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Judgment: approved by the Court for handing down | *Delivered:* **03/12/03**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

BETWEEN:

EILEEN ELIZABETH GRAHAM

Petitioner

and

JOHN SIMPSON GRAHAM and JOHN SAMUEL GRAHAM

Respondents

GILLEN J

[1] I have already given judgment on the substantive issues in this case dealing with financial provision under Articles 25 and 26 of the Matrimonial Causes (Northern Ireland) Order 1978 ("the 1978 Order") and also on an application pursuant to Article 39 of the 1978 Act.

[2] I now turn to consider the issue of costs. Mr Martin on behalf of the petitioner submits that whilst costs are within the discretion of the court, the general rule is that prima facie costs should follow the event. He argues that the petitioner has been successful on all of the material matters that fell to be determined in this case and, having achieved an award which far exceeded any offer made by the respondents, is entitled to a full award of costs. Mr Malcolm on behalf of the respondents argues that the justice of the case requires that a broad brush approach be adopted to the issue of costs in this, a large money case and that each side should bear its own costs.

THE LAW

[3] The law in Northern Ireland is different from that in England and Wales where, by virtue of amendments made by the Family Proceedings (Amendment) Rules 2003, the relevant provisions of the Family Proceedings Rules 1991 govern costs. In addition the relevant parts of the Civil Procedure Rules 1998 also govern costs in ancillary relief proceedings. In Northern

Ireland costs are governed by the Family Proceedings Rules (Northern Ireland) 1996 ("the 1996 Rules"). In particular Rule 1.4 provides as follows:

> "(1) Subject to the provisions of these Rules and of any statutory provision, the Rules of the Supreme Court (NI) 1980 and the County Court Rules (NI) 1981 other than CCR Order 25, Rule 20 (which deals with a new hearing and a rehearing) shall apply with necessary modifications to the commencement of Family Proceedings in, and to the practice and procedure in Family Proceedings pending in, the High Court and a County Court respectively."

[4] Order 62 Rule 3 of the Rules of the Supreme Court (Northern Ireland) provides as follows:

> "(1) This rule shall have effect subject only to the following provisions of this order.
>
> (2) 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.
>
> (3) If the court in the exercise of its discretion sees fit to make any order as to costs of any proceedings, the court should 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."

[5] The first principles approach conventionally adopted by the courts in the past have largely been informed by the decision in Gojkovic v Gojkovic & Anor [1992] Fam 40 sub nom Gojkovic v Gojkovic (No 2) [1991] 2 FLR 233. This case was determined at a time when financial relief was approached on the basis of "reasonable requirements", an approach now departed from in the recent decisions of White v White [2001] 1 AC 596, Cannon v Cannon [2002] Fam 97, and Lambert v Lambert [2003] 1 FLR 139. In Gojkovic Butler-Sloss LJ set out the principles governing the conventional approach to costs at paragraph 238H:

> "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 or other examples. The absence of an offer or 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 a communication of the offer and a reasonable time to consider it. That seems clear from the decided cases, and is in accord with the Rules of 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 the other factors in the Family Division may alter that prima facie position."

[6] I have come to the conclusion that that approach has to be revisited in light of the law that now obtains post White v White and Lambert v Lambert. Where the law was that a wife's claim was viewed as being against the husband's money for a sum necessary to meet her reasonable requirements, the position was not unsimilar to that of an ordinary civil claimant. Costs should therefore prima facie have followed the event. The function of the court is now different in light of White v White where essentially equality is now the yardstick of fairness. There has been both a conceptual and a policy change from a "reasonable requirements" approach to an "entitlement approach". Another way of putting this is that the parties now come to court to determine their unascertained shares in the pool of assets that has evolved during the course of the marriage. I think there is much to be said for now looking upon the division of matrimonial assets following divorce as being something akin to the division of partnership assets on the dissolution of a

partnership where costs in big money cases are seen as a necessary expense of the dissolution with each party bearing their own costs. The advantage of such an approach is that it will introduce some degree of certainty into a system where at the end of the day the judge has a very wide discretion about how to decide the outcome of the case, and where at times it has to be recognised that different judges could come to different conclusions. In reality therefore it is difficult and sometimes impossible to predict what a court is going to order. In these circumstances the cost penalty for getting it wrong can often be very significant. Recently in GW v RW [2003] 2 FLR 108 Mr Mostyn QC, sitting as a Deputy High Court Judge, reviewed in detail the current cost regime that obtains in England and Wales and compared the guessing game on costs to that of spread betting. He made the point that "vast sums can swing on even the smallest failure to guess accurately". His conclusion, with which I agree particularly in the context of Northern Ireland law, was set out at paragraph 92 as follows:

> "In my judgment, a safer starting point nowadays in a big money case, where the assets exceed the aggregate of the party's needs, is that there should be no order as to costs. That staring 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 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 may also reduce the extent of satellite costs assessment litigation, which can itself be protracted and acrimonious, and which prolongs the agony between the parties."

[7] Helpfully Mr Mostyn QC then outlined some of the grounds where unreasonableness may be determined. At paragraph 94 he said:

> "Unreasonableness may encompass the following:
>
> (1) Failure to give full and frank disclosure;
>
> (2) Other culpable conduct of the litigation such as the unreasonable and unsuccessful pursuit of a particular issue or other meritless tactical posturing;
>
> (3) The failure to negotiate or the adoption of a manifestly unreasonable stance in the Calderbank correspondence.

> This is not intended to be an exhaustive list. There may be other instances of unreasonableness.
>
> I should emphasise that the opinion I am offering is confined to the big money case where there is an identifiable pool of assets the creation of which is referable to the contributions, both financial and domestic, of each of the parties. It would not apply with the wife's claim if specifically needs based, for instance where all, or the majority, of the assets are "inherited" or where the marriage is short. In such a case I can see that the claiming wife can be more closely compared to an ordinary civil litigant and that, therefore, the orthodox theory should perhaps more directly apply. Nor should anything I say be taken to apply to the smaller case where the aggregate of the parties' needs exceeds the available assets."

[8] It is important to appreciate however that this shift in approach must not in any be seen as diluting the positive duty on the parties to negotiate. This duty was not only enunciated by Gojkovic v Gojkovic & Anor but also in A v A (Costs Appeals) [1996] 1 FLR 14 where Singer J said at 25:

> "The lesson of this case, which litigants and lawyers alike must recognise and give effect to it, is that just because ancillary applications have to be conducted and prepared in the fraught emotional atmosphere that so often and understandably exists after marriage and its breakdown, nevertheless that does not mean common sense and commercial realities can be allowed to fly out of the window. A spouse who does not respond constructively to a Calderbank offer, whether a good offer as in this case or only one that is bad or indifferent, stymies whatever chance there is of settlement. Such a spouse cannot with impunity expect immunity from responsibility for that."

[9] Accordingly the courts will be wary to ensure that no encouragement is given to a party to misbehave in litigation safe in the knowledge that the starting point will be no order as to costs. The courts will be watchful in order to discern those cases where exorbitant demands for disclosure, inordinate demands in correspondence, disproportionate attention to the

minutiae of the case and tactical posturing have all contributed unreasonably to the costs of the case. Such an approach will be characterised as unreasonable and the guilty party will be penalised. The role therefore of Calderbank Order letters is not at all diminished by the approach that the courts should now advocate.

[10] It must of course be emphasised that Mr Mostyn QC's comments were made in the context of different legislation in England and in particular in the context of the Family Proceedings Rules 1991, with a new rule 2.69 coming into effect on 5 October 1992. That rule was wholly rewritten by the Family Proceedings (Amendment No 2) Rules 1999 dealing with, inter alia, offers to settle. Moreover more recently in Norris v Norris; Haskins v Haskins [2003] 2 FLR 1124 the Court of Appeal in England made clear that Mr Mostyn QC had been wrong to treat that rule as incomprehensible and to substitute his own approach by making a decision which was not based on the existing rules. I therefore recognise that the court must apply the rules unless or until they are amended. Nonetheless I consider that in Northern Ireland the discretion of the court is sufficiently wide to allow the courts to have a general and wide discretion to depart from the starting point of "winner takes all" and that that now should be the approach adopted by our courts in large money cases for the reasons I have already set out. This would accord not only with equity and justice, but also with the clear sympathies of the Court of Appeal in England and Wales as set out in Norris v Norris and the current thinking of the senior costs judge in that jurisdiction (see Norris at para 30).

THIS CASE

[11] Applying those principles to this case, I have come to the conclusion that prima facie this is an instance of a large money case where the starting point in looking at the question of costs is that each party should bear their own costs. A number of issues were raised and debated in this case which I consider to have been perfectly reasonable notwithstanding the fact that I determined them against the respondents. In particular issues surrounding the historical disposition to each of the children by the parties and the valuation of the minority shareholdings (whether on a basis of the conventional discount approach or as a quasi partnership) were lengthy issues which merited determination by the court after consideration of reasonable arguments on behalf of both parties. These points illustrate I consider classic examples of where parties are attempting to determine then unascertained shares in a pool of assets in an area which may well have been uncertain and difficult to resolve. To that extent I consider that the lengthy correspondence between the parties, the delay in seriously engaging in Calderbank offers (in the case of the petitioner until 2 December 2002 when the petitioner's offer did emerge) the wide gulf between the parties in the approach that was made are all explicable and in the normal course of events should not be the subject of punitive cost awards. The two issues that I have

mentioned above would alone have made advice as to an informed calderbank letter extremely difficult. Where I consider however the respondents were wholly unreasonable was in the time spent preparing and litigating the issue of the disposition of Amelia Street. This was an approach that was doomed to failure from the start and quite unreasonably took up four days court hearing.

[12] My conclusion therefore is that with the exception of the witness I have already adverted to in the course of my substantive judgment, each party should bear their own costs for this hearing save for the costs incurred in dealing with the issue of the disposition of Amelia Street. This took up the hearing between 2 and 4 December 2002 and it also had an influence on the overall development of the case including the time spent leading up to the hearing. Both parties took up time calling experts as to valuation of Amelia Street which, in each case, proved to be materially different from the eventual sale price. Weighing up all these matters, I have come to the conclusion that in addition to bearing his own costs, the first-named respondent in this case should bear 25% of the costs of the petitioner. The second-named respondent will bear his own costs. If these costs are not agreed then they shall be taxed in default of agreement.

[13] I conclude by recognising that this approach to costs in big money cases may to some extent represent an evolution of previous thinking on costs in this jurisdiction. I gain some reassurance from the views expressed by Megarry VC in Malone v Comr of Police of the Metropolis [1979] 2 AER 620 at 642 who said, when invited to declare that invasion of privacy was in itself a cause of action:

> "… I am not unduly troubled by the absence of English authority: there has to be a first time for everything, and, if the principles of English law, and not least analogies from the existing rules, together with the requirements of justice and common sense, point firmly to such a right existing, then I think the court should not be deterred from recognising the right. On the other hand, it is no function of the courts to legislate in a field. The extension of the existing laws and principles is one thing, the creation of an altogether new right is another."

[14] I draw an analogy in this instance in that the principles of White v White and the breadth of discretion vested in this court by the existing rules, coupled with what I consider now are the requirements of justice and common sense, all point to a reassessment of the approach to costs in cases of this type.