IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN

Cause No: FAM 0056/2010

BETWEEN:

DLF

PETITIONER

AND:

DKF

RESPONDENT

Appearances: **Ms. Sheridan Brooks of Brooks & Brooks on behalf of the Petitioner**

Mr. Philip Boni and Ms. Kate Palfrey of Higgs & Johnson for the Respondent

Before: **The Hon. Mr. Justice Charles Quin**

Preamble

This Ruling is distributed on the strict understanding that in any report of this kind no persons other than the counsel or the attorneys instructing them (and other persons identified by name in the Ruling itself) may be identified by name or location and, in particular, the anonymity of the children and the adult members of the family must be strictly preserved.

RULING ON COSTS

1. On the 21st May 2010 I delivered a judgment in relation to the Respondent's Summons issued on the 24th September 2010 for Orders pursuant to s.19 and s.21 of the Matrimonial Causes Law (2005 Revision) for the disposition of matrimonial property, including the former matrimonial home, and for the provision of

1 maintenance for the two younger children of the marriage 'E' and 'B'. In that
2 Judgment I made the following Order:

3 i. That the Petitioner That the Petitioner do transfer her interest in DFC to
4 the Respondent;

5 ii. That the Respondent do transfer to the Petitioner his interest in the
6 former matrimonial home, namely West Bay North East Block 9A
7 Parcel 455;

8 iii. That the Respondent do transfer to the Petitioner his interest in Block
9 8A Parcel 157;

10 iv. That the Respondent do transfer to the Petitioner his interest in the
11 property in Enfield, Maine – Lot 1 Map 3;

12 v. That the Respondent do retain his sole interest in Block 9A Parcel 298,
13 and Block 9A Parcel 465;

14 vi. That the Respondent do retain his sole interest in the property known as
15 the "Shared Land" namely his 1/3rd share in:

16 a) Block 4E Parcel 12;

17 b) Block 4D Parcel 478;

18 c) Block 5B Parcel 141.

19 vii. That the Petitioner be allowed to retain her 50% interest in the
20 Respondent's shareholding of Mahogany Holdings Ltd.

In relation to the children I ordered:

viii. That the Respondent shall pay maintenance to the Petitioner for the two younger children of the marriage, 'E', 'B', in the amount of CI$400.00 per month per child until 'E' and 'B' reach the age of 21 years or complete their tertiary education, whichever occurs sooner;

ix. That the Respondent will continue to make voluntary payments for the eldest child of the marriage, namely, 'N', in the sum of CI$400.00 per month whilst 'N' lives with the Petitioner.

x. That the costs of the children's educational expenses be borne 50:50 by the Petitioner and the Respondent.

2. At paragraph 87 of my Judgment I stated:

> "*Finally, I make no order as to costs. However, I will of course consider either oral or written submissions if counsel decide to make submissions on the question of the costs of the hearing.*"

3. Both parties filed written submission on the question of the costs of the hearing at the end of June 2011.

The position of the parties

4. Counsel for the Petitioner submits that the Petitioner should be entitled to her costs on an indemnity basis, but, should the Court not agree that the Respondent conducted the proceedings improperly, unreasonably and/or negligently, then the Petitioner should be entitled to her costs on the standard basis, to be taxed if not agreed.

1 5. Counsel for the Petitioner submits that the general principle that costs follow the
2 event should apply, and that the Petitioner should be awarded her costs, because she
3 adhered to the overriding objective pursuant to GCR O.62 r.4(2), that the
4 proceedings be conducted in an economic, expeditious and proper manner.

5 6. The Respondent submits that the Court should order the costs of, and associated
6 with, the two summonses for maintenance, to the Respondent, to be taxed on a
7 standard basis, and that the parties should each bear their own costs in relation to
8 the rest of the proceedings.

9 ***The Law***

10 7. As Henderson J. stated at paragraph 9 on page 373 in ***G v. G*** 2010 CILR 365:

11 *"Thus r.22 of the Matrimonial Causes Rules, which lists those portions of the*
12 *Grand Court Rules applicable to matrimonial proceedings, implies by its*
13 *omission of any reference to O.62 that that order has no application in*
14 *matrimonial causes. However, O.1 r.2(1) and r.2(4)(a) of the Grand Court*
15 *Rules provides expressly that GCR O.62 does have application in matrimonial*
16 *causes."*

17

18 8. In ***G v. G*** Henderson J. highlights the inconsistency in r.22 of the Matrimonial
19 Causes Rules, which omits any reference to GCR O.62, and also the fact that GCR
20 O.1 r.2(1) and r.2(4)(a) expressly provide that O.62 does have application in
21 matrimonial causes. Henderson J. stated at paragraph 9 on 373:

22 *"This inconsistency need not be resolved on the present application because, as*
23 *the court said in **Gojkovic** (1), there must be some starting point for a cost*
24 *analysis and the most rational starting point is the rule that costs ordinarily*
25 *follow the event."*

26

27

1 9. Henderson J. went on to state at paragraph 10 of his Judgment in ***G v. G***:

2–5 *"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:*

6–9 *(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;*

10–11 *(b) ordinarily, it will be appropriate to award costs only where the assets are "substantial";*

12–14 *(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*

15–18 *(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."*

19

20–21 10. In ***G v. G*** Henderson J. dismissed Mr. G's the (Respondent's) application for indemnity of costs and ordered that each party was to bear their own costs.

22–26 11. In coming to his decision in ***G v. G*** Henderson J. applied the English Court of Appeal decision in ***Gojkovic v. Gojkovic*** (No.2) [1991] 3 W.L.R. 621, and in particular, the Judgment of the then President Lady Justice Butler-Sloss. For the purpose of this Judgment I deem it necessary to re-state what President Dame Elizabeth Butler-Sloss said at page 636 paragraph F:

27–34 *"It is incumbent on both parties to negotiate if possible and at least to make the attempt to settle a 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 v. McDonnell*** *[1977] 1 W.L.R. 34, 38, the* ***Calderbank*** *offer should influence but not govern the exercise of discretion...There are many reasons which may affect the court in considering costs, such as culpability in the conduct of the litigation: for*

1 *instance (as I have already indicated earlier) material non-disclosure of*
2 *documents. Delay or excessive zeal in seeking disclosure are other examples.*
3 *The absence of an offer or of a counter-offer may well be reflected in costs – or*
4 *an offer made too late to be effective. The need to use all the available money to*
5 *house the spouse and children of the family may also affect the exercise of the*
6 *court's discretion. It would, however, be inappropriate, and indeed unhelpful,*
7 *to seek to enumerate and possibly be thought to constrain in any way, that wide*
8 *exercise of discretion. But the starting point in a case where there has been an*
9 *offer is that, prima facie, if the applicant receives no more or less than the offer*
10 *made, she/he is at risk not only of not being awarded costs, but also of paying*
11 *the costs of the other party after communication of the offer and a reasonable*
12 *time to consider it. That seems clear from the decided cases and is in accord*
13 *with the Rules of the Supreme Court and the County Court Rules 1981*
14 *requiring the court to have regard to the offer. I cannot, for my part, see why*
15 *there is any difference in principle between the position of a party who fails to*
16 *obtain an order equal to the offer made and pays the costs, and a party who*
17 *fails by the offer to meet the award made by the court. In the latter case prima*
18 *facie costs should follow the event, as they would do in a payment into court,*
19 *with the proviso that other factors in the Family Division may alter that prima*
20 *facie position."*

21

22 12. The English Court of Appeal in ***Norris v. Norris: Haskins v. Haskins*** [2003]
23 EWCA Civ 1084, [2003] 2 FLR 1124 has reviewed the question of costs in
24 ancillary relief proceedings, which in England are governed by r.44.3 of the Civil
25 Procedure Rules ("CPR") and r.2.69 of the Family Proceedings (Miscellaneous
26 Amendments) Rules ("FPR") of 1999. Indeed, CPR 44.3(2)(a) reads:

27 *"If the court decides to make an order about costs –*

28 *(a) the general rule is that the unsuccessful party will be ordered to*
29 *pay the costs of the successful party;"*

30 *(b) the court may make a different order."*

31

32 This Court notes that in England the "general rule" at CPR 44.3(2)(a) is disapplied
33 in relation to family proceedings by FPR r.4(1)(b).

1 13. In ***Norris v. Norris: Haskins v. Haskins*** Lady Justice Butler-Sloss re-stated the

2 principles set out in ***Gojkovic*** and referred to Acting Mostyn J. (Actg.) Judgment in

3 ***GW v. RW*** (2003) EWHC 611 (Fam) where he stated at paragraph 85:

4 *"It is very easy to see why in an era where the wife's claim was perceived to be*
5 *against the husband's money for a sum necessary to meet her reasonable*
6 *requirements, costs should, prima facie, follow the event. Her position was*
7 *comparable to that of an ordinary civil claimant. It is much more difficult to*
8 *apply the analogy in the post-**White v. White** era where the court's function is*
9 *(per Thorpe LJ in **Cowan v Cowan** [2001] 2 FCR 331 at 70 Fam 97 at [70] to*
10 *determine the parties' "unascertained shares" in the pool of assets that is the*
11 *fruit of the marital partnership."*

12

13 14. Mostyn J. continued at paragraph 86:

14 *"In this case I have ascertained W's share in this pool to be 40% and H's*
15 *to be 60%. In such circumstances what is the event that the costs are*
16 *supposed to follow? It is an intellectual concept with which I find it hard*
17 *to grapple .....*

18 *This is a submission that is often made: "the wife has had to come to*
19 *court to get her money". But surely the husband has equally had to come*
20 *to court to get his? Each party has had to come to the Court to obtain an*
21 *order which fairly disposes of the issues between them."*

22

23 15. Lady Justice Butler-Sloss, again quoting from Mostyn J's Judgment in ***GW v. RW***

24 stated at paragraph 19:

25 *"At paragraphs 87 and 88, Mr. Mostyn noted further objections. The existing*
26 *procedures discriminate, he said, against husbands. Further, it forces parties to*
27 *engage in a form of "spread betting" by requiring them to guess the outcome of*
28 *the case and take a position accordingly, without making an award for those*
29 *who might guess better than others."*

30

31 16. Lady Justice Butler-Sloss noted Mostyn J.'s objections to the existing procedures

32 and then cited his conclusion at paragraph 20 of her Judgment:

> *"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 No 2 when due allowance is made for the seismic shift in the law since that decision was given. It reflects the terms of CPR 44.3(5). It also reflects the disapplication by FPR 10.27(1)(b) of the general rule within CPR 44.3(2) of the unsuccessful party paying the costs of the successful party."*

And further, at paragraph 93 of his judgment Mostyn J. stated:

> *"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."*

17. Lady Justice Butler-Sloss stated at paragraph 22 in ***Norris v. Norris: Haskins v. Haskins*** in referring to the argument of counsel for the husband regarding the starting point for costs:

> *"It was submitted that in light of the radical change in approach to the division of marital assets post-White, and in particular the 'yardstick of equality' approach, the proper starting point should now be that there should be no order as to costs."*

18. Lady Justice Butler-Sloss continued at paragraph 22:

> *"This was the approach of Mr. Mostyn in **GW v. RW**. It was also the approach of the Costs Sub-Committee of the President's Committee on Ancillary Relief in its Report ...which said at paragraph 4(b) "Family proceedings arise out of the breakdown of a marriage, which may be seen as a misfortune falling on both parties. The fact that the court has to assist the parties to re-adjust their finances should not of itself imply blame on the part of either party...As Mr. Mostyn Q.C. points out at para 86 of his judgment [in **GW v. RW**], it may often be that 'each party has had to come to the court to obtain an order which fairly disposes of the issues between them."*

19. Lady Justice Butler-Sloss referred at paragraph 30 in ***Norris v. Norris: Haskins v. Haskins*** to a letter from the senior Costs Judge dated the 27th January 2003 in which he stated:

> "*The purpose of this letter is to suggest that it may be worth giving serious thought to doing away with fee shifting in family proceedings. The Family Proceedings (Miscellaneous Amendment) Rules 1991 disapply CPR 44.3(2) (costs follow the event). It is therefore a relatively short step to providing that in family proceedings no order for costs will be made unless a particular party has behaved in such an unreasonable manner that the court feels that a sanction should be imposed. I would suggest that if this idea were to be adopted the court making such an order should decide what amount should be paid by way of costs there and then.*
>
> *The level of venom and 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 costs were never in issue the heat would be taken out of the situation far more quickly and any incentive to legal representatives to pursue remedies over vigorously in the hope of recovering greater costs would also disappear.*"

20. Lady Justice Butler-Sloss stated at paragraph 31:

> "*I am extremely grateful to the Senior Costs Judge for his timely warning as to the adverse effect of the costs assessment process on family financial litigation. His sensible proposals require urgent consideration and provide a spur to taking action to introduce a radical approach to costs in all ancillary relief or similar disputes.*"

21. Further guidance is also received from Lord Justice Thorpe in ***Norris v. Norris: Haskins v. Haskins*** who said at paragraph 61 that whilst he disagrees with the route Mr. Mostyn was taking regarding his analysis of the CPR and FPR in the United Kingdom he stated that he was:

> "*in complete agreement with the direction that Mr. Mostyn sought to take in his costs judgment in the case of* ***GW v. RW***."

1 Lord Justice Thorpe also expressly agreed with the letter of the 27th January 2003
2 from the Senior Costs Judge quoted at paragraph 19 above.

3 22. For whilst Henderson J's Judgment applies ***Gojkovic*** and, is in my view, the law to
4 be applied to this case, it is worthy of note that distinguished family judges such as
5 Lady Butler-Sloss, Lord Justice Thorpe, and now Mostyn J., are urging a re-think of
6 this issue. What these family judges favour is a new starting point of no order for
7 costs, because each party has had to come to court to obtain an order which fairly
8 disposes of the issues between them. As stated above, this starting point can always
9 be departed from where unreasonableness by one or other party is demonstrated.

10 23. I turn now to ***DLF v. DKF***. I reject the Petitioner's submission that she should be
11 entitled to indemnity costs because the Respondent was of the view that certain
12 properties were "non-matrimonial" which the Petitioner considered to be
13 "matrimonial properties." The properties that the Respondent claimed were non-
14 matrimonial were gifts from his family. Consequently, I do not find that it was an
15 unreasonable view for the Respondent to take and further, I find that he was quite
16 entitled to make the not unreasonable submissions he made in support of his case.

17 24. I accept the Respondent's submissions that both parties made just and forcible
18 arguments before the Court, and that neither of the parties to the proceedings was
19 entirely successful.

20 25. In my Judgment each party succeeded in relation to different issues, in that the
21 Petitioner succeeded in her argument that all the property was matrimonial
22 property, whereas the Respondent succeeded in his argument that the parties should
23 bear the educational costs of the children of the marriage equally. Accordingly,
24 each of the parties succeeded in relation to different ancillary issues, and neither of

the parties succeeded in "beating" any offer, whether open or without prejudice. In addition, I find that the matrimonial assets exceed the aggregate of the parties' needs.

26. As Henderson J stated in ***G v. G***, the discretion of the Family Court regarding costs is "far wider" than in other types of civil proceedings.

From my review of the conduct of the parties, both, in their affidavits and at the hearing before me in May, I do not find that either behaved in an unreasonable or obstinate manner. There was no unreasonable pursuit of any particular issue, nor did I find either party guilty of any unnecessary tactical posture.

27. As set out in paragraph 18 above, the fact that the Court has had to assist the parties to re-adjust their financial positions should not, of itself, imply blame on the part of either party. I am of the view that my Judgment dated the 21st May 2010 meets the "yardstick of equality" approach and disposes of the issues between the parties.

28. Consequently, and for the aforesaid reasons I make no Order as to costs.

29. The Family Division of the Grand Court of the Cayman Islands has been subject to a marked increase in divorce cases coming before the Court. The vast majority of these cases relate to financial relief and the maintenance for spouses and the children of the marriage. Consequently, the question of assessing costs on family financial litigation is a constant and difficult issue.

1 30. The Matrimonial Causes Law was enacted in 1976 and the Matrimonial Causes
2 Rules were laid down in 1986. I would suggest, with respect, that these laws, and
3 the question of the costs assessment process on family financial litigation, be
4 referred by the Attorney General to the Law Reform Commission for its attention
5 and review.

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7 **Dated this the 18th October 2011**

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11 **Honourable Mr. Justice Charles Quin**
12 **Judge of the Grand Court of the Cayman Islands**