

1 **THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **FAMILY DIVISION**

3 **CAUSE NO. FAM 201 OF 2014**

4 **BETWEEN:**

5 **AKS**

6 **Petitioner**

7 **AND**

8 **JS**

9 **Respondent**

10 **AND**

11 **RS & HS**

12 **Proposed Intervenor**

13
14
15 **Appearances:** **Ms. Sheridan Brooks of Brooks & Brooks for the Petitioner**
16 **Mr. Waide DaCosta for the Respondent**
17 **Mr. Matthew Dors of Ritch & Conolly for the Proposed**
18 **Intervenor**

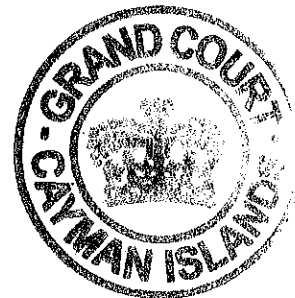
19
20 **Before:** **Hon. Justice Williams**

21
22 **Date of Judgment:** **11 February 2016**

23
24 **Written submissions**
25 **in relation to costs:** **8 & 9 March 2016**

26
27 **Draft Judgment on**
28 **Costs Circulated:** **17 March 2016**

29
30 **Judgment Delivered:** **22 March 2016**



31
32
33 **HEADNOTE**

34
35 *Family Law – divorce – financial provision – costs in relation to application of a third party to*
36 *intervene in ancillary relief proceedings – test when considering application for indemnity costs*

37
38 **JUDGMENT ON COSTS**

1 **The Application**

2 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.

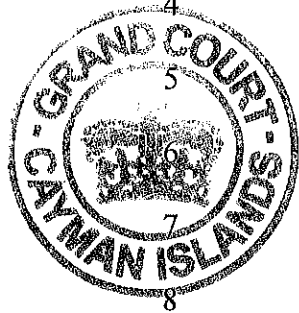
7 **The Background**

8 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.

12 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:

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

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



1 4. In compliance with my directions, on 22 May 2015 AKS served her Affidavit of
2 Means in which she detailed her position about the Intervenor's financial
3 contribution to the matrimonial home. On 16 June 2015 the Intervenor's instructed
4 their current attorneys, Ritch & Connolly. On 18 June 2015 JS's then attorneys,
5 Travers Thorp Alberga, notified the Court and the other parties by email that RS
6 and HS had engaged Ritch & Connolly to represent them as intervenors in the
7 matter.
8

9 5. All of the parties were notified by the Court that the mention hearing on 16 July
10 would have to vacated and be relisted. The attorney for JS and the attorney for the
11 Intervenor's provided the Court with their dates to avoid on 25 June 2015. The
12 Court sent out several emails to try to obtain AKS's dates to avoid and eventually
13 on 18 August 2015, almost 2 months later than the other parties, AKS's attorney
14 provided dates to avoid.¹
15

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

19 *"to be a party to the proceedings in order to have their claim to an*
20 *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."

3 He enclosed a draft, coupled with a request for AKS to consent to the application.

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

11 "*compelled to prepare a much more comprehensive application*
12 *and seek a longer hearing at which a contested application can be*
13 *dealt with.*"
14

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

20 "*had been previously provided with an opportunity to be joined*
21 *as parties*" and had "*neglected and/or refused to do so*" and
22 that "*as the pleadings have been closed*" it was "*a matter for*
23 *the Court.*"
24



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

7

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

10

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

18 "We shall draw the attention of the court to this letter as appropriate in
19 relation to costs."²

20

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

² My emphasis by underlining

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

3

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

19

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



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

4 "We will draw our exchange of correspondence to the Court at the
5 appropriate time and seek an order for indemnity or wasted
6 costs³."
7

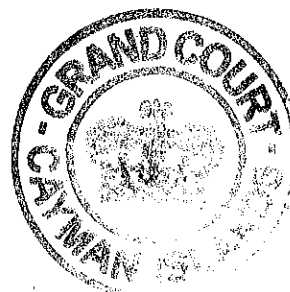
8 14. On 27 September 2015 the Summons was filed with a Listing Form. In the Listing
9 Form, under the heading "legal issues to be argued" reference was made to Grand
10 Court Rules ("GCR") O.15, r.6(2)(b)(i) and to whether the Court should
11 "...exercise its discretion to allow the Applicants to intervene."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

14
15 15. On 23 December 2015 the Intervenor's attorney wrote to AKS' attorney to
16 provide service of their Summons, an affidavit in support from each Intervenor
17 and a skeleton argument. In the letter the attorney stated:

18 *"We urge your client to reconsider her position and confirm that*
19 *she does not intend to contest our clients' application so that*
20 *unnecessary costs of preparing hearing bundles and attending the*
21 *hearing on 3 February 2016 are not incurred. If your client will*
22 *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."

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

6

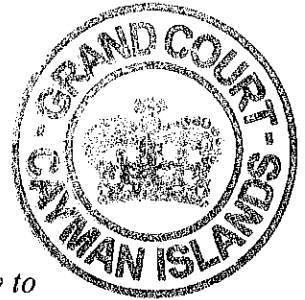
7 **The Orders Made on 11 February 2016**

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

13

14 **Nature of the Costs Hearing**

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



1 **The Law in Relation to the Awarding of Costs**

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

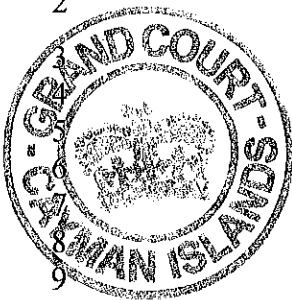
3 *"The overriding objective of this order is that a successful party to*
4 *any proceedings should recover from the opposing party the*
5 *reasonable costs incurred by him in conducting that proceeding in*
6 *an economical, expeditious and proper manner unless otherwise*
7 *ordered by the Court."*

8
9 20. GCR Order 65, r.4 (5) provides that:

10 *"If the Court in the exercise of its discretion sees fit to make any*
11 *order as to the costs of any proceedings, the Court shall order the*
12 *costs to follow the event, except where it appears to the Court that*
13 *in the circumstances that case some other order should be made as*
14 *to the whole or any part of the costs."*

15
16 21. In ***DJ v BJ & RK*** FAM 66 of 2014 (30 October 2015) I considered and applied
17 the Ruling of Sir John Chadwick, President in ***Roy Michael McTaggart v Mary***
18 ***Elizabeth McTaggart*** 2015 (1) CILR 123). In that important decision the
19 President of the Court of Appeal gave guidance about the approach to be taken in
20 relation to costs in matrimonial proceedings. Although ***McTaggart*** was a "big-
21 money case" the majority of the principles outlined by him are applicable to all
22 ancillary cases. At paragraph 5 the President referred to his earlier judgment in the
23 same matter (2011 (2) CILR 366) in which he stated at paragraph 106:

24 *"Put shortly, the position, here, is that costs in matrimonial*
25 *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. But there has been no corresponding change in the rules applicable in this jurisdiction.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:

".... unless and until there is a change to the relevant rule in this jurisdiction,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.

1 *him in conducting that proceeding and in an economical,*
2 *expeditious and proper manner."*
3

4 24. Accordingly, echoing the President's approach, I found in **DJ v BK** that GCR
5 O.62 provides a code¹ for dealing with the entitlement to costs, that it governs
6 costs applications in matrimonial proceedings and that "*any power to make an*
7 *order for costs under the Law must be read in conjunction with that order.*" At
8 paragraph 26 I reminded myself that GCR Order 62, r.4(2) provides that no party
9 to any proceedings is entitled to recover any costs of those proceedings from any
10 other party to the proceedings except under an order of the Court.

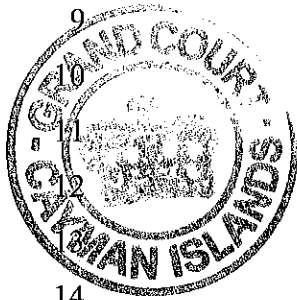
11
12 25. Significantly at paragraph 24 in **McTaggart** Chadwick P. added:

13 *"....it is important to keep in mind (a) that GCR O.62, r.4*
14 *recognizes that the court has a discretion whether or not to make*
15 *any order as to costs of any proceedings – the mandatory*
16 *requirement that "the court shall order the costs to follow the*
17 *event" arises only "if the court in the exercise of its discretion sees*
18 *fit to make any order as to the costs of any proceedings" – (b) that*
19 *the mandatory requirement is, itself, qualified by the words except*
20 *where it appears to the court that in the circumstances of the case*
21 *some other order should be made as to the whole or any part of the*
22 *costs."*
23

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



1 “25 In deciding whether or not to make any order as to the costs of
2 ancillary relief proceedings, the court should have in mind that the
3 powers conferred by s.21 of the Matrimonial Causes Law (2005
4 revision) - and, in particular, the power to make an order for the
5 disposition of matrimonial property, conferred by para. (b) of that
6 section, the power to make financial provision for one spouse out
7 of the property of another referred by para. (e) and a power to
8 make an order for costs, conferred by para. (g) - must be
9 exercised with regard to the direction, in s.19 of the Law, that in
10 dealing with all ancillary matters, the court shall have regard to
11 (inter alia) “the needs, financial and other resources of the parties.
12 26 Having regard to the needs and financial resources of a party
13 requires, it seems to me, that – in exercising its powers under s.21
14 of the Law - the court takes account of the need of each party to
15 discharge his or her liabilities to their respective legal
16 representatives in respect of the costs of the ancillary relief
17 proceedings and the resources available to each party to meet that
18 need.”
19



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



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

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

11
12 28. The fact that a case is not a 'big-money case' or one involving more substantial
13 assets does not necessarily mean that an order for costs cannot be made in favour
14 of a successful party. The limited size of the assets would be one of the factors to
15 be taken into account when considering the division of the assets, how a costs
16 order would affect a fair distribution of any available assets and whether that
17 distribution will meet the needs of any children and the parties. It would be one of
18 the factors that the Court could consider when exercising its wide discretion as to
19 whether or not to make a costs order. It is clear that even if a party is viewed as
20 being successful in ancillary relief proceedings, the Court is not compelled to
21 make a costs order in his favour as it has a discretion whether or not to make any
22 order for costs and even if it deems appropriate to make such an order it need not

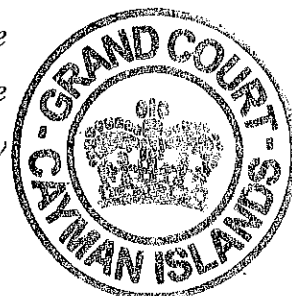
1 order that they follow the event if having regard to the circumstances of the case it
2 finds that some order should be made in relation to the costs.

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

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

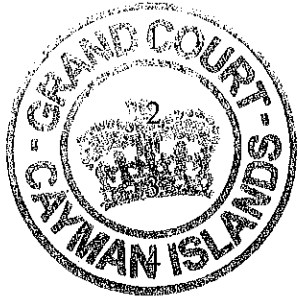
8
9 Having found at paragraph 27 in **DJ v BK** that it was clear under O. 62, r. 3 that a
10 costs order in divorce matters can be made includes interlocutory proceedings I
11 went on to note at paragraph 29 that:

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



18
19 **AKS's Position**

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



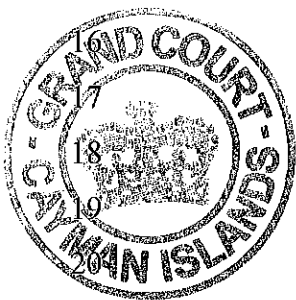
determine what percentage of the net proceeds of sale from the former matrimonial home will be available to be distributed to meet the needs of the parties.

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

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

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

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

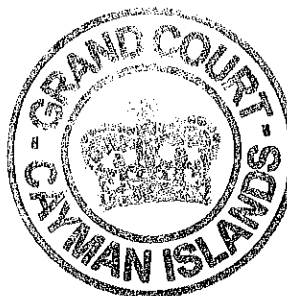


⁷ My emphasis by underlining.

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

9
10 34. It is also submitted by Ms. Brooks that this may be the first opposed case in the
11 Family Division of the Grand Court where the Court had to rule on whether it had
12 jurisdiction to permit third parties to intervene in ancillary relief proceedings. It is
13 suggested that as all the previous orders permitting intervention had been made by
14 consent this meant that a ruling was necessary, in the general public interest, to
15 provide clarification and proper guidelines.

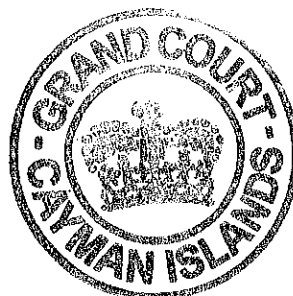
16
17 35. Although there was clearly an issue as to the jurisdiction to make orders to
18 intervene pursuant to O.15, r.6(2) in ancillary relief proceedings, it is trite law that
19 the Court has the power to make an order for third parties to intervene under its
20 inherent jurisdiction.



1 **The Intervenors' Position**

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

12
13 37. It is rightly contended in Mr. Dors' Written Submission on Costs that it should
14 have been clear to AKS and her attorney that the only appropriate course was for
15 JS's parents to be permitted to intervene if they sought to do so. Both parties
16 recognised, at the hearing on 1 May 2015, the existence of a substantial issue
17 concerning the effect of the intervenors' financial contribution to the former
18 matrimonial home. It is rightly submitted by Mr. Dors that AKS's attorneys
19 should have been aware of the general principles surrounding third parties'
20 intervention in such cases espoused by me at paragraph 38 in the reported
21 decision of *B v B* [2012] (2) CILR 124.



1 38. Mr. Dors highlights AKS's failure to give a timely indication about her position in
2 relation to the application and/or to outline any basis for an objection to the
3 application, save to state the obvious point that leave was a matter for the Court.
4 The case authorities clearly show how the Courts feel it necessary to permit
5 intervention for the issues to be properly dealt with. It is submitted that the
6 objections emerging from AKS' affidavit were based on a contention that there
7 had been inordinate delay on behalf of the intervenors and that they had "*refused*"
8 to be joined in the proceedings at the hearing on 1 May 2015.⁸ Mr. Dors drew to
9 the Court's attention that, despite there being pre-hearing correspondence between
10 the parties, the jurisdiction issue was only raised for the first time by AKS in her
11 Skeleton Argument dated 2 February 2016 which was provided to him on the day
12 before the hearing.

13
14 39. In her Skeleton Argument it was rightly noted by Ms. Brooks that no basis had
15 been given in the Skeleton Argument prepared on behalf of the Intervenor for a
16 submission that GCR O.15, r.6 applied in matrimonial proceedings. In her
17 Skeleton Argument it was also submitted that no authorities had been provided by
18 the Intervenor in support of any assertion that the Court had an inherent
19 jurisdiction to permit proposed intervenors to join. On the other hand, no
20 authorities were cited in her Skeleton Argument to show the Court did not have
21 such jurisdiction.

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

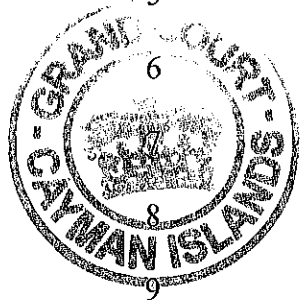




1 40. Mr. Dors indicates that he did not deal with the issue of jurisdiction in his
2 Skeleton Argument which had been filed much earlier, namely on 22 December
3 2015, because the case authorities make clear that the Court had jurisdiction to
4 join intervenors. Importantly, on the day of the hearing, before coming into Court,
5 Mr. Dors provided AKS' attorney with a copy of the reported decision of the
6 Chief Justice in *Rodriguez v Ebanks and R.L Ebanks Intervening* [2014 (1)
7 CILR 264]. It should have been clear to anyone reading that case that Chief
8 Justice Smellie expressed a clear view that the Court has the power to add a third
9 party as intervener in its inherent jurisdiction. At paragraph 15 in my Judgment I
10 rejected Ms. Brooks submission that little weight should be placed on the Chief
11 Justice's remarks and indicated that I was satisfied that the parties must have
12 conceded that the Court had the jurisdiction at the very least under the inherent
13 jurisdiction. Apart from the fact that there is no legal basis to support Ms. Brooks'
14 submission that the inherent jurisdiction could not be exercised in a case where a
15 proposed intervenor can still bring separate proceedings in relation to the alleged
16 beneficial interest, such a contention is unattractive as it runs counter to the
17 Court's goal to deal with every matter in a just, expeditious and economical way.

18

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



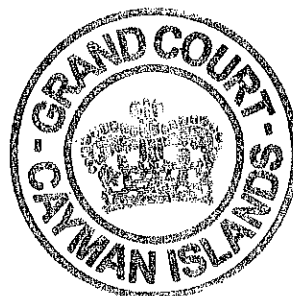
1 Counsel had been aware of the decision she would have been obligated to draw it
2 to the Court's attention even if unfavourable to her case. Ms. Brooks told the
3 Court that she was not aware of the decision until Mr. Dors had shown it to her, as
4 she played no part in the later hearing. I am content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

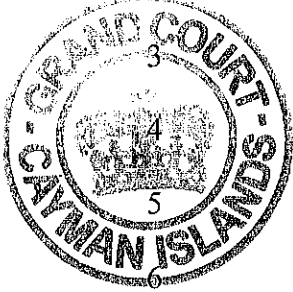
19 **Conclusion – Principle of Costs**

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

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

13
14 43. Accordingly I am satisfied that AKS should pay the Intervenors' costs of the
15 application. As is appropriate in matrimonial matters, and as I intend the
16 Intervenors to have the cost of this pre-decree application irrespective of the
17 outcome of the substantive action, I order costs in any event in which case
18 taxation will be deferred until the conclusion of the substantive action. It would
19 only be in exceptional circumstances to simply order "*Intervenors' costs*" thereby
20 entitling an immediate taxation.





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

7 **Indemnity Costs**

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

12
13 46. The general rule in litigation is costs follow the event and that the successful party
14 will be awarded costs on a party and party basis. It is recognised that this can
15 leave the successful party out of pocket. The gap between the amount of costs in
16 fact paid by a successful litigant and the amount of party and party costs which
17 are recoverable can be substantial.

18
19 47. As highlighted by Henderson J. in *Sagicor General Insurance (Cayman) Limited*
20 *and another v Crawford Adjusters (Cayman) Limited* Cause No. 78 of 2006
21 GCR O.62 r.4(11) provides an alternative basis upon which costs may be ordered.
22 The rule provides in respect of costs ordered on an indemnity basis that:

1 *"The Court may make an inter-partes order for costs to be taxed*
2 *on the indemnity basis only if it is satisfied that the paying party*
3 *has conducted the proceedings, or that part of the proceedings to*
4 *which the order relates, improperly, unreasonably or negligently."*
5

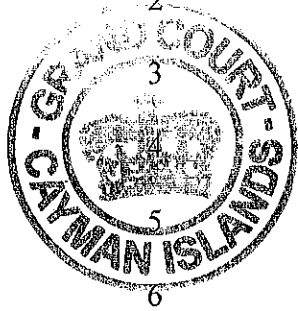
6 48. The discretion under the rule is not fettered or circumscribed, and it must be
7 exercised judicially in the light of the particular facts of each case. There are
8 many civil cases which have considered the appropriate principles to be applied in
9 exercising the discretion to award costs on the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

15
16 49. The award of costs on indemnity basis is generally reserved to cases where the
17 Court wishes to indicate its disapproval of the conduct of the paying party. In the
18 words of Halsbury's Laws, 4th Edition (2007) Volume 10, para 23, Note 8:

19 *"Indemnity costs may be awarded against the party whose conduct*
20 *has been unreasonable, even though the conduct could not*
21 *properly be regarded as lacking moral probity or deserving moral*
22 *condemnation: Reid Minty (A Firm) v Taylor [2002] 2 All ER*
23 *150."*
24

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





1 50. It is right that I have been critical of AKS's failure to promptly provide dates to
2 avoid. I have also highlighted my concern about the failure to give an appropriate
3 reply to the Intervenor's attorney's various requests for an indication about
4 whether the application was opposed, and if it was, upon what basis. I have
5 accepted Ms. Brooks' statement that she could not recall the *Rodriguez* judgment.
6

7 51. I note that a formal warning of an intention to claim indemnity costs can make the
8 awarding of indemnity costs more likely. This is illustrated by the Australian case
9 of *Huntsman Chemical Co. Aust. Pty Ltd v International Pools Aust. Pty Ltd*
10 (1995) 36 NSWLR 242. The attorney for the Intervenor did give two written
11 formal costs warning in the matter before me¹⁰, and these warnings which were
12 not heeded formed a part of my consideration when making a costs order against
13 AKS in principle.
14

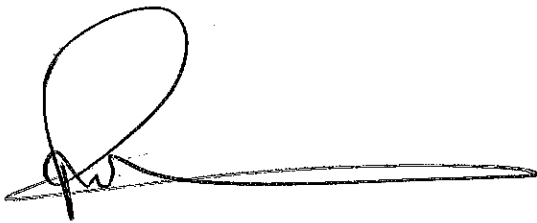
15 52. The conduct of AKS as a litigant in this case has not been sufficiently
16 unreasonable or unmeritorious so as to justify departure from the ordinary rule as
17 to the basis of assessment of costs. Indemnity costs are rarely ordered in
18 matrimonial matters, especially when the assets are not substantial. The reasoning
19 for this is that any such order may reduce any capital award in such a way that it
20 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.

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

3
4 53. Accordingly, the cost order in paragraph 43 above is for costs on the standard
5 basis.

6
7 54. This is not a case in which it would be suitable to make any orders for wasted
8 costs on the Court's own motion.

9
10
11
12


13 **The Hon. Justice Richard Williams**
14 **JUDGE OF THE GRAND COURT**

