Alan John Norris v Penelope Catherine Norris : Warren George Haskins v Lesley Erica Haskins

CA on appeal from High Court Family Division ((1) The Hon Mr Justice Bennett (2) Mr Bruce Blair QC Sitting as a Deputy High Court Judge) before The President; Thorpe LJ; Mantell LJ. 28th July 2003.

JUDGMENT : Dame Elizabeth Butler-Sloss P. :

1. The two cases before this Court raise similar issues of general importance, that is to say, the correct approach of the court to the treatment of costs in family financial disputes. One feature relevant to both the cases is that they come within the bracket sometimes described as big money cases. The main issue raised is the proper approach of the court to the making of confidential offers and counter-offers by the parties which are then disclosed to the judge after he/she has made an award in an ancillary relief application, otherwise called 'the ***Calderbank*** offers'.

2. On 11th April 2003 Mr Norris sought permission to appeal and a long extension of time from the order of Bennett J made on the 28th November 2002. On that day Bennett J ordered Mr Norris to pay 80% of the costs of Mrs Norris. Thorpe LJ directed an oral hearing on notice with the appeal to follow if permission and extension of time were granted. On 3rd June 2003 on the application for permission to appeal by Mr Haskins, made within the required time, Thorpe LJ directed an oral hearing on notice with appeal to follow if permission was granted. In that case Mr Bruce Blair QC, sitting as a deputy High Court judge, ordered Mr Haskins to pay 85% of the costs of Mrs Haskins.

The background to costs orders

3. The ***Calderbank*** doctrine is by now well-known. The case from which it takes its name was decided by this court in 1975, and whilst the views in that case may have been *obiter*, they were soon adopted as the established procedure in matrimonial financial claims (see ***McDonnell*** [1977] 1 WLR 34).

4. In ***Cutts v Head*** [1984] Ch 290, this court reviewed the ***Calderbank*** procedures, and decided that they should be applied more generally to civil litigation. Two years later the ***Calderbank*** principle was formally written into the Rules of the Supreme Court by the introduction of Order 22, rule 14 and Order 62, rule 9.

5. Following the civil procedure reforms and the introduction of the Civil Procedure Rules, RSC Order 62 and CCR Order 38 were replaced in relation to family proceedings by Parts 43, 44, 47 and 48 (with some exceptions) of the CPR: Family Proceedings (Miscellaneous Amendments) Rules 1999 (SI 1999/1012).

6. The relevant part of CPR Part 44 reads as follows *"44.3 Court's discretion and circumstances to be taken into account when exercising its discretion as to costs*

(1) The court has discretion as to –

(a) whether costs are payable by one party to another;

(b) the amount of those costs; and

(c) when they are to be paid.

(2) If the court decides to make an order about costs –

(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but

(b) the court may make a different order.

(3) The general rule does not apply to the following proceedings –

(a) proceedings in the Court of Appeal on an application or appeal made in connection with proceedings in the Family Division; or

(b) proceedings in the Court of Appeal from a judgment, direction, decision or order given or made in probate proceedings or family proceedings.

(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including –

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and

(c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Part 36).

(Part 36 contains further provisions about how the court's discretion is to be exercised where a payment into court or an offer to settle is made under that Part)

(5) The conduct of the parties includes –

(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed any relevant pre-action protocol;

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended his case or a particular allegation or issue; and

(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.

(6) 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 from or until a certain date, including a date before judgment.

(7) Where the court would otherwise consider making an order under paragraph (6)(f), it must instead, if practicable, make an order under paragraph (6)(a) or (c)."

7. The 'general rule' at sub-rule (2)(a) is also disapplied in relation to family proceedings by the Family Proceedings (Miscellaneous Amendments) Rules 1999, r 4(1)(b).

8. In ***Butcher v Wolfe and Another*** [1999] 2FCR 165, this Court reviewed the working of the ***Calderbank*** procedure. Although the decision was given before the introduction of the Civil Procedure Rules, Mummery LJ in his judgment helpfully set out at pages 170-171 nine propositions, which included under proposition (6) *"The court has an overall broad judicial discretion on costs."*

9. The issue in that case was the reasonableness or otherwise of the refusal to accept the offer and the question of a counter-offer did not arise. The principle of broad overall judicial discretion is underlined in CPR Part 44.

Family Proceedings - *Gojkovic v Gojkovic*

10. We have been told by counsel in the two appeals that the approach to the award of costs in ancillary relief cases, where ***Calderbank*** offers have been made, has been dominated by the decision of this court in ***Gojkovic v Gojkovic (No 2)*** [1992] Fam 54 and less attention, it appears, has been paid to the Family Proceedings Rules as amended by SI 1999/3491 and the judicial exercise of discretion provided by rules 2.69B and 2.69D (see below).

11. It is of some importance to know the facts of ***Gojkovic v Gojkovic (No 1)*** **[**1992] Fam 40 and the principles governing the orders for financial relief for wives in 'big money cases' in 1991. The husband in that case had not made full and frank disclosure of his assets which amounted to £4 million not £1 million to which he originally deposed. The final ***Calderbank*** offer of £600,000 was made on the 17th January, only the day before the substantive hearing. On the same day the offer was rejected and the husband was informed that the wife was asking for £1 million. The judge awarded the wife a lump sum of £1 million. This was, for those days, a very high award to a wife. The appeal against the award was dismissed by this Court.

12. The judge made no order as to costs after the 6th January, the date when the wife's solicitors had rejected an earlier, lower, offer by the husband and had suggested a meeting to try to settle the matter. The judge held that from the 6th January, both sides had acted reasonably. The wife appealed. A major issue in ***Gojkovic (No 2)*** was the absence of a counter-offer by the wife. In my judgment I set out the general principles then applicable to High Court civil proceedings. I said at page 271 *"However, in the Family Division there still remains the necessity for some starting point. That starting point, in my judgment, is that costs prima facie follow the event (see Cumming-Bruce LJ in* ***Singer (formerly Sharegin) v Sharegin*** *[1984] FLR 114 at 119) but may be displaced much more easily than, and in circumstances which would not apply, in other divisions of the High Court. One important example is, as the judge pointed out, that it is*

Alternative Dispute Resolution Law Reports. Typeset by NADR. Crown Copyright reserved.

unusual to order costs in children cases. In applications for financial relief the applicant (usually the wife) has to make the application in order to obtain an order. If the financial dispute can be resolved it is usual, and normally in the interests of both parties, that the applicant should obtain an order by consent; and if money is available and in the absence of special circumstances, such an agreement would usually include the applicant's costs of the application. If the application is contested and the applicant succeeds, in practice in the divorce registries around the country where most ancillary relief applications are tried, if there is money available and no special factors, the applicant spouse is prima facie entitled to, and likely to obtain, an order for costs against the respondent. 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.

There is, however, a minority of cases, of which the present appeal is an example, where the assets are substantial and an order for costs can (if appropriate) be made."

13. I then set out the practice in the Rules of the Supreme Court and said at 272 *"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 Ord 62, r 9 (and the equivalent CCR Ord 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 an 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 LJ said **in McDonnell v McDonnell** [1977] 1 All ER 766 at 770, [1977] 1 WLR 34 at 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 instance (as I have already indicated earlier) material non-disclosure of documents. Delay or excessive zeal in seeking disclosure are other examples. The absence of an offer or of a counter-offer may well be reflected in costs, or an offer made too late to be effective. The need to use all the available money to house the spouse and children of the family may also affect the exercise of the court's discretion. It would, however, be inappropriate, and indeed unhelpful, to seek to enumerate and possibly be thought to constrain in any way that wide exercise of discretion. 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 into court, with the proviso that other factors in the Family Division may alter that prima facie position."

14. The position of the parties in ***Gojkovic (No 2)*** is, I assume, fairly unusual in that the husband's inadequate offer was made very late and the wife genuinely had no opportunity to make a counter-offer. If that situation is remembered, and my emphasis upon the importance of negotiation by both parties and real efforts by both parties to settle the case, my judgment may be read somewhat differently. My observation that there was no difference in principle between the failure of the payer in family cases to meet the sum awarded by the court and the failure to reach the payment into court in civil proceedings is to be seen as applicable to the ***Gojkovic (No 2)*** situation of only one offer and no opportunity for a counter-offer. I am somewhat dismayed to learn that it may have been taken far more broadly by the legal advisers, thereby ignoring the significant importance of the need for a counter-offer and for genuine negotiation by both parties. As I said, in the passage set out above, the starting point is the offer by the paying party but the absence of a counter-offer may well be reflected in costs.

Family Proceedings Rules 1991

15. The decision in ***Gojkovic (No 2)*** was followed by the introduction of the ***Calderbank*** procedure into the Family Proceedings Rules 1991, with a new rule 2.69 coming into effect on 5th October 1992. Rule 2.69 was wholly rewritten by the Family Proceedings (Amendment No. 2) Rules 1999 (SI 1999/3491). The relevant provisions of rule 2.69, as amended, now read as follows:

> *"**2.69 Offers to settle***
> *(1) Either party to the application may at any time make a written offer to the other party which is expressed to be "without prejudice except as to costs" and which relates to any issue in the proceedings relating to the application.*
> *(2) Where an offer is made under paragraph (1), the fact that such an offer has been made shall not be communicated to the court, except in accordance with rule 2.61E(3), until the question of costs falls to be decided.*
>
> ***2.69B Judgment or order more advantageous than an offer made by the other party***
> *(1) This rule applies where the judgment or order in favour of the applicant or respondent is more advantageous to him than an offer made under rule 2.69(1) by the other party.*
> *(2)*
> *The court must, unless it considers it unjust to do so, order that other party to pay any costs incurred after the date beginning 28 days after the offer was made.*
>
> *2.69C (revoked)*
>
> ***2.69D Factors for court's consideration under rules 2.69B***
> *(1) In considering whether it would be unjust, or whether it would be just, to make the order referred to in rule 2.69B, the court must take into account all the circumstances of the case, including—*
> *(a) the terms of any offers made under rule 2.69(1);*
> *(b) the stage in the proceedings when any offer was made;*
> *(c) the information available to the parties at the time when the offer was made;*
> *(d) the conduct of the parties with regard to the giving or refusing to give information for the purposes of enabling the offer to be made or evaluated; and*
> *(e) the respective means of the parties."*

16. Whatever may have been understood by the profession from my judgment in *Gojkovic (No 2)* it has been overtaken by and has to be read in the light of the 1991 Rules as amended. Rule 2.69C, which attempted to deal with the situation where both offers and counter-offers have been made, was originally inserted along with the above-cited rules. That rule was subsequently revoked by the Family Proceedings (Amendment) Rules 2003 (SI 2003/184) with effect from February this year, and its demise has left rule 2.69B appearing to deal with *an* offer and not with *offers*.

17. It appears that in some cases where rule 2.69B has been considered by the court or by Counsel, the only offer considered has been that of the payer. This construction of rule 2.69B is at the heart of the criticism made by Mr Mostyn QC, sitting as a Deputy High Court judge, in ***GW v RW*** [2003] EWHC 611 (Fam); [2003] 2 FCR 289. He said at paragraph 83 *"Thus we are left only with r 2.69B which appears to contemplate the position where one party alone has made **a Calderbank** offer. Where the position is (as here) that each party* has made such an offer, the rule becomes unworkable. I agree with Mr Marks' submission that: ***'The surviving r 2.69B is incomprehensible. It is impossible to divine what the draftsman had in mind. Very often in a case such as this the order ends up between the offers—in which case, under the rule, both parties pay "the costs".'"***

18. Mr Mostyn in his judgment then went on to set out his objections in principle to the general rule that costs should follow the event.

> *"85. It is very easy to see why in an era where the wife's claim was perceived to be **against the husband's money** for a sum necessary to meet her reasonable requirements, costs should, prima facie, follow the event. Her position was comparable to that of an ordinary civil claimant. It is much more difficult to apply the analogy in the post-White v White era where the court's function is (per Thorpe LJ in **Cowan v Cowan** [2001] 2 FCR 331 at [70], [2002] Fam 97 at [70]) to determine the parties 'unascertained shares' in the pool of assets that is the fruit of the marital partnership.*

*86. In this case I have ascertained W's share in this pool to be 40% and H's to be 60%. In such circumstances what is the event that the costs are supposed to follow? It is an intellectual concept with which I find it hard to grapple. … This is a submission that is often made: '**… the wife has had to come to court to get her money.**' But surely the husband has equally had to come to court to get his? Each party has had to come to the court to obtain an order which fairly disposes of the issues between them."*

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

20. Having set out the objections to the existing procedures, he concluded

*"92. In my judgment, a safer starting point nowadays in a big money case, where the assets exceed the aggregate of the parties' needs, is that there should be no order as to costs. That starting point should be readily departed from where unreasonableness by one or other party is demonstrated. This approach is I believe consistent with the spirit of the judgment of Butler-Sloss LJ in **Gojkovic v Gojkovic** when due allowance is made for the seismic shift in the law since that decision was given. It reflects the terms of CPR 44.3(5). It also reflects the disapplication by r 10.27(1)(b) of the 1991 rules of the general rule within CPR 44.3(2) of the unsuccessful party paying the costs of the successful party.*

93. It may also reduce the extent of satellite costs assessment litigation, which itself can be protracted and acrimonious, and which prolongs the agony between the parties."

21. I recognise the difficulties which arise and which have been so trenchantly expressed by Mr Mostyn as set out above. The removal of rule 2.69C increases the awkwardness of the language of rule 2.69B and has presented problems. It does not, however, make that rule incomprehensible. In any event it is not for judges to deem a rule or a section of an Act of Parliament incomprehensible or unworkable. If passed by Parliament, whether it be primary or secondary legislation, it is the duty of the court to do its best to make sense of it. Judges do not have the right to dump the awkward passage wholesale. In my judgment, therefore, Mr Mostyn QC in his judgment in *GW v RW* (above) was wrong to treat the rule as incomprehensible and to substitute his own approach by making a decision which was not based on the existing rules.

22. Mr Le Grice QC, for Mr Haskins, made submissions to the effect that since the decisions in ***White v White*** [2001] 1 AC 596 and ***Lambert v Lambert*** [2002] EWCA Civ 1685, the traditional approach to the award of costs required to be changed in order to do justice between the parties. He referred to the court's move away from the concept of 'reasonable requirements' in the division of family assets, a concept which Mr Mostyn in *GW v RW* (above) said, at paragraph 84, had now been "comprehensively condemned as discriminatory". 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. 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 (see below), 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 QC 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.**"*

23. The court is, nonetheless, obliged to apply the rules unless or until they are amended. Rule 2.69, as amended, provides the current code on ***Calderbank*** offers to be followed until any further rule changes are made. Sub-rules 2.69(1) and (2) give statutory authority to the ***Calderbank*** practice in ancillary relief proceedings. The starting point in rule 2.69B is whether the offerer offers more or less than the court order. If less, he/she will pay the costs incurred after 28 days after the offer was made, unless the court considers it would be unjust to do so.

24. Rule 2.69D and its effect on rule 2.69B merit closer consideration. In rule 2.69D the court must take into account all the circumstances of the case including the list set out therein. This includes, in (a), the terms of any offers. That must include counter-offers. It also requires, in (e), the court to take into account the respective means of the parties. In my view, (e) enables the court to look at the whole position of the parties after the order has been made and see whether costs may fall disproportionately on one party rather than the other. It may enable a judge or district judge to mitigate, to some extent, the uncomfortable consequences of a ***Calderbank*** situation in a case where there is some but not a substantial amount of property and/or money to divide and costs will have to be paid from the available capital. The judge, in such a case, may make an order, often just enough to buy a suitable property for the wife, and then find that effect of the ***Calderbank*** offers may totally destabilise his order. Equally, of course, the ***Calderbank*** process must have teeth which can bite. Both parties are under an obligation to engage in genuine negotiation with the other side, otherwise one party may have to be penalised in costs. In medium asset cases I do not underestimate the difficulties. Rule 2.69D does however give the court a greater latitude in making costs orders than may so far have been widely recognised.

25. In my judgment, therefore, rules 2.69B and 2.69D can be managed and, where the court considers it unjust to apply rule 2.69B, it can make a different costs order to reflect the justice of the case. Mr Pointer QC, in his thoughtful and comprehensive skeleton argument, sets out in a bar chart a series of permutations arising from a court order to a wife of £1 million. I take one hypothetical situation. If a husband offers £800,000 and the wife asks for £1,200,000, neither has achieved the figure of the order and each is wide of the mark by the same amount. In broadly comparable situations, not tied to exact percentages since each case must be decided on its own facts, the result might be termed, as Mr Cusworth for Mr Norris suggested, a draw. In my view, in some offer and counter-offer cases, the proper approach might well be, under the present procedure, to make no order as to costs and leave each party to pay his/her own costs.

26. A complication in sub-rule 2.69B(2) is that the order for costs dates from 28 days after the (relevant) offer was made. Neither judge in the two cases before us had his attention drawn to that part of the sub-rule. It seems to me, however, that the costs prior to the relevant offer are to be dealt with in the exercise of the court's discretion.

27. The current procedure on costs in family financial disputes is regulated by the two statutory codes, the CPR and the FPR, each of which gives the judge or district judge a broad judicial discretion. I have had the opportunity of reading the judgment of Thorpe LJ in this case, and would respectfully agree with paragraph 61 of his judgment in which he says that the harmonious integration of the separate codes is to be best achieved by treating CPR 44.3 as covering all cases. The exercise which the court undertakes under CPR 44.3(4) requires consideration of all the circumstances, including the parties' respective conduct and success and, under subsection (4)(c), any offers made. In so far as the court is looking at a ***Calderbank*** type case, the exercise under subsection (4)(c) is better dealt with under the fuller provisions to be found in FPR rules 2.69, 2.69B and 2.69D. Reading the two sets of rules together, the court has a general and wide discretion to depart from the starting point of 'winner takes all'.

28. The difficulties which undoubtedly arise from rule 2.69, set out by Mr Mostyn with clarity in his judgment in *GW v RW*, do now urgently require a rethink and it is time for further amendments to the rules governing awards of costs in ancillary relief cases. The present rules may affect disproportionately the payers in big money cases. The effect of costs is however to be felt across all ancillary relief claims. Although I have criticised Mr Mostyn for the cavalier way in which he dismissed the Family Proceedings Rules, his approach to the reconsideration of costs requires careful thought, and I agree with the overall direction of his judgment for the future.

29. The Costs Sub-Committee of the President's Committee on Ancillary Relief, to which I refer above, under the chairmanship of Bodey J, recently reported to the Main Committee. We have been provided with a copy of the Report. It makes a series of excellent suggestions, many of a radical nature, which would meet the current requirements in relation to costs in family financial disputes. I agree with

them and endorse them. I hope time may be found to bring them into effect by amendments to the Family Proceedings Rules in the near future.

30. My view that the present approach of the courts in family financial matters needs reconsideration is reinforced by a letter I received from the Senior Costs Judge on the 27th January 2003 in which he said *"As you know we took over the assessment of costs in family proceedings comparatively recently. Large numbers of bills are payable out of the CLS Fund and, because of the rigorous funding regime, are comparatively modest. Where a party obtains an order that the costs be paid by the other spouse (usually the husband) any costs recovered go to reduce the statutory charge on property recovered or preserved (usually a share of the matrimonial home). In such cases solicitors have a vested interest in maximising the costs recoverable from a paying party because those costs are recoverable at commercial rates. The effect of this is twofold, the detailed assessment proceedings are very hard fought, and, perhaps more importantly, the underlying family proceedings may be pursued with unnecessary extra vigour to ensure an adequate return for the legal representatives.*

Whereas in non-family civil proceedings the resolution of the substantive dispute frequently takes the heat out of any animosity between the parties, and enables settlement of the costs to be achieved in a significant number of cases, in family proceedings that animosity, which is in any event likely to be at a very high level, continues unabated during the assessment proceedings. The successful spouse on one side vows to bleed the other dry of every penny if at all possible, whilst the paying spouse goes out of his or her way to deny the other the possibility of any recovery. The number of settlements in assessments arising out of family proceedings is very low. This in turn means that the assessment hearings themselves last for longer than similar assessments in non family proceedings. Where a party is LSC funded the cost of the assessment proceedings is not added to the statutory charge and is therefore borne by the CLS Fund…….

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 in detailed assessment in family proceedings is such that I am firmly of the view that the removal of costs as an area of conflict would have an overall beneficial effect. If 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."

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.

32. I turn now to the individual cases before this Court, and shall deal first with the issues which arise in the Haskins case in which we give permission to appeal.

Haskins v Haskins

33. The wife's application for ancillary relief is based on a 23 year marriage which endured from 1973 until 1996, the year after their separation. There are three children of the marriage, two boys of 23 and 20 and a girl of 19. One son has learning difficulties and both sons have health problems. The husband is 54 and the wife is 51. The wife had some inherited assets of her own. The husband runs a family nurseryman business started by his great grandfather in 1882. The arrangements for the family business, set out with clarity and in detail by the deputy High Court judge were extremely complicated. A separate business, selling arts and crafts and hobby materials, was set up. There were very considerable borrowings from the bank and cross guarantees.

34. The husband had set up a family trust for the benefit of the 3 children and transferred a considerable number of shares in his companies to the trust. He was one of the trustees and resigned from the trust as a result of the divorce proceedings. Any arrangements which affected the shares of his companies

required the approval of the trustees who were acting at arm's length from the husband. The husband also had a valuable pension fund.

35. The ancillary relief applications were litigated over a period of about 4 to 5 years. As a result of the problems of the two sons, the wife had been reluctant to move from the former matrimonial home which the parties eventually agreed should be transferred to her and should be sold in due course. One important factor was the apparent lack of liquidity with which to provide a fair proportion of the family assets to the wife. There was complicated and disputed evidence of valuations of the relevant shareholdings and as to liquidity.

36. The detailed order of the deputy High Court judge on the 11th March 2003, inter alia, awarded the wife a lump sum of £1,230,000 to be paid in instalments and transferred a number of shares in the Hobbycraft company upon which no value was set. It is not necessary to set out other parts of the order.

37. After his decision Mr Blair QC was shown the lengthy *Calderbank* correspondence. He gave a careful but extempore judgment on the issue of costs in which he said at paragraph 3 *"A stark fact which immediately jumps from the relevant documentation is that, in comparison with the order which actually I am going to make today and which is flagged in the main judgment, the husband has never made a sufficient offer at any stage; and that proposition applies by a wide, not a narrow, margin. So, pursuant to conventional, one could almost say axiomatic, principle (and I have in mind in particular such decisions as* ***Gojkovic v Gojkovic (No 2))*** *the husband being offeror, the wife offeree, and his offers in their entirety being well short of that which has been ordered, the wife is entitled in justice to her costs."*

38. Although Mr Blair QC appeared in that paragraph to be concentrating entirely on the offers made by the husband, as one reads further it is clear that, as he said at the beginning of the next paragraph *"It does not end there. Other points are made and need to be addressed. "*

39. He considered the stages of the offers made by the husband and was critical of the failure of the husband to find a way round the liquidity problem until a late stage. The deputy High Court judge held that a core feature of the saga was the failure to pursue the potential unlocking of liquidity as he should have done. That failure and the inadequacy of all the earlier offers led him to the conclusion that, in broad principle, the husband should pay the wife's costs. He then considered the factors adverse to the wife and concluded that *"… it was culpable of the wife not to seek to negotiate whilst accepting the point, as I say, that probably the dialogue would not have borne fruit had she done so."*

40. He made findings of fact as to the respective positions of the parties and their relative culpability. He looked at the whole of the circumstances and the wife's stance towards the husband. Mr Blair's conclusion was *" It is a question, obviously, of overview, taking the litigation as a whole over its several years, looking at the structure of this hearing; how it arose that it went forward to, not just one sitting in November 2001, but actually four hearings in all before this one, the second in March 2002, the third in October 2002 and a short one in January 2003; whether the husband is entirely responsible for that; whether there is some degree of (so to speak) common misfortune in terms of misestimate; whether it might have been different, in terms any rate of the costs being something less than they have proven to be, if the wife's evidence on liquidity in the autumn of 2001 had been presented earlier, as it should have been. I certainly do not propose to apportion arithmetical percentages as between these factors. I take an overview. It is clear to me the husband must pay the vast majority of the wife's costs. I do not propose to express a result which confers upon him the responsibility to pay the whole costs in respect of a given period and less than the whole costs in respect of some other period. In my estimation he should pay 85% of the wife's costs and all of those costs are to be assessed on the standard basis, if not agreed."*

41. Mr Le Grice QC, for Mr Haskins, submitted that the deputy High Court judge misdirected himself in failing to follow the approach subsequently adopted by Mr Mostyn in ***GW v RW*** and Mr Mostyn's consideration of the cases since *White v White.* He pointed out that the wife had failed to enter into negotiations until a late stage and that the husband was unable to make an effective offer until the problem over liquidity had been resolved. He accepted however that the wife had, shortly before the

resumed hearing in November, made a final counter-offer which was extremely close to the final lump sum order.

42. Looking broadly at the justice of the case and the careful approach of the deputy High Court judge, in my judgment he did not fail to apply the relevant rules nor err in principle on the assessment of costs. He exercised his discretion and made a careful decision on costs. There are, in my view, no grounds upon which this Court would be entitled to interfere with that exercise of discretion nor to substitute our views for those of the trial judge in the circumstances of this case.

43. I would dismiss Mr Haskins' appeal.

Norris v Norris

44. The couple met when he was 30 and she was 19. They married in 1975 and parted in 1998, also a marriage of 23 years. There is one son aged 20. The decree absolute was granted in April 2002. The husband is living with a partner by whom he has two young children. The assets of the wife were roughly £3.6+ million. The assets of the husband were about £3.3 million without adding his pension fund, or £4.1million including his pension fund.

45. The judge found that there was a difference between the assets of the parties of about £720,000 and awarded the wife a lump sum of £360,000. He was then shown the *Calderbank* correspondence between the solicitors for the parties.

46. Mr Scott QC, then appearing on behalf of Mrs Norris, referred the judge to FPR rules 2.69B, 2.69C (then in force) and 2.69D and made the simple submission that the order of the judge had comfortably beaten the *Calderbank* offer. Mr Mostyn QC for the husband made submissions which set out in summary the main points in his later judgment in ***GW v RW***. The judge said *"I am with you (Mr Scott) on Mr Mostyn's first point, but I am against you on the second point to some extent. The wife will have her costs on the standard basis, but she will only receive 80 per cent of her standard costs to reflect the fact that she lost on a major issue."*

47. The position of Mr Norris is entirely different from that of Mr Haskins. The substantive hearing was completed on the 28th November 2002 and the costs order immediately followed the judgment. Mr Norris did not ask Bennett J for permission to appeal. He had 14 days from judgment within which to apply to the Court of Appeal for permission to appeal, see CPR 52.4(2)(b). His application for permission to appeal was made on the 2nd April 2003, some four months after the hearing and over three months out of time. It was therefore necessary for him to apply for an extension of time in accordance with CPR 52.6. On applications for extension of time, this Court must take into account CPR 3.9 which sets out the factors to be taken into account in considering whether to grant relief from sanctions. Those include whether the application for relief was made promptly, to which the answer is no; whether the failure to comply was intentional – yes; whether there is a good explanation for the failure – I shall turn to that in a moment; and the effect on each party - in this case a great deal of money is involved in the costs which have mounted over the hearings. The effect upon the former wife as well as the former husband would be very considerable indeed.

48. Generally the interests of the administration of justice are best met by applying the overriding objective, by hearing cases expeditiously and fairly and by bringing about an end to litigation. Mr Cusworth, in carefully argued submissions to us, pointed out that the effect of the mounting costs on both sides would be to generate continuing litigation over the assessment of the parties' costs before the costs judge. Consequently he argued, it was not possible to draw a line under the proceedings and bring them to a close. The difficulty with that submission is that, if the judge misdirected himself on the issue of costs, the opportunity was there to challenge it at the hearing or to seek permission to appeal shortly thereafter. Mr Mostyn, leading Mr Cusworth, argued shortly to Bennett J the points he later elaborated in his judgment in ***GW v RW.*** It was not suggested that Mr Norris received bad advice from his team of lawyers, among the most experienced in the country, and it strains credulity to imagine that Mr Norris did not seek or receive advice as to whether to take the issue of costs further.

49. The main reason, and indeed the only reason, for the delay in excess of 3 months in filing the application was put as attractively as it could be by Mr Cusworth. But his advocacy could not disguise its lack of merit. Stated shortly, in November 2002, there had been no reported challenge to the traditional approach to costs orders in ***Calderbank*** cases as discerned from my judgment in *Gojkovic (No 2).* There was no basis, in the view of Mr Norris' legal team, upon which to mount an application for permission to appeal and, presumably, Mr Norris did not wish to be a trailblazer. However, when Mr Mostyn, wearing his judicial hat, decided ***GW v RW*** in March 2003, from whose decision Mrs GW appealed, although the appeal was later withdrawn, there was then a peg upon which to hang an appeal by Mr Norris and the application was made for permission and for an extension of time. The flaw in the argument is however that the issue was the same in November 2002 as it was in April 2003. The issue was identified in November 2002. The decision not to appeal was clearly intentional in December when time for permission to appeal expired. There is no excuse for the late application other than the controversial decision in ***GW v RW***.

50. The interests of the administration of justice require the Court not to be unjust to either spouse. To set aside the order for costs would have a considerable effect upon the wife. For the reasons I have set out above, the hurdles that require to be surmounted by the husband to demonstrate a greater injustice to him than to the wife are, in my view, insurmountable.

51. I would refuse the application by Mr Norris for permission to appeal and for an extension of time.

Lord Justice Thorpe:

52. I have had the advantage of reading in draft the judgment of the President. I agree the results that she proposes and her reasons. I add a brief judgment of my own given the fact that over the course of more than a decade I have chaired what was the Lord Chancellor's Ancillary Relief Advisory Group and what is now the President's Ancillary Relief Working Group.

53. The early work of the group was conducted against the background of Family Proceedings Rule 2.69 which with effect from 5 October 1992 applied CCR Order 11 Rule 10 to ancillary relief proceedings. That was of course a specific provision in relation to Calderbank proposals and the more general field was governed by complex provisions in the Rules of the Supreme Court, the County Court Rules and Family Proceedings Costs Rules. In April 1997 rules to introduce the procedural innovations to be operated in specified courts (the pilot scheme) included provisions as to cost estimates and open offers.

54. On 26 April 1999 CPR 44.3 was applied to family proceedings with the exception of sub-rule (2) which was specifically disapplied. This innovation replaced earlier complexity and was broadly welcomed as a simplification. By this time the Ancillary Relief Working Group were collaborating with the Lord Chancellor's Department in preparation for the extension of the pilot scheme throughout the jurisdiction. There was much discussion within the group as to how Rule 2.69 should be extended to codify best practice in negotiation through the medium of Calderbank correspondence. Ultimately the extension emerged as FPR 2.69A-E with effect from 5 June 2000.

55. This innovation was not well received and did not stand up to hard wear and tear. In preparation for a meeting of the group on 24 October 2001 Nicholas Mostyn QC submitted a detailed critique which can be summarised in this quotation: *"I do not believe these rules say what we intended them to say."*

56. At the meeting he suggested that the time had come to adopt an assumption that legal costs should lie where they fall throughout family proceedings.

57. At the next meeting of the working group on 24 April 2002 FPR 2.69A-E was further discussed and it was agreed that the Family Law Bar Association and the Solicitors Family Law Association representatives should work together on the developing problem.

58. This initiative was developed at the next meeting on 7 November 2002 by the creation of a sub-committee to look into the question of costs in ancillary relief proceedings generally and whether the assumption of no order which applied in Children Act proceedings should not be adopted in ancillary relief proceedings.

59. At the first meeting of the sub-committee under the chairmanship of Bodey J on 25 November 2002 a recommendation was advanced to the Lord Chancellor's Department to delete 2.69C as an immediate measure, given that the majority of the criticism from practitioners and judges had focussed on the difficulty of construing and applying that rule. The recommendation was implemented by SI 2003 No 184 with effect from 24 February 2003. In the interim the President had received the very significant letter from the Senior Costs Judge alerting her to the unacceptable level of contention generated by the assessment of costs incurred in ancillary relief proceedings.

60. Mr Mostyn's decision in ***GW v RW*** was made available on 18 March 2003 and considered at the second meeting of the sub-committee on 26 March. Their concluded recommendations were completed at the end of April and adopted at the meeting of PARAG on 14 May 2003. That is a brief overview of the work of the group in this area.

61. Whilst I am in complete agreement with the direction that Mr Mostyn sought to take in his costs judgment in the case of ***GW v RW*** I cannot agree his route. As a matter of principle the determination of any question of costs in ancillary relief proceedings must be governed by CPR 44.3 together with FPR 2.69 in its current form, namely 2.69, 2.69B and 2.69D. The harmonious integration of these separate codes is in my judgment best achieved by treating CPR 44.3 as covering all cases. If in a specific case no Calderbank offer has been written then the judge will apply CPR 44.3 without more. In a case in which a Calderbank offer or offers are relied upon then I consider that the judge should apply CPR 44.3 notionally inserting into the exercise FPR 2.69 in substitution for CPR 44.3(4)(c).

62. Thus I do not consider that Mr Mostyn was right to reject the Rules as being incomprehensible or unworkable and develop from a clean sheet a new code. The courts must continue to determine costs applications in accordance with the Rules. However within the broad discretion that the Rules confer the judge is of course entitled to give due weight to the general evolution signalled by Mr Mostyn's decision in *GW v RW* and the report of the sub-committee.

63. What then is the rationale for change? First, as these appeals illustrate, paragraphs 2.69(B) and (D) are difficult to construe and apply to any case in which there has been a progressive ***Calderbank*** negotiation with the exchange of several offers and several counter offers. Those rules were drafted at a time when the predominant culture endured that if the judge's award clearly exceeded the husband's best ***Calderbank*** offer then he paid the costs. Of course in the aftermath of this court's decision in ***Gojkovic (No. 2)*** [1992] Fam 54 the obligation on the applicant to counter offer in response to an unacceptable ***Calderbank*** offer was plainly established. However that did not impact much on the culture. That was perhaps understandable throughout a time in which the applicant's award in substantial cases was calculated by reference to her reasonable requirements. If the husband's ***Calderbank*** proposal had not sufficiently recognised her reasonable requirements then he should pay her costs even if the wife had put her case higher than the judge's assessment. Of course the culture encouraged the husband to put forward generous proposals, the more so if he perceived the wife to be unreasonable, in order to avoid the costs liability. Equally if the wife's unaided reaction was to reject the husband's ***Calderbank*** offer it enabled those advising her to issue a clear warning of the risks of going forward to trial. Thus it cannot be doubted that the ***Calderbank*** conventions as then understood made a significant contribution to the resolution of ancillary relief cases in the high range.

64. However, for all the reasons given by Mr Mostyn in his judgment in ***GW v RW*** ancillary relief cases are now litigated under very different principles. He has for long been an advocate for the proposition that in ancillary relief, as in Children Act cases, there should be no order for costs unless exceptional circumstances justify an order. He has found an ally from a quarter which I doubt he anticipated. The experience of the Senior Costs Judge, having taken over from the Principal Registry the task of assessing costs in ancillary relief cases, is in my judgment extremely significant. His view has undoubtedly influenced the report of the costs sub-committee. The committee has also factored in the considerations identified by Mr Mostyn in his judgment. The committee, upon which the relevant professional associations are duly represented, has endorsed the direction indicated by the Senior Costs Judge and by Mr Mostyn. The report has been adopted by PARAG without qualification. More importantly the report has the support of officials from the Lord Chancellor's Department and the

Legal Services Commission. Our judgments in these appeals add further support for the reform movement. To introduce the new regime it will be necessary not only to consider the required amendments to the Family Proceedings Rules but also the application of CPR 44.3 to ancillary relief proceedings. The ultimate shape is a matter of policy and the report of the sub-committee offers a carefully considered detailed model. If I were expressing my own view of the objective of the amendments I could not do better than to cite the following sentences from the letter of 27 January 2003 from the Senior Costs Judge to the President: *"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 orders 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."*

65. The Senior Costs Judge's proposal demonstrates simplicity, clarity and overall fairness. Those should be the standards to which we aspire in all aspects of ancillary relief proceedings.

Lord Justice Mantell:

66. I agree with both judgments.

1) Mr N. Cusworth (instructed by Jacobs Allen Hammond) for the Appellant
Miss Clare Renton (instructed by Kidd Rapinet) for the Respondent

(2) Mr V. Le Grice QC and Mr S. Webster (instructed by Guillaumes) for the Appellant
Mr M. Pointer QC and Mr Jonathan P. Swift (instructed by Williams Thompson) for the Respondent