duxbury* basis) to provide an income of CI$100,000 per annum; and so will provide an income which will make up the income shortfall. It follows that, on the facts of the present case, I would not have thought it necessary to adjust the amount of the additional capital sum

above CI$2,000,000 – or to increase the aggregate payable under paragraph 5 of the judge's order of 28 June 2010 (as varied by the order made by this Court on 8 December 2011) - in order to meet the Wife's need to pay her costs of the ancillary relief proceedings in the Grand Court.

35 But that, of course, takes no account of the further costs of the appeal to this Court. Given the outcome of that appeal, it is appropriate to treat the costs incurred by the Wife (CI$156,635) as part of the costs of obtaining the ancillary relief to which she was entitled; and to make provision for her need to pay those costs. Adopting the same methodology as that set out above – but treating her unrecovered costs of the whole of the ancillary relief proceedings (including the costs of the further hearing of the appeal) as, say, CI$350,000 – the additional capital sum should be adjusted upwards, from CI$2,000,000 to CI$2,070,000; and the aggregate payable under the judge's order should be increased accordingly.

Conclusion

36 On the Wife's cross appeal from paragraph 9 of the judge's order of 28 June 2010, I would make a further order, pursuant to paragraph 2 of the Order made by this Court on 8 December 2011, that paragraph 5 of the order of 28 June 2010 be varied by substituting for the figure of $3,912,789.00 the figure of $4,750,820. I would make no order setting aside or varying paragraph 9 of the order of 28 June 2010; and I would make no order for the payment of the costs of the appeal or the cross-appeal. It is unnecessary to do so in the circumstances that –given the adjustment to the figure in paragraph 5 of the judge's order – provision has been made for the Wife's need in respect of her liability for costs.

Elliott Mottley, Justice of Appeal:

37 I agree.

Sir Anthony Campbell, Justice of Appeal:

38 I also agree.