THE GRAND COURT OF THE CAYMAN ISLANDS
FAMILY DIVISION

CAUSE NO. FAM 0039 OF 2015

BETWEEN:	**AK**	**PETITIONER**
AND:	**TK**	**RESPONDENT**

Appearances:	**Mr. Alistair Walters of Campbells for the Petitioner**
	Mr. David McGrath of McGrath Tonner for the Respondent
Before:	**The Hon. Justice Cheryll Richards Q.C.**
Hearing:	**30th October 2019**
Draft Judgment Circulated:	**23rd January 2020**

HEADNOTE

Family Law *– Costs Arising from Application for Variation of Ancillary Order*

JUDGMENT

INTRODUCTION

1. This is an application for costs by the Respondent, TK (the wife). This follows on from an application by the Petitioner, AK, (the husband) made by Summons dated 23rd April 2018 for the downward variation of an ancillary order for maintenance of the wife and children. I shall refer to both parties as the husband and wife, although their divorce is now final.

2. On the hearing of the application the husband's evidence was that he had lost his job in March 2018. He secured new employment at the end of August 2018 but at a reduced level of income. By judgment issued on the 3rd September 2019, the Order previously made on the 9th May 2017 was varied, such that the husband is to pay, US$2,100.00 per child per month rather than US$3,000.00 per child per month. Additionally spousal maintenance was varied from US$2,000.00 per month to US$1,200 per month, to be paid up to February 2020. This amounts to a total payment of US$5,400.00 per month rather than the US$8,500.00 previously ordered. Arrears of maintenance were assessed at US$95,100.00 to be paid within six months.

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3. Following the hearing, Practice Direction No. 3 of 2019 was gazetted on the 9th October 2019. This requires that the parties provide schedules of costs at least 14 days before the ancillary hearing. Going forward this will assist to eliminate the need for second hearings such as in this matter. In this case which pre-dated that Practice Direction, no such schedules were provided at the time of, or before the hearing.

4. By way of background, prior to the substantive hearing for variation, there were five interlocutory hearings in the matter. On the 11th May 2018 the wife consented to a temporary moratorium on maintenance payments. No order was made as to costs. On the 11th October 2018, the wife applied for the lifting of the moratorium following the husband securing

alternative employment. Costs were reserved. On the 18th October 2018, the husband's applications for leave to appeal and a stay were refused. The husband was ordered to pay the costs of the wife. On the 29th January 2019, the husband's application to adjourn the substantive hearing was granted and the wife was ordered to pay the husband's costs. Between 13th November 2018 and 6th February 2019, both parties attended private mediation sessions. The mediation process was terminated by the Mediator on the 13th March 2019 on the basis that there was no positive way forward given the respective positions and expectations of the parties.[1]

5. The wife's costs in relation to the husband's application now total CI$106,036.81 not including the costs for mediation and the costs ordered on the hearings on the 18th October 2018 and the 29th January 2019. The husband's costs total US$88,000.00. In oral and written submissions, both Counsel have quite rightly described these costs as entirely disproportionate to the matter and no doubt the parties themselves are fully live to this description. Each side has sought to identify circumstances where the actions of the other may have served to increase the level of costs.

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THE POSITIONS OF THE PARTIES

6. The husband's position is that costs should lie where they fall or alternatively that any award of costs should be made in his favour. He says that he has been successful in obtaining a downward variation in circumstances where the wife's conduct has been unreasonable. It is said that despite his changed employment circumstances, the wife sought to have maintenance payments remain at the previous level, only relenting shortly before the hearing which was too

[1] Letter from Private Mediator dated 17th June 2019

little too late. Further, that notwithstanding the numerous suggestions of the husband, the wife was reluctant to engage in mediation and, despite having done so at the urging of the Court, she refused to participate in mediation in a meaningful way.

7. The wife's position is that she is entitled to her costs having made a ***Calderbank***[2] offer on the 1st April 2019, which offer was not accepted by the husband and which was less than the sums subsequently awarded by the Court. The offer was made about eleven weeks before the substantive hearing on the 18th June 2019. At the hearing, the wife accepted that there should be a modest decrease in the amounts to be paid.[3]

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THE STATUTORY PROVISIONS AND APPLICABLE PRINCIPLES

8. By s.21 (g)[4] of the ***Matrimonial Causes Law (2005 Revision),*** ("the Law") the Court may make orders for costs with respect to ancillary proceedings.

9. Section 19 of the said Law provides that in dealing with all ancillary matters arising under the Law, the Court shall have regard, first of all, to the best interests of any children of a marriage and, thereafter, to the responsibilities, needs, financial and other resources, actual and potential earning power and the deserts of the parties.

10. Section 21 (g) is to be read in conjunction with the Grand Court Rules (GCR) O.62 r.4 which sets out the general principles with respect to costs. This is in the following terms:-

> *"4. (1) This rule shall have effect unless otherwise provided by any Law.*
> *(2) The overriding objective of this Order is that a successful party to any proceeding should recover from the opposing party the reasonable costs*

[2] Calderbank v. Calderbank [1976] Fam. 93
[3] A total of US $6,500.00 up to February 2019, $6,000.00 to February 2020 and $5,000.00 thereafter
[4] Law - 21 (e) - error in sequential numbering of the Law

incurred by him in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court.

(3) A person who claims to be entitled pursuant to a contract to recover the legal fees and expenses incurred in enforcing that contract shall be entitled to judgment for the amount found due under the contract and such amount shall not be subject to taxation pursuant to this Order.

(4) Except as provided in paragraph (3), no party to any proceedings shall be entitled to recover any of the costs of those proceedings from any other party to those proceedings except under an order of the Court.

(5) If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except 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.

(6) The amount of the costs which a successful party shall be entitled to recover from any other party is –

a. the fixed costs prescribed in rule 7;
b. the amount assessed by the Judge in accordance with rule 8;
c. the amount allowed after taxation on the standard basis; or
d. the amount allowed after taxation on the indemnity basis.

(7) The orders which the court may make under this rule include an order that a party must pay –

a. a proportion of another party's costs;
b. a stated amount in respect of another party's costs;
c. costs from or until a certain date only;
d. costs incurred before proceedings have begun;
e. costs relating to particular steps taken in the proceedings;
f. costs relating only to a distinct part of the proceedings; and
g. interest on costs (at the prescribed rate for Cayman Islands dollars) from or

until a certain date, including a date before judgment."

11. In ***McTaggart v. McTaggart***[5], the Cayman Islands Court of Appeal (CICA) provided guidance in dealing with claims for costs arising out of ancillary applications. The Court held that the starting point in "big money" cases is that when making a costs order under the above Law, costs should follow the event and not lie where they fall. The Court stated:

> *"Whatever may now be the position in family proceedings in England and Wales, the position in this jurisdiction remains that set out in GCR, O.62, r.4: if the court in the exercise of its discretion sees fit to make any order as to costs in ancillary relief*

[5] 2015 (1) CILR 123

proceedings, it shall order costs to follow the event (save where there are some special circumstances)."

12. The Court said that the guidance in ***Gojkovic v. Gojkovic (No. 2)***[6] should be followed and cautioned that:

> *"24. Nevertheless, it is important to keep in mind (a) that GCR, O.62, r.4 recognizes that the court has a discretion whether or not to make any order as to the costs of any proceedings—the mandatory requirement that "the court shall order the costs to follow the event" arises only "if the court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings"—and (b) that the mandatory requirement is, itself, qualified by the words "except where it appears to the court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."*
>
> *25. In deciding whether or not to make any order as to the costs of ancillary relief proceedings, **the court should have in mind that the powers conferred by s.21 of the Matrimonial Causes Law (2005 Revision)—and, in particular, the power to make an order for the disposition of matrimonial property, conferred by para. (b) of that section, the power to make financial provision for one spouse out of the property of another conferred by para. (e) and the power to make an order for costs, conferred by para. (g)—must be exercised with regard to the direction, in s.19 of that Law, that in dealing with all ancillary matters, the court shall have regard to (inter alia) "the needs, financial and other resources" of the parties.***
>
> *26. Having regard to the needs and financial resources of a party requires, it seems to me, that—in exercising its powers under s.21 of the Law—the court takes account of the need of each party to discharge his or her liabilities to their respective legal representatives in respect of the costs of the ancillary relief proceedings and the resources available to each party to meet that need. So, in a "big money" case, the court should ask itself—when determining what order to make under s.21(b) of the Law for the disposition of the matrimonial property—whether the order which it is proposing to make will adequately meet the need of each party in relation to his or her liabilities in respect of costs. If the court is not satisfied that the order which it is proposing to make will adequately meet the need of, say, the wife in respect of her liability to her legal representatives then, as it seems to me, there are three courses open to it: (a) it can vary the proposed order under s.21(b)—that is to say, it can make an order under that section which awards the wife a greater proportionate share of the matrimonial property; (b) it can leave the order under s.21(b) in the form proposed and make an order under s.21(e) for a payment by the husband to the wife which includes a sufficient sum to meet that need; or (c) it can leave the matter to be dealt with by an order for costs in the wife's favour.*
>
> *27. Further, if in a "big money" case the resources available to one party (usually, but not, of course, invariably, the husband) are substantially greater than the resources available to the other (again usually, but not invariably, the wife) it can*

[6] 1992 Fam. 40

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

28. In deciding whether to make provision for, say, the wife's need in respect of her liability to her legal representatives by an order under paras. (b) or (e) of s.21 of the Law, or to leave the matter to be dealt with by an order for costs in her favour, the court should have in mind the observation of Mr. Mostyn, Q.C. in GW v. RW (3) ([2003] EWHC 611 (Fam) at para. 93) as to the desirability of avoiding "satellite costs assessment litigation," which, as he said, can itself be protracted and acrimonious, and which "prolongs the agony between the parties." The same concern was expressed in the letter from the senior costs judge to which Butler-Sloss, P., referred in her judgment in Norris v. Norris (6) ([2003] 1 W.L.R. 2960, at para. 30)." (Emphasis added.)

13. In the case of ***McTaggart v. McTaggart,*** the Court concluded that as the award to the wife exceeded the ***Calderbank*** offers made by the husband, the wife was entitled to her costs and that the capital sum awarded to her should be adjusted accordingly.

14. In the case of ***Gojkovic v. Gojkovic (No. 2),*** the Court in its judgment stated that while in the Family Division the starting point is that costs *prima facie* follow the event, that starting point may be more easily displaced than in other civil cases. For example it would be unusual to order costs in children cases. The Court stated:

> *"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. The behaviour of one party, such as in material non-disclosure of documents, will be a material factor in the exercise of the court's discretion in making a decision as to who pays the costs.*

The incidence of legal aid, the inadequacy of the financial assets available, for instance, to house both parties or even one spouse and the children, are major circumstances which may affect or even distort an order for costs that would otherwise have been expected to be made. 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."

15. The Court noted that in a minority of cases, where the assets are substantial if appropriate, a costs order can be made. In describing the practice of negotiation and settlement by way of ***Calderbank*** or open offers, the Court referred with approval to the case of ***Singer v. Sharegin***[7] in which Cumming-Bruce L.J. stated that if an applicant has refused what the Judge regards as a reasonable offer, he must face the consequences of such refusal by paying both his own costs and the costs of the Respondent in so far as they accrued after a reasonable period for consideration of the offer.

16. In the case of ***Gojkovic v. Gojkovic (No. 2),*** the Court noted that there are many reasons which may affect the Court's consideration of whether to order costs. These include culpability in the conduct of the litigation, delay or excessive zeal in seeking disclosure, the absence of an offer or counter offer, an offer which was made too late in order to be effective and the need for all the funds to be used for housing the spouse and children of the family. The Court stated:-

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

[7] [1984] FLR 114

into court, with the proviso that other factors in the Family Division may alter that prima facie position."

17. In the case of ***G. v. G***[8], Henderson J. accepted that the approach to ***Calderbank*** letters as set out in ***Gojkovic v. Gojkovic (No. 2),*** is applicable to matrimonial proceedings in the Cayman Islands. He summarised the important points arising from that judgment as follows:

> *"(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."*

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THE SUBMISSIONS

18. Counsel for the husband in the instant case argued that the principles discussed in the case of ***McTaggart v. McTaggart*** apply only to "big money" cases and that in contrast, this is not a case where the assets are substantial.

19. Counsel for the wife submitted that the said principles have been generally applied by the Grand Court and thus also to cases where the assets are not substantial. Counsel drew the Court's attention to a number of more recent cases[9] in this jurisdiction in which those principles on costs have been applied with consistency, it being accepted that the general principle is that

[8] [2010] 1 CILR 365
[9] ***AT v. JT*** Fam 34 of 2012, ***DJ v. BJ*** Fam 66 of 2014, ***NR v. AR*** Fam 169 of 2015, ***TF v. SD*** Fam 60 of 2016

costs should follow the event unless there is good reason for departure. In ***AT v. JT***[10], Williams J. stated:

> *"In the Court of Appeal decision of* ***Rory Michael McTaggart v. Mary Elizabeth McTaggart*** *CICA 14 of 2010, handed down on 12th February 2015, guidance was given by the President, Sir John Chadwick, in relation to the proper approach to costs in ancillary relief proceedings. Although* ***McTaggart*** *was a "big money case' in which Calderbank Letters featured, a number of the helpful observations made by the President are applicable to all ancillary relief proceedings."*

20. Counsel on behalf of the wife submits that the ***Calderbank*** principles as discussed in the case of ***Gojkovic*** are clear and that the instant case is a paradigm case for the award of costs in favour of the wife. In short it is urged that had the husband accepted the offer made by the wife on the 1st April 2019, a substantive hearing and further costs would have been avoided. The wife's offer was for a compendious total of US $5,000.00 per month with arrears at the full rate of $8,500 per month from May to August 2019 and at the lower rate of US $5,000.00 per month from September 2018.

21. It is submitted that the wife has beaten not only the husband's best offer but also her own offer to the husband and thus that there can be no basis for the Court to depart from the principle embodied in the overriding objective of GCR O.62 and the principle that costs shall follow the event.

22. The sequence of correspondence and events as put forward by both Counsel may be summarised as follows:

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[10] ***AT v. JT*** Fam 34 of 2012, 10th July 2015

Date:	Letter on behalf of:	Summary:
6th September 2018	Husband	Offer of US $1,500.00 for child M. Suggests mediation for any other dispute.
17th September 2018	Wife	Request for clarification as to offer and for financial disclosure.
20th September 2018	Husband	Hold placed on offer made. Request for financial disclosure from wife.
25th September 2018	Wife	Asking that maintenance payments recommence.
1st October 2018	Husband	Offer of US $1,500.00 is withdrawn - updated schedule of expenses of H is provided. Asking for mediation.
1st October 2018	Wife	There have been previous attempts at mediation which have failed. Client does not think that there is the remotest prospect of finding a mediated solution.
22nd October 2018	Husband	Suggestion of private mediation as later time for Court mediation.
6th November 2018	Wife	Private Mediator agreed.
13th November 2018	**1st Mediation Session**	
7th January 2019	Husband	Complaint that wife has not been attending joint mediation appointments and that hearing date of 11th and 12th February should be adjourned for mediation to take place.
13th March 2019	**Mediation Process Terminated**	
22nd March 2019	Husband	Complaint that despite wife agreeing to mediation, she made no effort to engage in the mediation process. She refused to meet with H or engage in any constructive discussions with him. Suggestion that this is unreasonable conduct. Offer of US $500.00 per month for M Spousal support of $1,000.00 per month until 7th February 2020 US $1,000 per month in respect of arrears of maintenance backdated to 20th September 2018.
1st April 2019	Wife	Husband's offer rejected.
1st April 2019 (2nd letter) ***Calderbank*** offer	Wife	Offer to resolve matters US $3,000.00 per month on behalf of M, US $1,000.00 per month on behalf of K. US $1000.00 for spousal maintenance until 1st February 2020 for a total of $5000.00 per month until 1st February 2020

		Arrears of $66,000 with the sum of $24,500 being remitted.
3rd April 2019	Husband	Response to offer, "Your client's proposal does not make any sense as it completely ignores the reality of our clients' financial position. ….On what basis is your client's proposal being put forward?
10th April 2019	Wife	We believe offer is fair based on levels of income and outgoings. Please advise whether offer accepted.
11th April 2019	Husband	Wife's proposal ignores economic reality of husband's situation.
30th April 2019	Wife	Request for further financial disclosure.
17th May 2019	Husband	Request for further financial disclosure.

23. The further submission of Counsel on behalf of the wife is as follows:

> *"The secondary, economic basis for an award of costs which was considered and accepted by the President in **McTaggart** is even more applicable in a case such as this one. The sole criterion by which the maintenance figures are payable to W is on a needs-calculated basis. If W was to divert funds away from her and the children's needs so as to pay for legal fees to oppose H's application, then self-evidently her and the children's needs are not being met. In contesting the application, if she is not made financially whole, the court's calculation is respect of W's and the children's needs is understated by the amount of her costs. The needs based calculation therefore must be corrected by an award of costs in her favour."*

24. Counsel on behalf of the husband relied on the case of ***Re Elgindata (No. 2)***[11] in relation to the discretionary nature of costs orders under Order 62. Counsel drew attention to the stated principles set out in that case:

[11] [1992] 1 W.L. R. 1207

"The principles are these. (i) Costs are in the discretion of the court. (ii) They should follow the event, except when it appears to the court that in the circumstances of the case some other order should be made. (iii) The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or a part of his costs.

(iv) Where the successful party raises issues or makes allegations improperly or unreasonably, the court may not only deprive him of his costs but may order him to pay the whole or a part of the unsuccessful party's costs. Of these principles the first, second and fourth are expressly recognised or provided for by rules 2(4), 3(3) and 10 respectively. The third depends on well-established practice. Moreover, the fourth implies that a successful party who neither improperly nor unreasonably raises issues or makes allegations on which he fails ought not to be ordered to pay any part of the unsuccessful party's costs. It was because of his disregard of that principle that the judge erred in this case."

25. Counsel on behalf of the husband accepts that the wife has been successful on various issues arising from the enforcement application and thus that the parties have each been partially successful. However it is submitted that in any event the Court should depart from the general principle of costs following the event because of the circumstances of this case. Counsel's submissions may be summarised in the following way.

26. Firstly it is said that the wife has maintained an unreasonable approach throughout these proceedings. It is submitted that the position as to no change in payment levels was maintained until just days before the hearing at which point, the wife appeared to concede that a modest reduction was justified. The husband on the other hand made several attempts to engage in discussion and mediation which attempts were met with non-response or disengagement. This led to unnecessary and disproportionate costs.

27. Secondly, it is urged that the assets of the parties are insubstantial considering the needs of the family. This fact, it is said, amounts to a special circumstance which would justify the Court's departure from the general principle. Each party has limited resources and the husband is

presently unable to meet the order for the payment of maintenance arrears. The husband argues that payment of these costs would significantly impact his ability to provide for the children of the family. In these circumstances, it is said that the fair order is that each party should bear their own costs.

28. Thirdly, Counsel on behalf of the husband argues that given the circumstances relating to the wife's ***Calderbank*** offer on the 1st April 2019, the actions of the husband were not unreasonable. It is submitted that the wife's offer fell short of an offer which the husband should have reasonably accepted and in all the circumstances, his failure to respond substantively was justified. Both orally and in writing Counsel argued that in response to the offer, the husband sought clarification as to the merits of the wife's case. He neither accepted nor refused the offer. He sought to query it. It is said that the wife maintained a take-it-or-leave-it approach. The husband was never given any clarity and could not reasonably have been expected to accept an offer on the basis put forward. Moreover it was too little too late in respect of an application which was made from the 23rd April 2018.

ASSESSMENT

29. The Court accepts the submission of Counsel for the husband that each party was successful in this matter in different ways. The husband was successful in securing a downward variation of the previous order. The wife was successful with respect to payment of the arrears to be paid in full for the months of April to August 2018. The issue is the appropriateness of a costs order, whether in part or in whole in light of the circumstances of this case.

Was the Wife's Approach Unreasonable?

30. I have considered with care the husband's submission that the wife refused to engage in any meaningful discussions in relation to matters in dispute. An important aspect of this submission is the alleged refusal by the wife to engage in mediation until encouraged by the Court to do so and that she did not participate wholeheartedly in this exercise. It is said in particular that she refused to engage in joint sessions. A letter from the private Mediator was presented with the agreement of both parties. In the course of the hearing, in light of the issue joined with respect to mediation, I enquired whether evidence would be required from the private Mediator in order to resolve this issue. Both parties responded in the negative, deeming this unnecessary, and urging that the issue be resolved on the papers.

31. The letter provides information that both parties participated willingly and engaged in the process. There were four direct mediation sessions, on the 13th November 2018, 19th November 2018, 30th January 2019, and 6th February 2019. On the latter two dates, shuttle sessions were conducted with both parties. The four session were supplemented by various email correspondence and telephone calls with both parties. The mediation was terminated for the reason stated above, that there was no positive way forward given the positions and expectations of the parties.

32. A refusal by the wife to participate in joint sessions does not by itself prove a lack of engagement. The assertion of a lack of engagement is inconsistent with the information from the Mediator. The fact of a gulf between the positions of the parties is also evidenced by the correspondence which the parties produced in the hearing bundle. This is in line with the conclusion of the Mediator.

33. I conclude with respect to mediation that, from the material which is before this Court, there is insufficient evidence to suggest that the wife's participation in the process lacked wholeheartedness such that her conduct can be described as unreasonable as is submitted by the husband.

34. I accept, as the husband points out, that the wife was unwilling to engage in mediation in the first place. This reluctance is explained in a letter written on her behalf on the 1st October 2018[12]. This refers to the background to the matter, the protracted litigation and describes "acrimonious children proceedings" before concluding:

> "*We agree that mediation can, in certain circumstances, be a useful and cost-effective tool in the resolution of disputes between parties but the process presupposes a level of reasonableness and conciliatoriness that does not exist here. If our client thought that there was even the remotest prospect of finding a mediated solution, she would engage in the process but she does not see the point in wasting more time or more money when this is simply one of those cases where the issues will have to be determined by the court.*"

35. Against the background of the circumstances of this matter, I do not find that the initial reaction of the wife was so unreasonable that it rises to the level that she should be penalized in costs.

36. I also took note of the sequence and nature of the correspondence between the parties, which is summarised above, as well as, the fact that the wife agreed to a moratorium on payments and agreed not to enforce payments after the moratorium was lifted by the Court pending the substantive hearing.

[12] Page 112 of the Hearing Bundle.

Was the Wife's offer too late?

37. The husband remained unemployed between April 2018 and the end of August 2018. No offer could have been made or negotiated during that time. The wife's submission is that no offer was made until after the process of mediation was concluded or terminated. The process was terminated on 13th March 2019 and the offer was made on the 1st April 2019. The hearing was some eleven weeks later on the 18th June 2019.

38. While the offer could have perhaps been made earlier, I accept that attempts at mediation were ongoing. The offer was made about two weeks after the end of mediation and in sufficient time that the substantive hearing could have been avoided. I do not consider that this offer was too late to be effective.

39. The husband did not make a counter offer. Instead he maintained that the wife's offer ignored the reality of his financial position and sought clarification as to how the wife intended to make out her case. The wife replied indicating a disinclination to engage in argument. The husband appeared to maintain a lack of affordability throughout negotiations and in the course of the substantive hearing. The additional payments from his employer for the education of the children were not included in his income calculations. On the 6th September 2018, he made an offer of US$1500.00 for M, which offer he withdrew on the 1st October 2018. On the 22nd March 2019 he made an offer of US$1500.00 per month for M, spousal support of $1,000.00 per month until 7th February 2020 and US$1,000 per month in respect of arrears. The wife rejected this offer and put forward another. On the 3rd April 2019, the husband responded with an inquiry, he made no counter offer.

40. Despite the question as to how the wife's proposal was being put forward, the response of the husband was in effect a rejection of the wife's offer out of hand as not making any sense and as being sums which he could not afford.

41. On 10th April 2019, the wife did provide a short explanation as to how the wife's case was being put by identifying three factors including the stated income and outgoings of each party.

42. In my view, the defining circumstance on the issue of costs is the fact of this offer. Had the husband accepted or seriously considered and thus made a counter offer to this offer in April 2019, when it was made, there may well have been no need for the subsequent substantive hearing.

43. In ***Gojkovic v. Gojkovic*, (*No. 2*),** the Court stated:-

> *"It is therefore clear that Calderbank offers require to have teeth in order for them to be effective. This is recognised by the requirement in Order 62 r. 9 (and the equivalent CCR Order 11 r.10) for the court to take account of Calderbank offers, and by analogy open offers, in exercising its discretion as to costs. There are certain preconditions. Both parties must make full and frank disclosure of all relevant assets, and put their cards on the table. Thereafter the respondent to an application must make a serious offer worthy of consideration. If he does so, then it is incumbent on the applicant to accept or reject the offer and, if the latter, to make her/his position clear and indicate in figures what she/he is asking for (a counter—offer). It is incumbent on both parties to negotiate if possible and at least to make the attempt to settle the case. This can be done either by open offers or by Calderbank offers, both adopted by the husband in this case. It is a matter for the parties which procedure they prefer. There is a very wide discretion in the court in awarding costs, and as Ormrod L.J. said in McDonnell (supra) at p. 38, the Calderbank offer should influence but not govern the exercise of discretion."*

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44. The husband argues that the wife had a take-it-or-leave-it attitude but it appears to me that he may well have been the one with that attitude. One might have expected him to have put forward some alternative middle ground in response to the wife's 1st April 2019 offer.

45. I accept the submissions made on behalf of the wife on this point. On the basis of the ***Calderban***k principles the wife is entitled to her costs. The time frame discussed in the cited cases of ***Gojkovic*** and ***G. v. G.*** is that costs would be from the date of the communication of the offer and after the other party has had a reasonable time to consider it. In this case, costs would accrue from the 3rd April 2019, when the husband appears to have considered and made an initial response to the offer.

46. One area of concern for the Court is the resources of the parties. I take into account the submissions of the parties in this regard. Should the wife have to meet the entirety of these costs this will significantly reduce the maintenance amount for the children and herself. I am similarly concerned about the husband's resources and as to his ability to pay these costs in the immediate future. He has already indicated that he will have difficulty meeting arrears of maintenance. He is responsible for meeting a significant portion of the maintenance for the children.

47. However I note that of the two parties, he is the higher income earner with a monthly basic income of more than four times that of the wife. I accept the submission of Counsel on behalf of the wife that the concern which the Court has, can in all the circumstances be dealt with by giving him an extended time to pay.

CONCLUSION

48. The husband is to pay the costs of the wife on this application from the 3rd April 2019 on the standard basis to be taxed if not agreed.

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49. With respect to costs incurred prior to the 3rd April 2019 excluding the cost orders previously made on 22nd October 2018 and 29th January 2019, accepting the needs-basis argument made by Counsel on behalf of the wife and considering the fact of the partial nature of her success, the husband is to pay 50 percent of the costs of the wife in responding to his application.

50. The husband is to have an extended time period for payments of costs. Costs are to be paid on or before the 31st December 2020, a further period of nine months from the date for completion of payment of maintenance arrears.

Dated this the 14th day of February 2020

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Honourable Justice Cheryll Richards Q.C.
Judge of the Grand Court