EDITORIAL NOTE: NO SUPPRESSION APPLIED.

NOTE: PURSUANT TO S 35A OF THE PROPERTY (RELATIONSHIPS) ACT 1976, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE HTTP://WWW.JUSTICE.GOVT.NZ/COURTS/FAMILY-COURT/LEGISLATION/RESTRICTIONS-ON-PUBLICATIONS.

IN THE FAMILY COURT
AT AUCKLAND

FAM-2006-092-001674
[2016] NZFC 4221

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	CHRISTINE HAMILTON THOMPSON Applicant
AND	MICHAEL LEITH THOMPSON Respondent
AND	MICHAEL LEITH THOMPSON, DEAN ALAN ELLWOOD AND BRUCE KENNETH DELL AS TRUSTEES OF THE ML THOMPSON FAMILY TRUST Second Respondents

Hearing:	On the papers
Appearances:	Dr J Farmer QC/Ms S Ambler for the Applicant Lady D Chambers QC for the First Respondent Mr T G Tesiram (excused from attending Court) for Second Respondents
Judgment:	25 May 2016

RESERVED JUDGMENT OF JUDGE D A BURNS
[In relation to application for increased or indemnity costs]

---

[1] In paragraph [68] of my reserved judgment dated 15 April 2016 I made an order for costs on a 3C basis reserving leave for counsel to file a memorandum if an agreement could not be reached on quantum.

[2] I am advised that agreement has not been reached on quantum. Mrs Thompson instructed her counsel to seek indemnity costs or increased costs. Ms Ambler filed a memorandum with the Court dated 28 April 2016. Essentially Mrs Thompson seeks indemnity or increased costs against Mr Thompson on the basis that Mr Thompson has acted improperly and unnecessarily by filing his interlocutory application, defending Mrs Thompson's strike out application, and failing to accept an offer made by Mrs Thompson on 2 June 2015 to dispose of the proceedings.

[3] Ms Ambler in her memorandum submitted as follows:

> **Costs principles**
>
> 3. Rule 207 of the Family Courts Rules ("FCR") confirms that costs are at the discretion of the Court and in exercising that discretion the Court may apply the District Courts Rules ("DCR"):
>
> **207 Costs at discretion of Court**
>
> (1) The Court has a discretion to determine the costs of—
>
> (a) any proceeding:
>
> (b) any step in a proceeding:
>
> (c) any matter incidental to a proceeding.
>
> (2) In exercising that discretion, the Court may apply any or all of the following DCRs, so far as applicable and with all necessary modifications:
>
> (a) 4.2—principles applying to determination of costs:
>
> (b) 4.3—categorisation of proceedings:
>
> (c) 4.4—appropriate daily recovery rates:
>
> (d) 4.5—determination of reasonable time:
>
> (e) 4.6—increased costs and indemnity costs:
>
> (f) 4.7—refusal of, or reduction in, costs:

(g) 4.8—costs in interlocutory applications:

(h) 4.9—costs may be determined by different Judge:

(i) 4.10—written offers without prejudice except as to costs:

(j) 4.11—effect on costs:

(k) 4.12—disbursements.

(3) This rule is subject to the provisions of the Family Law Act under which the proceedings are brought.

4. The steps to be followed in assessing costs are set out in *Holdfast New Zealand v Selleys Pty Ltd* (2005) 17 PRNZ 897 (CA):

(a) the party should categorise the proceeding;

(b) it should then identify a reasonable time for each step;

(c) as part of the two step exercise a party can apply for extra time for a particular step;

(d) the party should step back and look at the costs award to which it could be entitled.

5. The Court of Appeal held in *Glaister v Amalgamated Dairies Ltd* [2004] 2 NZLR 606 at [21] and [22] that the integrity of the (High Court) costs scheme should be maintained and if a departure is to be made from the statutory allowances then it is necessary that it be done in a particular and principled way.

6. DCR 14.6(3)(b)(v) enables a Court to order a party to pay increased costs if:

(b) The party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in the proceeding by:

(v) failing, without reasonable justification, to accept an offer of settlement, whether in the form of an offer under rule 14.10 or some other offer to settle or dispose of the proceeding.

7. DCR 14.6(4) enables a Court to pay indemnity costs if -

(a) the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding; or

(b) some other reason exists that justifies the court making an order for indemnity costs despite the principle that the determination of costs should be predictable and expeditious.

8. DCR 14.11(3) which deals with "Written offers without prejudice except as to costs" is also relevant. 14.11 confirms that the effect of a without prejudice save as to costs offer is at the discretion of the Court.

9. DCR 14.11(3) provides that:

> Party A is entitled to costs on the steps taken in the proceeding after the offer is made, if party A –
>
> (a) offers a sum of money to party B that exceeds the amount of a judgment obtained by party B against party A; or
>
> (b) makes an offer that would have been more beneficial to party B than the judgment obtained by party B against party A.

Indemnity/Increased costs against Mr Thompson

Relevant background

10. The Calderbank offer made by Mrs Thompson on 3 December 2012 and the Without Prejudice Save as to Costs letter dated 2 June 2015, are both relevant to Your Honour's assessment of indemnity costs for steps taken by Mr Thompson following the release of the Supreme Court's decision. It is Mrs Thompson's position that Mr Thompson has acted improperly and unnecessarily in filing his interlocutory application and defending Mrs Thompson's strike out application.

11. Mrs Thompson made a Calderbank offer on 3 December 2012 (attached and marked "A") in an attempt to settle the Family Court proceedings, which was rejected by Mr Thompson.

12. Mrs Thompson's Calderbank offer needs to be understood in the context of the Family Court consent orders made on 12 October 2011 (attached and marked "B") which provide (inter alia) that:

> (a) Mrs Thompson will pay Mr Thompson $2,209,130 on final settlement plus interest at 5% from 12 October 2011;
>
> (b) In the event that Mr Thompson is ordered to make a payment to Mrs Thompson in respect of the $8 million he received from Next Capital in January 2007, Mr Thompson will pay Mrs Thompson interest at 5% from 12 October 2012;
>
> (c) Final settlement will occur when the restraint of trade payment issue has been determined.

13. The net result of the determination of the restraint of trade issue, seen in the context of the consent orders and Mrs Thompson's Calderbank offer is:

(a) If Mrs Thompson was successful and the $8 million received for the restraint of trade was classified as relationship property, she would not have to pay Mr Thompson anything and he would owe her $1.8 million (i.e. $4 million minus 2.2 million); and

(b) If Mr Thompson was successful and the $8 million received for the restraint of trade was classified as separate property, Mrs Thompson would have to pay Mr Thompson $2.2 million.

14. By virtue of her Calderbank offer dated 3 December 2012, Mrs Thompson offered to settle the proceedings on the basis that Mr Thompson pay Mrs Thompson $800,000 as a final settlement figure. i.e. Mrs Thompson would not have to pay Mr Thompson $2.2million, so she would receive $3 million of the $8 million restraint payment.

15. The Calderbank offer provides at [7] that if Mrs Thompson is successful in arguing that the restraint of trade payment is relationship property, then Mr Thompson will have to pay immediately:

(a) $1,790,870 (i.e. $4,000,000 - $2,209,190);

(b) $104,467.41 being interest on $1,790,870 at 5% since 12 October 2011 (14 months);

(c) His own costs;

(d) The trustees costs; and

(e) Mrs Thompson's costs.

16. Mr Thompson responded the following day, 4 December 2012 advising that he was prepared to increase his earlier Calderbank offer of $250,000 made on 6 December 2011 to $500,000 and that payment was to be off-set against the money Mrs Thompson owed pursuant to the consent orders dated 12 October 2011. See email sent on 4 December 2012 attached and marked "C". This offer would see Mrs Thompson receiving only $500,000 of the $8 million payment, being a 6% share of the restraint of trade payment. Mrs Thompson did not accept the trivial offer made by Mr Thompson and the matter proceeding to hearing in the Family Court.

17. The matter proceeded on appeal to the High Court, Court of Appeal and the Supreme Court with the Supreme Court declaring the restraint of trade payment to be relationship property and ordering Mr Thompson to pay Mrs Thompson's costs and disbursements in respect of the proceedings in each court. (BOD 120).

18. Following the Supreme Court Judgment Mrs Thompson made a request for payment of her $4million, plus interest from Mr Thompson. (BOD 155).

19. Mr Thompson's solicitor responded that:

> The Supreme Court made the following orders:
>
> (a) The $8million restraint of trade payment received by Mr Thompson is declared to be relationship property.
>
> (b) The case is remitted to the Family Court for the making of such orders as may be necessary to give effect to the declaration.
>
> The matter is clearly to be remitted back to the Family Court for the making of orders necessary to give effect to the declaration, including any orders in relation to payment. Therefore in our view the sum of $4m is not yet due and payable by Mr Thompson. (BOD 155).

20. On 15 April 2015 Mrs Thompson filed a memorandum seeking orders giving effect to the Supreme Court's declaration (BOD 154).

21. On 30 April 2015 Mr Thompson filed his interlocutory application seeking unequal sharing of the restraint of trade payment pursuant to s13 and s18B of the Property (Relationships) Act 1976. (He did not file any affidavits in support of his application until 9 December 2015).

22. On 13 May 2015 Mrs Thompson filed her strike out application.

23. On 2 June 2015 Mrs Thompson sent a without prejudice save as to costs letter to Mr Thompson's counsel advising that:

> [2] The matter is res judicata, being finally determined by the Supreme Court on 13 March 2015. Further, your client has previously settled all claims under the Property (Relationships) Act 1976, including claims under s18B.
>
> [3] We put you on notice that if your client continues to pursue his application and it is struck out or fails, our client will be applying for indemnity costs against Mr Thompson.

24. See letter from Tompkins Wake dated 2 June 2015 attached and marked "D".

25. There was no response to Mrs Thompson's letter of 2 June 2015 and Mrs Thompson was forced to proceed with her strike out application.

26. In accordance with your Honour's Judgment, Mrs Thompson's application to strike out the s13 and 18B claim has been granted and the orders sought by Mrs Thompson in her counsel's memorandum dated 15 April 2015 have been made.

27. Mrs Thompson submits that, given the history of these proceedings, the offer that she made to settle on 3 December 2012, the decision of the Supreme Court on 13 March 2015, including the award against Mr Thompson in all Courts, Mrs Thompson's invitation for Mr

Thompson to withdraw his application made 2 June 2016, the success of Mrs Thompson's strike out application and Your Honour granting the orders sought by Mrs Thompson in her memorandum dated 15 April 2015 (i.e. over one year ago) Mr Thompson has acted improperly and unnecessarily continuing to defend the proceedings.

Mrs Thompson's actual costs

28. Mrs Thompson seeks indemnity costs of $76,669.36 for all steps taken in the Family Court proceedings since 2 June 2015.

29. Mrs Thompson's actual legal costs since 2 June 2015 are as follows:

(a) Tompkins Wake invoices:

(i)	29 May 2015	$10,071.70
(ii)	30 June 2015	$3,912.30
(iii)	28 September 2015	$2,573.70
(iv)	30 October 2015	$8,093.13
(v)	30 November 2015	$1,940.05
(vi)	22 December 2015	$2,780.70
(vii)	29 January 2016	$2,336.80
(viii)	31 March 2016	$10,460.98
Total		**$42,169.36**

(b) Jim Farmer QC:

(i)	26 January 2016	$13,800.00
(ii)	10 March 2016	$20,700.00
Total		**$34,500.00**

30. Attached and marked "E" are the invoices from Tompkins Wake and Jim Farmer QC with narrations redacted.

Increased Costs

31. Alternatively if the Court is not minded to award indemnity costs, Mrs Thompson seeks an uplift of 50% uplift of her 3C costs on the basis that Mr Thompson has failed without reasonable justification to dispose of the proceeding as Mrs Thompson invited him to do on 2 June 2015.

32. Scale 3C costs total $22,998.00 as set out in the Schedule annexed and marked "F". This figure includes $660 for second counsel, which Mrs Thompson requests be allowed by the Court, if the Court is not minded to award indemnity costs.

33. A 50% uplift of Scale 3C costs increases the amount to $34,497.00

Orders Sought

34. An order is sought that Mr Thompson pay Mrs Thompson indemnity costs of $76,669.36. Alternatively Mrs Thompson seeks Scale 3C costs with a 50% uplift being $34,497.

[4] The matter was placed in Chambers before me and I made timetable directions to enable Lady Chambers to file any submissions in reply.

[5] I set out Lady Chambers submissions in response:

2. Mrs Thompson seeks indemnity or increased costs solely on the basis of two letters, asserted to be Calderbank offers. Those letters do not automatically provide a basis for an award of increased or indemnity costs. The matters that can give rise to an award of increased or indemnity costs are set out in DCR 14.6. A refusal of any offer to settle has to be unreasonable (under 14.6(3)(b)(v)) before it can give rise to an entitlement to increased costs. Mr Thompson did not unreasonably refuse to accept any offer. There is no basis at all for an award of increased or indemnity costs.

Legal principles

3. Rule 207 of the Family Court Rules makes applicable Part 14 of the District Court Rules. Part 14 of the District Court Rules is identical to Part 14 of the High Court Rules.

4. Under both the District Court Rules and the High Court Rules, a written offer without prejudice except as to costs gives rise to an entitlement to costs only. It does not give rise to an entitlement to increased or indemnity costs. The relevant rules are DCR 14.10 and 14.11:

14.10 Written offers without prejudice except as to costs

(1) A party to a proceeding may at any time make to any other party to the proceeding a written offer that—

(a) is expressly stated to be without prejudice except as to costs; and

(b) relates to an issue in the proceeding.

(2) The fact that the offer has been made must not be communicated to the court until the question of costs is to be decided.

14.11 Effect on costs

(1) The effect (if any) that the making of an offer under rule 14.10 has on the question of costs is at the discretion of the court.

(2) Subclauses (3) and (4)—

(a) are subject to subclause (1); and

(b) do not limit rule 14.6 or 14.7; and

(c) apply to an offer made under rule 14.10 by a party to a proceeding (party A) to another party to it (party B).

(3) Party A is entitled to costs on the steps taken in the proceeding after the offer is made, if party A—

(a) offers a sum of money to party B that exceeds the amount of a judgment obtained by party B against party A; or

(b) makes an offer that would have been more beneficial to party B than the judgment obtained by party B against party A.

(4) The offer may be taken into account if party A makes an offer that—

(a) does not fall within subclause (3)(a) or (b); and

(b) is close to the value or benefit of the judgment obtained by party B.

5. Mrs Thompson is mistaken in her view that a Calderbank offer automatically gives rise to an entitlement to increased or indemnity costs. It does not. Under DCR 14.11(3) a Calderbank offer only gives rise to a entitlement to costs on the steps in the proceeding taken after the offer is made. Any entitlement to increased or indemnity costs is still governed by DCR 14.6. As stated by the authors of McGechan on Procedure:

> A successful R14.10 offer does not of itself give rise to an entitlement to increased or indemnity costs. Any such entitlement is under R14.6.

6. Mrs Thompson's submissions do not rely on or even refer to any DCR 14.6 factor. The only part of DCR 14.6 that is potentially relevant is DCR 14.6(3)(b)(v). That provides that the Court may order a party to pay increased costs only if the party fails, without reasonable justification, to accept an offer of settlement whether in the form of a Calderbank offer or not.

7. A refusal to accept an offer is not one of the factors listed in s14.6(4) dealing with indemnity costs.

8. The reasonableness of a party's rejection of a R14.10 offer is to be assessed at the time of rejection, not against the subsequent result.

9. The Calderbank offer made by Mrs Thompson on 3 December 2012 was made prior to the hearing of the Family Court proceedings. The hearing was on 5 December 2012. The Court of Appeal has previously determined that a without prejudice offer made prior to the Family Court hearing is not relevant to costs at a later stage. After the Court of Appeal hearing, in which Mr Thompson was successful, Mr Thompson applied for increased costs on the basis of a Calderbank offer made prior to the Family Court hearing. The Court of Appeal said:

> Finally, with respect to the claim for increased costs, we are satisfied it is not made out. The Calderbank offer was made on 6 December 2011 prior to the Family Court hearing. It lapsed 7 days later. Mrs Thompson was unsuccessful in the Family Court and obtained some success in the High Court. Mr Thompson did not make any renewed settlement offer or refresh the Calderbank offer after the release of the High Court judgment. Moreover we are satisfied Mrs Thompson did not contribute unnecessarily to the time and expense in any aspect of the appeal or any step in it.

10. As to the second letter sent by Mrs Thompson dated 3 June 2015: a letter which simply invites a plaintiff to give up is not a Calderbank offer and does not give rise to any entitlement to increased costs. In Craike v Tilsley the defendant made a Calderbank offer inviting the plaintiffs to discontinue and offering the sum of $20,000 in settlement. Asher J held that the $20,000 was never going to be accepted unless the plaintiffs were prepared to give up. He said:

> Successful defendants who in letter form record their defences and invite a settlement should not necessarily be in a stronger position than any other defendant who takes the same position without sending a letter.

Application of the legal principles

11. Mrs Thompson relies on two letters, which she says are Calderbank offers, to claim indemnity or increased costs. One is made by letter dated 3 December 2015. The second was made by letter dated 3 June 2015.

12. Mr Thompson did not unreasonably refuse either offer (judging unreasonableness at the time of the offer). The 3 December 2012 letter is identical in nature to the Calderbank offer previously ruled irrelevant to costs by the Court of Appeal in this proceeding. The 3 June 2015 letter is not a Calderbank offer.

3 December 2012 letter

13. The Court of Appeal has already determined that the 3 December 2012 offer is not relevant to the determination of costs at this stage of the proceeding. Mrs Thompson's offer was made on 3 December 2012 and expired at 4pm the next day.

14. Mrs Thompson's offer is the same as the offer made by Mr Thompson before the Family Court hearing. That offer was determined not to be relevant at the stage of the Court of Appeal hearing. The proceeding has advanced even further now. If it was not relevant then, the offer would not be relevant to costs now. So it is with Mrs Thompsons's offer.

15. As the Court of Appeal said about Mrs Thompson (see para 9 above), Mr Thompson had a measure of success in the High Court and was successful in the Court of Appeal. Following Mrs Thompson's offer on 3 December 2012, she did not make any renewed settlement offer or refresh the Calderbank offer. Mrs Thompson is now in exactly the same position Mr Thompson was in before the Court of Appeal when the Court of Appeal disallowed increased costs.

3 June 2015 letter

16. Mrs Thompson's letter of 3 June 2015 does not contain any offer whatsoever. It is not a letter that comes within DCR 14.10 or DCR 14.6(3)(b)(v). It is simply a letter inviting Mr Thompson to withdraw his application. That offer was never going to be accepted unless Mr Thompson was prepared to give up. A party who writes such a letter is not in any better position in relation to costs than one who does not.

17. Mrs Thompson's 3 June 2015 letter did no more than record her defences to Mr Thompson's application. She did not even make an offer of settlement. This letter cannot found any claim to increased or indemnity costs.

18. Mr Thompson has not contributed unnecessarily to the time and expense in any aspect in this proceeding and there is no entitlement to increased costs.

Quantum of costs

19. In relation to the quantum of costs sought, Mr Thompson submits:

    (i) The memorandum of counsel for the applicant seeking orders giving effect to the Supreme Court's declaration is not a step in this proceeding. It is a step required by the Supreme Court's judgment and Mrs Thompson needed to take this step to obtain the orders from the Family Court in accordance with the Supreme Court judgment in any event.

(ii) Prior to 1 July 2015, the appropriate daily recovery rate for a Category 3 proceeding was $2,300. This is the appropriate rate to use for all steps prior to 1 July 2015.

20. Therefore, the correct calculation of Category 3 costs for the proceeding is set out in the Schedule annexed to this memorandum. That Schedule is the same as annexure F to the applicant's memorandum except that the first step (the memorandum of counsel for the applicant seeking orders giving effect to the Supreme Court's declaration) has been deleted and the rate of $2,300 has been used for steps prior to 1 July 2015.

20. The appropriate amount of costs on a 3C basis is $19, 883.00

[6] Lady Chambers provided me with the judgment of the Court of Appeal in relation to costs on the substantive appeal and stay appeal dated 18 June 2014 and the judgment of Justice Asher in a case of *Craike v Showfields Equestrian Centre Limited & Ors*[1].

[7] The issue of increased costs and indemnity costs is covered by rule 14.6 of the District Courts Rules 2014. I set out rule 14.6 in full:

Increased costs and indemnity costs

14.6

(1) Despite rules 14.2 to 14.5, the court may make an order—

(a) increasing costs otherwise payable under those rules (increased costs); or

(b) that the costs payable are the actual costs, disbursements, and witness expenses reasonably incurred by a party (indemnity costs).

(2) The court may make the order at any stage of a proceeding in relation to any step in the proceeding.

(3) The court may order a party to pay increased costs if—

(a) the nature of the proceeding or the step in the proceeding is such that the time required by the party claiming costs would substantially exceed the time allocated under band C; or

(b) the party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in the proceeding by—

[1] CIV-2010-404-002846.

(i) failing to comply with these rules or a direction of the court; or

(ii) taking or pursuing an unnecessary step or an argument that lacks merit; or

(iii) failing, without reasonable justification, to admit facts, evidence, or documents or accept a legal argument; or

(iv) failing, without reasonable justification, to comply with an order for discovery, a notice for further particulars, a notice for interrogatories, or any other similar requirement under these rules; or

(v) failing, without reasonable justification, to accept an offer of settlement, whether in the form of an offer under rule 14.10 or some other offer to settle or dispose of the proceeding; or

(c) the proceeding is of general importance to persons other than just the parties and it was reasonably necessary for the party claiming costs to bring the proceeding or participate in the proceeding in the interests of those affected; or

(d) some other reason exists that justifies the court making an order for increased costs despite the principle that the determination of costs should be predictable and expeditious.

(4) The court may order a party to pay indemnity costs if—

(a) the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding; or

(b) the party has ignored or disobeyed an order or a direction of the court or breached an undertaking given to the court or another party to the proceeding; or

(c) costs are payable from a fund, the party claiming costs is a necessary party to the proceeding affecting the fund, and the party claiming costs has acted reasonably in the proceeding; or

(d) the person in whose favour the order of costs is made was not a party to the proceeding and has acted reasonably in relation to the proceeding; or

(e) the party claiming costs is entitled to indemnity costs under a contract or deed; or

(f) some other reason exists that justifies the court making an order for indemnity costs despite the principle that the determination of costs should be predictable and expeditious.

Should the Court grant the application for increased costs?

[8] Applying rule 14.6(3) as follows:

(a) the nature of the proceeding or the step in the proceeding is such that the time required by the party claiming costs would substantially exceed the time allocated under band C.

[9] In my view based on the analysis presented by both counsel of the time involved in filing the proceedings and defending the proceedings I do not consider that the time substantially exceeds the time allocated under Band C therefore rule 14(3)(a) does not apply.

Rule 14.3(b)(i) – failure to comply with these rules or directions of the Court

There was no failure to comply with any directions of the Court. I will have to determine on application of the other rules as to whether there has been a failure to comply.

Rule 14.6(3)(b)(ii) – taking or pursuing unnecessary steps or argument that lacks merit

This is the core argument presented for either increased or indemnity costs by Mrs Thompson. I agree that the claim for unequal sharing pursuant to s 13 of the Property (Relationships) Act 1976 lacked merit. For the reasons I set out in my reserved judgment of 15 April I concluded that there was no possibility of success for such a claim. On that aspect of the application I regarded the application as an unnecessary step or an argument that lacked merit.

With respect to s 18B claim for the reasons set out in my reserved judgment I consider there was an arguable case as presented. However I found that the parties had settled their differences on a full and final basis and the issue had

been the subject of consent orders. Accordingly it was res judicata and could not be argued any further. I concluded however that the s 18B claim had merit but I must conclude that it was an unnecessary step for the reasons set out in my reserved judgment.

Rule 14.6(3)(b)(iii) – failing, without reasonable justification, to admit facts, evidence, or documents or accept a legal argument

This is not applicable in this case.

Rule 14.6(3)(b)(iv) – failing, without reasonable justification, to comply with an order for discovery, a notice for further particulars, a notice for interrogatories, or any other similar requirement under these rules

This is not applicable in this particular case.

Rule 14.6(3)(b)(v) - failing, without reasonable justification, to accept an offer of settlement, whether in the form of an offer under rule 14.10 or some other offer to settle or dispose of the proceeding

This is applicable in this case because it is argued by Mrs Thompson that there was a Calderbank offer which was not accepted. Lady Chambers argues that this issue is only a factor to be taken into account and does not of itself justify increased or indemnity costs. She refers to the Court of Appeal decision. I do not consider that the Calder Bank offer is relevant and accept the submission made by Lady Chambers that it does not automatically give rise to an entitlement to increased or indemnity costs. I take into account the husband's partial success in the High Court and success in the Court of Appeal. It is clear because of the number of Judges involved and the contrary findings of the different Courts that the matter is finally balanced. I adopt the same reasoning as Justice Stevens in the Court of Appeal set out in paragraph [12] of the judgment which I set out in full:

> Finally, with respect to the claim for increased costs, we are satisfied it is not made out. The Calderrbank offer was made on 6 December 2011 prior to the Family Court hearing. It lapsed seven days later. Mrs Thompson was unsuccessful in the Family Court and obtained

> some success in the High Court. Mr Thompson did not make any renewed settlement offer or refresh the Calderbank offer after the release of the High Court judgment. Moreover, we are satisfied Mrs Thompson did not contribute unnecessarily to the time and expense in any aspect of the appeal or any step in it.

I accept the argument present Lady Chambers that the subsequent letter of 2015 does not amount to a Calderbank offer for the reasons set out in her submissions. In my view there is no nexus between the two letters and the strike out application. I consider the application for orders under ss 13 and 18B post the Supreme Court judgment to be standalone and I do not consider the Calderbank offer contemplated such an application or the opposing strike out application. Because there is no link I am not going to apply this provision.

Rule 14.6(3)(c)

I do not consider this provision is applicable in this case.

Rule 14.6(3)(d)

I do not see any other reason to justify the Court making the order in this case other than the application of the standard principles.

Should the Court order Mr Thompson to pay indemnity costs

[10] I apply rule 14.6(4) as follows:

Rule 14.6(4)(a) - the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding

I do not regard Mr Thompson as acting vexatiously, frivously, improperly or unnecessarily in commencing or continuing or defending the proceedings or a step in the proceedings. As I have said above I consider that s 18B application had merit. If the issue had been reserved for determination when the parties settled before Judge de Jong I would have allowed the application

to continue and the primary ruling in my reserved judgment was that the issue was settled. This is a decision made in the course of the proceedings but does not mean that the claim lacked merit.

Rule 14.6(4)(b) - the party has ignored or disobeyed an order or a direction of the court or breached an undertaking given to the court or another party to the proceeding

This is not applicable in this case.

Rule 14.6(4)(c) - costs are payable from a fund, the party claiming costs is a necessary party to the proceeding affecting the fund, and the party claiming costs has acted reasonably in the proceeding

This rule is not applicable in this case.

Rule 14.6(4)(d) - the person in whose favour the order of costs is made was not a party to the proceeding and has acted reasonably in relation to the proceeding

This is not applicable in this case.

Rule 14.6.(4)(e) - the party claiming costs is entitled to indemnity costs under a contract or deed

Not applicable.

Rule 14.6(4)(f) - some other reason exists that justifies the court making an order for indemnity costs despite the principle that the determination of costs should be predictable and expeditious

I do not regard this sub rule is applicable in this case.

Overall conclusion

[11] I conclude that the application under s 13 of the Act was without merit and could not have succeeded. It does not get to the very high standard to justify indemnity costs but does justify a claim for increased costs above scale. With respect to s 18B claim I consider that the claim was arguable and therefore had merit but due to a decision made by the parties during the course of the proceedings to resolve that issue could not proceed any further. I consider that the claim for increased costs has been made out and I order increased costs as a result. This is primarily by application of rule 14.6(3)(b)(ii).

[12] The next question is how much to increase the costs by.

[13] Justice Randerson in a decision of *Radisich v Taylor* in paragraph [29] worked out the mathematical result of application of costs if increased. I adopt Justice Randerson's reasoning:

> The rationale for identifying 50 percent as the usual maximum uplift is that the daily recovery rates under the Rules are fixed on the basis that they are two-thirds of the daily rate considered reasonable for each category of proceeding. By adding 50 percent of the rates specified, and assuming the time allocated for each step is reasonably calculated for each step in the appropriate band, the recovery is raised to the full amount of the daily rate considered reasonable for costs purposes. For example, a daily rate of $1,800 is two-thirds of $2,700. When a 50 percent ($900) uplift is applied to $1,800, the result is $2,700. To increase by more than 50 percent would be to award costs at a rate greater than is considered reasonable for costs purposes.

[14] This is a matter of discretion. When I stand back and look at the overall justice of the situation and the fact that Mr Thompson succeeded in the Court of Appeal but failed in the Supreme Court I can understand his reaction in bringing the subsequent applications to the Family Court. However in my judgment I have struck out those proceedings and therefore increased costs above scale is justified. The case falls short of the high threshold to justify indemnity costs but does meet the threshold for increased. I consider that an increase of costs of 50% is appropriate. However I accept the calculation of quantum set out by Lady Chambers as a schedule to her submissions and the calculation of scale applicable on a 3C basis in my view is $19, 883.00. I increase costs on a 50% basis which is $9,941.50.

Accordingly costs are awarded in the sum of $29,824.50 together with disbursements. I therefore order that costs are payable by Mr Thompson in favour of Mrs Thompson in that amount.

Dated at Auckland this 25th day of May 2016 at am/pm.

D A Burns
Family Court Judge