EDITORIAL NOTE: NO SUPPRESSION APPLIED.

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IN THE FAMILY COURT
AT NELSON

FAM-2016-042-000002
FAM-2016-042-000003
[2016] NZFC 8047

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
AND	
IN THE MATTER OF	THE FAMILY COURTS RULES 2002
BETWEEN	SHELLY MARIE TRENT Applicant
AND	ALAN RAY TRENT Respondent
AND	KIWI INTERNET MARKETING LIMITED (KIML) Other Party

Hearing:	In chambers on the papers
Counsel:	A R Shaw for the Applicant M L Greenhough for the Respondent J Sumner and S L Churstain for KIML
Judgment:	30 September 2016

JUDGMENT OF JUDGE R J RUSSELL
[as to costs on injunctive relief application]

Introduction

[1] These are proceedings under the Property (Relationships) Act 1986 and the Family Courts Rules 2002 ("FCR") between Shelley Maree Trent and Allan Ray Trent and Kiwi Internet Marketing Limited ("KIML"). In particular, it is an application by each party for a costs award following my reserve judgment of 14 July 2016.

Background

[2] My judgment released on 14 July 2016 sets out the background to these proceedings. It was an application brought by Mrs Trent seeking injunctive relief under ss 182-185 of the FCR. In paragraph [116] of my decision I set out the result in this way:

> [116] I make the following orders and directions:
>
> (a) The application for injunctive relief in terms of the draft order submitted is refused.
>
> (b) Pending resolution of Mrs Trent's relationship property proceeding:
>
> (i) I direct that KIML, being a party to the proceedings, is to supply to Mrs Trent a report each three months in the form in Exhibit ART1 of Mr Trent's affidavit of 13 June 2016. The first report is to be provided by 30 September 2016
>
> (ii) I direct Mr Trent comply with the undertakings given in his evidence in relation to the use of KIML funds for hedge funds/options/future/foreign exchange trading as I have recorded in paragraph [52] of this judgment.
>
> (iii) I direct Mr Trent / KIML comply with the undertakings given in Mr Sumner's closing submissions, Exhibit A, as recorded in paragraph [73] of this judgement and page 166, line 20 of the transcript of evidence.
>
> (b) Costs are reserved. If sought, memoranda is to be filed within 21 days. Any submission is to include the actual costs incurred, the amount sought and DCR schedule calculations. Any right of reply is to be filed within 14 days following which all memoranda is to be referred to me in Chambers for decision.

(c) I direct the substantive application for Property (Relationship) Act orders to a judicial conference for further directions to be made. Thirty minutes is to be allocated at a date and time to be advised by the Registrar in approximately 6 weeks from now.

[3] Each party has filed submissions seeking an award of costs.

The case for KIML/Mr Trent

[4] In his submissions, counsel for KIML, Mr Sumner, submitted the costs calculations should be made under category 2, band C of the District Courts Rules 2014 ("DCR"). He submitted the principles in 14.2 DCR are relevant, namely a successful party is entitled to recover costs from the unsuccessful party. Regard should be had to the complexity and significance of the proceedings. Recovery of two thirds of the daily rate is considered reasonable and an order for costs should not exceed the amount of costs actually incurred.

[5] Mr Sumner submitted an uplift of 50% is justified in addition to the DCR scale costs. He sought indemnity costs from 7 April 2016, being the date a "Calderbank" letter was sent to Mrs Trent's solicitors.

[6] In support of these submissions Mr Sumner contended that Mrs Trent acted frivolously, improperly and unnecessarily in proceeding in the face of the flaws in her application, and that the evidence she provided fell well short of what was required. Mr Sumner contended the application had no prospects of success.

[7] The total legal and account costs incurred by KIML amounted to $304,465.28 including GST and disbursements. This included the fees and disbursements of the professional witness, Mr Vance of Deloitte, and Ms Callaghan of Colliers, which totalled $108,202.75.

[8] In a schedule attached to his submissions Mr Sumner calculated the costs on a Category 2C DCR basis at $25,810, including second counsel at $1,335. He submitted there should be an uplift of 50% on the scale costs from 18 February 2016 to 17 April 2016, increasing the award to $26,833.50. He submitted actual legal

costs from 7 April 2016 to the filing of closing submissions total $126,238.95, and KIML sought 66% of this sum, amounting to $83,317.70.

[9] All of this means that the scale, increased and indemnity costs sought total $110,151.20. Two thirds of the disbursements are sought in the sum of $77,723.68. The total sought in a costs award amounts to $187,874.88.

The case for Mrs Trent

[10] Mrs Trent seeks costs from Mr Trent/KIML on a category 2B basis. In his submissions Mr Shaw cites the various concerns held by Mrs Trent about the operation of KIML and Mr Trent's personal financial transactions as the catalyst for the bringing of the application seeking injunctive relief. Mr Shaw cited delays in the supplying of the information he sought from Mr Trent and his professional advisers as the reason for the Court processes being instigated to obtain this information.

[11] Mr Shaw referred to KIML's interlocutory application to address admissibility of evidence issues being unsuccessful and sought costs for this.

[12] Mr Shaw calculated Mrs Trent's costs sought on a category 2 basis at $13,350 together with disbursements of $621.40, making a total of $13,971.40.

[13] In reply to Mr Sumner's submissions Mr Shaw submitted the criteria for indemnity costs had not been met. He referred to r 14.6 DCR, contending Mrs Trent had not acted vexatiously, frivolously, improperly or unnecessarily bringing the proceedings. He submitted that Court orders had not been ignored, disobeyed or breached. He did not accept Mr Sumner's submission that the application for injunctive relief brought by Mrs Trent was fatally flawed, and noted the various undertakings that were made by Mr Trent/KIML during the course of the proceedings. He rejected the specific criticisms of Mrs Trent's case which were made by Mr Sumner.

[14] Mr Shaw submitted the nature of the evidence did not warrant DCR band C rates being applied. He replied to Mr Sumner's claim for indemnity costs,

contending the letter of 7 April 2016 was nothing more than a statement of opinion about the merits of KIML's defence. Mr Shaw queried the costs of Mr Trent being incorporated into the KIML claim. He went on to criticise some of the components of the claim, and submitted there were inaccuracies and deficiencies in the calculations. Mr Shaw submitted local counsel could have been instructed to minimise costs and is critical that legal costs of $126,238.95 and disbursements of $52,571.36 had been incurred since the primary evidence was filed by KIML.

[15] Mr Shaw submitted KIML's costs application should be refused because Mrs Trent had been protecting her relationship property position and was unable to meet her reasonable needs.

[16] In the alternative, if costs were awarded, Mr Shaw submitted that consideration and payment of any award should be deferred until the results of the substantive proceedings were known.

The law

[17] Although this was an application brought under the FCR, it was against a background of where substantive proceedings had been filed under the Property (Relationships) Act 1976 ("PRA"). The costs principles under that Act are therefore relevant.

[18] The relevant principle in the PRA which relates to costs applications is contained in s 1N(d) of the Act. It provides as follows:

> **1N Principles**
>
> The following principles are to guide the achievement of the purpose of this Act:
>
> ...
>
> (d) the principle that questions arising under this Act about relationship property should be resolved as inexpensively, simply, and speedily as is consistent with justice.

[19] Section 40 of the Property (Relationships) Act 1976 provides the statutory jurisdiction to award costs. It provides:

Costs

Subject to any rules of procedure made for the purposes of this Act, in any proceedings under this Act the Court may make such order as to costs as it thinks fit.

[20] There are no statutory guidelines in s 40 as to how the discretion should be exercised. Guidance can be gained from r 207 of the Family Courts Rules 2002, the District Courts Rules 2009 ("DCR") and from case law. Rule 207 provides:

207 Costs at discretion of Court

(1) The Court has 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.

It must be remembered the appropriate District Courts Rules only apply as far as applicable and with all necessary modifications.

[21] Rule 4.2 of the DCR sets out the general principles applying to determination of costs:

> **4.2 Principles applying to determination of costs**
>
> The following general principles apply to the determination of costs:
>
> (a) the party who fails with respect to a proceeding or an interlocutory application should pay costs to the party who succeeds:
>
> (b) an award of costs should reflect the complexity and significance of the proceeding:
>
> (c) costs should be assessed by applying the appropriate daily recovery rate to the time considered reasonable for each step reasonably required in relation to the proceeding or interlocutory application:
>
> (d) an appropriate daily recovery rate should normally be two-thirds of the daily rate considered reasonable in relation to the proceeding or interlocutory application:
>
> (e) what is an appropriate daily recovery rate and what is a reasonable time should not depend on the skill or experience of the solicitor or counsel involved or on the time actually spent by the solicitor or counsel involved or on the costs actually incurred by the party claiming costs:
>
> (f) an award of costs should not exceed the costs incurred by the party claiming costs:
>
> (g) so far as possible the determination of costs should be predictable and expeditious.

Application for increased costs/indemnity costs

[22] Where costs in excess of the DCR scale costs are sought or where indemnity costs are sought, consideration needs to be given to r 4.6 DCR. It provides:

> **4.6 Increased costs and indemnity costs**
>
> 4.6.1 Despite rules 4.2to4.5, 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").
>
> 4.6.2 The court may make the order at any stage of a proceeding in relation to any step in the proceeding.

4.6.3 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—

(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**]**, notice for further particulars, notice for interrogatories, or 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 4.10 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.

4.6.4 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 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) the party claiming costs is a defendant and—

(i) the defendant served the defendant's response in accordance with rules 2.12 and 2.13 but the plaintiff did not serve the plaintiff's information capsule within the 30-day period stated in rule 2.14.1; or

(ii) the defendant served the defendant's information capsule in accordance with rule 2.15 but the plaintiff did not pursue the plaintiff's claim under rule 2.17 within the 90-day period stated in rule 2.17.4; or

(g) 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.

Application for an increase in the DCR scale costs

[23] The correct approach for calculating an increase in DCR scale costs can be found in *Holdfast NZ Ltd v Selleys Pty Ltd* (2005) 17 PRNZ (CA) at [43] – [45] and [48]. To succeed, an applicant must:

(a) First categorise the proceedings as category 1, 2 or 3: at [43];

(b) Work out a reasonable time for each step in the proceeding: at [44]. (This involves reference to the appropriate daily recovery rates under r 4.4 and Schedule 3 to the DCR.

(c) Apply (as part of this exercise) for extra time for a particular step under r 4.6.3(a): at [44]; and

(d) Then, and only then, step back, look at the amount of costs the applicant would recover following the process to this point and then argue for additional costs if it is considered that r 4.6.3(b) can be relied on: at [45].

[24] The principles set out by Randerson J in *Radisich v Taylor* HC Auckland, CIV-2007-404-007578, 16 April 2008 are relevant. His Honour noted:

> [28] ... In *Holdfast*, the Court of Appeal made it clear at [46] - [48] that where conduct of a party of the kind described in the Rules is established, the Court's normal response should be to provide an uplift on scale costs for the particular step or steps at issue. An uplift of up to 50 percent should ordinarily be regarded as the maximum logically required by the scheme of the rules. While the Court of Appeal did not rule out the possibility of an uplift of more than 50 percent, the Court clearly regarded that as an unusual or exceptional course.

Application for indemnity costs

[25] To succeed in an application for indemnity costs an applicant must show that the respondent party has acted vexatiously, frivolously, improperly or unnecessarily in commencing, continuing or defending a proceeding or a step in the proceeding or has breached the other subclauses of r 4.6.4. The threshold that must be met before an order for indemnity costs is made is, however, a high one: see *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] 3 NZLR 188.

General principles relating to costs

[26] *Fisher on Relationship Property*, at paragraph 19.41 summarises the costs principles to be applied in relationship property proceedings in this way:

> The Courts' discretion to award costs is given by s 40 of the Property (Relationships) Act and is completely unfettered. Costs in the Family Court are governed by Rules 5(2) and 207 of the Family Courts Rules 2002. They in turn refer to R 4.1 of the District Court Rules 2009. Because proceedings under the Act were seen as a mutual approach to the Court for its assistance in dividing property the practice was to leave each party to bear his or her own costs. The practice has been modified recently. In the light of increasing numbers of cases in the Courts and the attendant legal costs, the Courts have tended to adopt the criteria applied in civil cases where costs follow the event. This is particularly so where one party has impeded resolution of the litigation and where the eventual result is not vastly different from a party's earlier settlement proposal. Indemnity costs have been ordered on occasions where there has been something in the other party's actions that is vexatious, frivolous, improper or unnecessary.

[27] In para 19.42 *Fisher* notes the factors relevant to costs awards as follows:

> **Grounds for costs**
>
> Notwithstanding the general principle (para 19.41), the Courts have based their award of costs on the following factors:
>
> (i) creation of delays impeding resolution; [1]
>
> (ii) rendering proceedings unnecessarily complex and protracted as a result of stalling tactics or procedural ploys; [2]
>
> (iii) failure to comply with directions or time frames for filing of documents; [3]
>
> (iv) unwillingness to provide full and frank disclosure [4] conduct unnecessarily increasing the costs of proceedings eg by providing inadequate or false information concerning assets and liabilities; [5]
>
> (v) providing information only at 11th hour;
>
> (vi) overzealous pursuit of misconceived inquiries;
>
> (vii) the introduction of irrelevant or spurious allegations of misconduct;
>
> (viii) unreasonable attitude blocks realising claim;[6]
>
> (ix) one party's incurring disbursements of benefit to both parties in the disposal of proceedings eg the valuation costs although not where both parties have incurred equivalent disbursements;
>
> (x) the seeking of an indulgence from the Court eg an application to commence proceedings out of time;
>
> (xi) an application for stay of execution pending an appeal;
>
> (xii) applications for adjournment;
>
> (xiii) total failure to establish any claims;
>
> (xiv) abdication of responsibility by husband and admitted prevarication by his counsel; [7]
>
> (xv) loss of appeal (para 19.47).

[28] There is the established principle that costs should follow the event. That principle was adopted by Harrison J in *Anderson v Anderson* (HC New Plymouth, CIV-2004-443-000025, 16 July 2004). In that decision His Honour noted:

> The guiding, indeed overriding, principle for exercising a judicial discretion, whatever the jurisdiction, is that costs follow the event.

Discussion

[29] I have carefully considered all of the submissions filed and re-read my judgment of 14 July 2016. Some preliminary observations can be made.

(a) KIML and Mr Trent have been successful in the defence of the application brought by Mrs Trent, and to this extent the principle that costs should follow the event is relevant.

(b) I noted in paragraph [16] of my judgment the significant volume of material the parties filed which had to be considered. Both parties must accept some responsibility for this.

(c) I accept that KIML and Mr Trent should have the ability to have counsel of their choice represent them. KIML was joined under s 37 and so it was appropriate that the company had separate legal representation. One counsel representing each party is appropriate for costs award considerations.

(d) Filing the interlocutory application to determine admissibility issues was not an unreasonable step to take. Due to the shortness of hearing time I accept that I made it clear that the available hearing time should be utilised to address the substantive issues rather than the interlocutory admissibility issue. I do not consider either party was prejudiced by this. I do not consider a costs award for work done on this issue is appropriate, noting that no actual decision in respect of it was required.

(e) I do not accept the submission that the application for injunctive relief was necessary to secure KIML's/Mr Trent's assurances and undertakings recorded in the judgment. I consider there were other much cheaper and cost-effective means by which such assurances and undertakings could have been obtained. I note some of these

assurances and undertakings were offered in correspondence in any event.

[30] I consider the daily rate in category 2 and the time allocations in band C are the appropriate rates. The application for injunctive relief was a rather unusual one which is not commonly made. There are few reported cases to give the parties/counsel guidance.

[31] The band C calculation submitted of $25,810 is appropriately calculated with the exception of the second counsel allowance of $1,335 and the sealing of the order/judgment $356, which I accept was not required. The band C calculation should be reduced by $1,335 and $356 for these items to $24,119.

[32] Turning now to consider the claim for increased costs, I have accepted this is a relatively uncommon application and the various issues which needed to be considered and the volume of material filed does mean that the time spent by KIML counsel would substantially exceed the time allocated for general civil proceedings under schedule 4 DCR.

[33] I consider an uplift of 50% for the reasons advanced by Mr Sumner is justified for the following:

9.6	production of documents/discovery	2 days	3,560.00
9.12	opening and closing submissions	4 days	7,120.00
9.14	appearance at hearing	1.5 days	2,670.00
		7.5 days	

[34] An uplift of 50% as sought is appropriate for these specific items. This is calculated as follows:

50% of 7.5 days = 3.75 days @ category 2 rate of $1,780 / day	6,675.00

This means that the total scale costs with uplift amounts to $30,794.

[35] As to the claim for indemnity costs from 7 April 20167 onwards, I accept Mr Shaw's submission that the criteria under 4.6.4 DCR are not present in the circumstances of this case.

[36] Turning now to consider the impact on this costs award of the "Calderbank" letter of 7 April 2016, I have considered the terms of that letter. It is addressed to Mrs Trent's counsel and marked "without prejudice save as to costs". The relevant parts of the letter provide:

> **Application and costs**
>
> KIML's deponents have provided clear and convincing evidence in support of its opposition to the application.
>
> Following a review of the application and supporting evidence filed, the threshold required for the Court to intervene in KIML's affairs with the appointment of an independent accountant has not been satisfied. We are confident that the circumstances of KIML's trading and the conduct of Mr Trent as director are sound and the intervention sought is unwarranted. Put simply, this case is not similar to cases where the Court has intervened.
>
> To date KIML has incurred considerable legal fees in protecting its position.
>
> Should your client continue with the application, we anticipate that our client will incur a further $50,000 (excluding GST) in legal, expert and associated costs and disbursements. Our client considers these costs to be unnecessary and as such we will seek recovery of the same from Mrs Trent once the matter is determined in KIML's favour.

and further:

> **Invitation to withdraw application**
>
> Accordingly, we invite your client to withdraw the application before the Family Court at her earliest convenience to avoid our client incurring further legal and associated costs necessitated by that application.

[37] A party to litigation is entitled to put the other party on notice in the period leading up to a hearing that if they are successful then a costs award will be sought against the losing party. In this case an estimate of $50,000, including disbursements but excluding GST was provided. The actual costs and disbursements incurred from 7 April 2016, including GST and disbursements, amount to $83,317.

[38] I consider some adjustment is warranted to the costs award because Mrs Trent was put on notice about costs in the "Calderbank" letter. An estimate of the expected costs was provided, albeit for a lesser sum than was actually incurred. The application for injunctive relief has been pursued and has been refused. I consider no more than the $50,000 plus GST estimate should be considered as a maximum adjustment which could be made. I accept some of the work from 17 April 2016 will have already been included in the DCR schedule calculation and the 50% uplift I have already calculated. On the information I have been given it is not possible to make any precise calculations about the appropriate DCR schedule calculations for the period 17 April 2016 onwards.

[39] Using my general discretion, what I have decided to do is to make a further adjustment on a global basis in the sum of $15,000 because of the Calderbank letter. In assessing this sum I have regard to the DCR scale and increased costs already calculated in order to ensure that there is no duplication. The additional $15,000 awarded recognises that Mrs Trent has been put on notice about costs if she pursued her application, and KIML's defence to her application has been successful.

[40] Disbursements of $77,723.68 are claimed. The major part of this claim is for the independent expert evidence of Mr Vance from Deloitte, and Ms Callahan from Colliers. I indicated in my judgment at paragraph [109], that I found the evidence of these two witnesses to have been particularly useful in coming to my decision. I accept it is appropriate that these disbursements are included in the costs award.

[41] I accept the point made by Mr Shaw that some of the other claims relating to travel costs and accommodation for second counsel and for beverages, etc, are not appropriately claimed. Rather than going through the individual invoices and trying to isolate these various items, I will deal with this on a global basis by rounding the disbursements down to the sum of $75,000, which I fix as disbursements in the proceedings.

[42] I have therefore reached the position that costs and disbursements can be calculated as follows:

Category 2 Band C DCR calculations	24,119.00
50% uplift	6,675.00
	$30,794.00
Adjustment for Calderbank letter	15,000
	$45,794.00
Disbursements	75,000.00
	$120,794.00

[43] Given Mrs Trent has been unsuccessful in pursuing her application, I do not consider it is appropriate that any award of costs be made in her favour. Mr Shaw submitted that the pre-substantive hearing directions about the supply of financial information by KIML and undertakings given by Mr Trent about his desisting from non-core trading activity, should be considered as a factor against making a cost award. I have already noted that some of those issues were already conceded prior to the hearing. I have also observed in my judgment that there was nothing legally complicated about Mrs Trent's substantive relationship property claim. In any event, even if the information/assurances were not voluntarily supplied, directions to this effect could have been sought as part of pre-trial directions in respect of the substantive claim.

[44] A significant amount of time and effort and delay in resolving substantive relationship property issues has been caused by this application. Mr Trent/KIML have been successful in the defence of it. Costs should follow the event. It is a discrete application, separate from the substantive proceedings. I do not consider this costs award should be delayed or deferred until the substantive hearing is held or the substantive property issues are resolved. While it is a matter for the parties, I anticipate that this costs award would be satisfied by either an adjustment to the parties' capital held in KIML or, alternatively, an adjustment made in the relationship property calculations.

Outcome and orders

[45] Mrs Trent is ordered to pay KIML costs and disbursements as follows:

Costs	45,794.00
Disbursements	75,000.00
	$120,794.00

R J Russell
Family Court Judge