EDITORIAL NOTE: NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED.

IN THE FAMILY COURT
AT NAPIER

FAM 2015-041-276
[2017] NZFC 3924

IN THE MATTER OF	PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	[SARAH MAYER] Applicant
AND	[ADAM MAYER] Respondent

On the Papers:

Counsel:	M Casey for the Applicant M Wall for the Respondent
Judgment:	26 May 2017

RESERVE DECISION OF JUDGE P J CALLINICOS
[Costs Upon Discontinuance]

Solicitors:
Carlile Dowling of Napier for the Applicant
Bannister and von Dadelszen of Hastings for the Respondent

Introduction

[1] On 16 November 2015 the applicant commenced proceedings under the Property (Relationships) Act 1976. Her narrative affidavit in support of her application made reference to a number of items of property claimed to be relationship in nature, the principal asset being a residential property with an attributed the value of $335,000.00. She claimed each of the parties had a net entitlement to relationship property in the sum of $214,323.00.

[2] The respondent filed a defence, negotiations occurred and eventually both parties sought allocation of a judicial settlement conference. After considering the joint memorandum of counsel outlining the issues, I issued a minute on 4 July 2016 indicating that a settlement conference could be allocated as sought. However, given the joint memorandum indicated that the issue between the parties was limited to the applicant's contention that she had made some kind of contribution to a property which was owned by a third party entity, namely a family trust, I raised a query as to whether the Family Court held jurisdiction. I inquired as to whether or not that claim was one of an equitable nature, such as constructive trust and, if so, whether jurisdiction was actually in the District Court's civil jurisdiction.

[3] Some months later, on 16 February 2017, the applicant filed a Notice of Discontinuance of her application. She accepted that as there were issues with regards to the jurisdiction of the Family Court it was appropriate that she discontinue the proceedings and re-file them in a court of appropriate jurisdiction. Her counsel submitted that any issue of costs should be reserved to be dealt with at the culmination of proceedings.

[4] In approving that discontinuance I set a timetable for submissions on any issues as to costs, with that issue to be addressed by the Court in which the discontinued proceedings had been filed. Given she accepted that the proceedings commenced in this court were without jurisdiction and that new proceedings would be filed in another court, it did not seem to me to be appropriate for another court to be determining matters of costs in respect of matters it had not dealt with.

[5] I have received submissions from both parties and proceed to determine on the papers the issue of the costs incurred on the discontinued proceedings.

The Law

[6] The starting point for determination of matters of costs must always be the statute under which the application was made, in this case the Property (Relationships) Act 1976. As with many other family law statutes, the Act provides a wide discretion to the Court as to matters of costs, s 40 stating:

> **40 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.

[7] Given that the discretion is expressly subject to any 'rules of procedure', reference must be had to the principal rules of procedure found in the Family Courts Rules 2002 (FCR). Rule 207 introduces to the Family Court jurisdiction the costs provisions contained in the District Courts Rules (DCR) 14.2 through 14.12, in so far as such rules are applicable and with all necessary modifications. Accordingly, given the absence of any express statutory guidance as to the exercise of the discretion, applications for costs in Property (Relationships) Act proceedings are decided by reference to a range of principles in the District Courts Rules, with the assistance of the time allocations and rates found in Schedules 4 and 5.

[8] In *Ormsby v van Selm* the High Court considered[1] whether a civil oriented approach should be taken in respect of proceedings under the Property (Relationships) Act. After observing that the traditional approach was that each party to proceedings under the Act should normally bear his or her own costs because the statute introduced a semi inquisitorial process designed to benefit both parties, Duffy J commented:

> [44] However, the authority relied upon by the appellants no longer accords with the approaches that have more recently been followed by this Court. In my view, I consider that the correct approach is to follow that adopted in *SB v DC, FT v JML, Thompson v Public Trust* and most recently

[1] *Ormsby v van Selm* [2015] NZHC 641, at [44]

> in *Martin v Marsh*. As the Family Court Rules have made specific references to the District Court Rules on costs, the civil costs regime should apply to Property (Relationships) Act proceedings. While costs decisions are discretionary, the Court should apply the regime in the absence of some reason to the contrary. Any departure must be a considered and particularised exercise of the discretion.

[9] Such binding authority makes clear that in proceedings under this Act, unless some reason to the contrary is made out, determination of applications for costs should be undertaken by reference to the regime in the District Courts Rules.

[10] Drawing from DCR 14.2 and the substantial available case law (such as the cases of *Aalders v Stevens*[2], *A v A*[3] and *R v S*[4]), the exercise of the costs discretion is guided by reference to such factors as:

(a) The outcome of the proceedings; as a general principle a party who fails with respect to their position should pay costs to the successful party.

(b) The complexity or otherwise of the matters in issue.

(c) The way in which the parties and their legal advisors conducted the proceedings.

(d) Whether proceedings were made unnecessarily complex or protracted because of stalling tactics or procedural ploys adopted by party.

(e) The means of the parties.

(f) The actual costs incurred by the parties.

(g) The overall interests of justice.

[11] Questions of costs should also be guided by reference to the objects and purposes of the legislation under consideration in the particular case[5]. In the case of

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2 *Aalders v Stevens* (1992) 5 FRNZ 198
3 *A v A* [1999] NZFLR 447
4 *R v S* [2004] NZFLR 207
5 *L v W*, above n 1, at [29]

the Property (Relationships) Act the purposes are as set out in s 1M and the principles guiding achievement of the purpose in s 1N, which may be paraphrased as incorporating the following objects:

(a) The focus is upon identifying and dividing in a just manner property which is derived from relationship assets or energies,

(b) All forms of contributions to the relationship should be treated as equal,

(c) Questions arising under the Act about relationship property should be resolved as inexpensively, simply, and speedily as is consistent with justice.

[12] In terms of the approach to be taken where costs are sought after a party has discontinued their application or defence, while the FCR's do not provide express provision as to costs arising on a discontinuance, FCR 195A(6) provides that the discontinuance of an applicant's substantive application does not affect the determination of costs in respect of that application.

[13] Although the new DCR's contain express provision in r 15.20 that 'Unless the defendant otherwise agrees or the court otherwise orders, a plaintiff who discontinues a proceeding against a defendant must pay costs to the defendant of and incidental to the proceedings up to and including the discontinuance', no such equivalent rule has been adopted into the FCR's. As FCR 5A expressly and clearly provides that a rule in the DCR's does not apply to proceedings in a Family Court unless that rule is specifically applied by the FCR's, the rigid 'costs follow discontinuance' approach of the DCR's does not apply in the Family Court. That being the case, where an application or defence has been discontinued and issues of costs arise, it is my view that the determination falls to be decided according to the general principles I have outlined.

[14] Authority in support of this view is derived from the recent High Court decision of *Prasad v Prasad* in which Katz J considered matters of costs after an appeal under the Property (Relationships) Act was discontinued and where the High Court equivalent of DCR 15.20 (HCR 15.23) applied. Notwithstanding the

presumption in favour of costs created by that rule, Katz J inquired whether the presumption was displaced in all the circumstances of the case. The approach taken by Kós J in *Ryde v Earthquake Commission* was adopted[6], an approach which considered 5 questions:

(a) Was it reasonable to bring the proceeding?

(b) Was it reasonable for the defendant to defend the proceeding?

(c) Why were the proceedings discontinued?

(d) Were the merits so obvious that they should influence the costs outcome?

(e) Does the outcome represent vindication of the plaintiff's commencement of proceedings?

[15] In the absence of any specific rule in the Family Court guiding the costs discretion upon discontinuance, and noting these considerations apply notwithstanding a presumption in favour of costs on discontinuance in the High Court and District Court civil jurisdiction, I adopt the approach from *Ryde* in guiding the determination of the current application.

Analysis

Introduction

[16] In determining the respondent's application for costs arising after discontinuance, I adopt a two-step approach; first, I consider the five point framework approach engaged in *Ryde*. Secondly, if the answer to the first step is in favour of an award of costs, then the inquiry shifts to an assessment of quantum according to the general principles.

[6] *Ryde v Earthquake Commission* [2014] NZHC 2763 at [23] – [30]

Was it reasonable to bring the proceeding?

[17] The first question is whether it was reasonable of the applicant to bring this proceeding. Her primary position is that costs should lie where they fall or, in the alternative, be a reasonable contribution to costs. Her counsel submits that there is nothing involved in the behaviour of the applicant which would require a departure from such approach.

[18] That primary submission might be appropriate if the traditional approach to matters of costs still applied, as opposed to the more civilly oriented approach indicated in cases such as *van Selm*, or indeed the governing legislative provision in r 14.2. That said, I accept that there was nothing in the behaviour of the applicant which was unreasonable in terms of conduct. However, the issue as to whether it was "reasonable" for the applicant to bring the proceeding in the sense that Kós J uses that term, has more to do with the appropriateness of bringing the claim as opposed to issues of conduct.

[19] In a situation where the applicant has accepted there was no jurisdiction permitting her to commence the subject proceeding, it must follow that it was unreasonable for her to bring a proceeding for which no jurisdiction existed. The word "reasonable" contains no magic, it means simply; "showing reason or sound judgement, having the ability to reason"[7]. Applying such definition, it could hardly be said that it is reasonable for any person to commence any Court proceeding where no jurisdiction existed. Although commencement may have arisen by mistake or error, that is an issue relevant to quantum rather than to whether commencement of proceedings was reasonable at the outset. My determination is that it was not reasonable for the applicant to bring this proceeding.

Was it reasonable to defend the proceeding?

[20] It must follow that it was reasonable for a respondent to defend a proceeding commenced against him where no jurisdiction existed for that application.

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[7] *Collins English Dictionary*10th edition, 2009

Why were the proceedings discontinued?

[21] The proceedings were discontinued upon acceptance that no jurisdiction existed permitting them to be brought, whereupon proceedings were to be brought in the proper court.

[22] The central subject matter of the litigation was an asset which was neither relationship property nor separate property. It was owned by a third party. The foundation of the applicant's claim was that she had contributed to the value of that property, jurisdiction for such claim would only exist if the contribution pertained to relationship or separate property within the limited scope of the Act.

Were the merits of the application so obvious that they should influence the costs outcome?

[23] The merits of the proceeding, in terms of jurisdiction to commence them, are an obvious matter to be considered when assessing merit of any proposed application. The issue requires a preliminary assessment of facts, then assessed against the legal criteria creating jurisdiction.

[24] Unlike the situation in *Prasad*, this is not a situation where the merits of a case lay in a bundle of disputed questions of fact. The formative inquiry for commencing the failed proceeding was as to whether the property which was the focal point of the proposed litigation fell within the jurisdictional criteria of the Property (Relationships) Act 1976. Although the subject property was owned by a trust, there was nothing to indicate that any of the available legislative mechanisms permitting limited intervention into a trust (such as the remedies in ss 44 or 44C) were at play. The fact the application was discontinued supports a view that no such remedies were available.

[25] In the circumstances of this case the lack of merit of the application was so obvious that they should influence the costs outcome.

Does the outcome represent vindication of the applicant's commencement of the proceedings?

[26] The final consideration is whether the outcome of the proceedings vindicates the applicant's commencement of them. The obvious answer is no. The fact she discontinued her application after accepting lack of fundamental jurisdiction does not vindicate her action in commencing them.

First Inquiry - Overview

[27] It follows from my assessment of the relevant questions that discontinuance of the proceedings in the circumstances of the present case merits an award of costs. I turn to the second point of inquiry, namely quantum.

Second Inquiry - Quantum

[28] The assessment of quantum of costs is undertaken according to the general principles I have outlined. Very little, if any, information has been provided to me in terms of; the means of the parties, their conduct or that of their advisers and whether any reasonable offers were made or rejected. Both parties have had full opportunity to present submissions on such matters if they felt such to be relevant to the determination of costs.

[29] The successful respondent advises that his actual costs up to and including the filing of the Notice of Discontinuance amounted to $5,344.95 and that an additional three hours of time was required for these submissions. His submissions do not actually state how much the respondent believes the court should order in terms of costs. They advise that the recovery rates in the District Courts Rules are of limited practical application in the current proceedings.

[30] Given the uncertainty as to what quantum the respondent actually seeks, I have assessed whether this is a case where indemnity or actual costs, or indeed increased costs should apply. I have had regard to the provision in DCR 14.6 (which governs assessments of increased or indemnity costs) and the approach taken by the

Supreme Court in *Prebble v Awatere-Huata (No 2)*[8]. In essence, for increased costs to be justified, the unsuccessful party must have failed to comply with rules or directions of court, or pursued an unnecessary step or argument that lacks merit or other unreasonable conduct and contributing unnecessarily to the time or expense of the proceeding. For indemnity costs to be merited, the conduct of the unsuccessful party must be of such a nature that it is vexatious or improper. The case law, such as that in *Prebble*, requires misconduct of a 'flagrant' kind. By any measure, that is a high standard to reach.

[31] In the circumstances of the present case, nothing has been presented to me by way of evidence or submission, that the actions of this applicant have been anything of that quality. There is nothing to suggest she has acted with malice or frivolity. Rather, it appears she genuinely believes that she contributed in some way to property under the control of the respondent in respect of which she is entitled to some form of compensation or reimbursement. All that has occurred is that she commenced proceedings in the wrong court and, when this jurisdictional issue was brought to her attention, she has reflected and discontinued the proceeding.

[32] Although no submissions were presented on the point, it is not unreasonable to infer that a component of the costs incurred by the respondent must have included Counsel's time in assessing components of the factual matrix which will also be relevant to any subsequent proceedings in the civil jurisdiction of this Court. It would be unreasonable to apportion to the applicant a share of those costs as those fundamental tasks of assessing events and circumstances for the current proceeding will have an element of cross-over in the civil proceedings.

[33] It is also relevant to quantum that it appears the respondent himself had not considered the jurisdictional issue until the Court brought to his attention. If he did, then there was certainly no issue raised with the Court and nothing submitted to that effect. To that extent, both parties continued the proceeding in the incorrect jurisdiction. It would therefore be quite unreasonable to expect the applicant to bear the full responsibility for the costs that have accrued.

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[8] *Prebble v Awatere-Huata (No 2)* [2005] 2 NZLR 467, at [6]

[34] Put another way, at the very commencement of the application, the respondent could have lodged a protest to jurisdiction (FCR 43) thereby limiting any subsequent costs arising from the misconceived application. There is a level of mutual responsibility for a portion of the costs of the proceeding. That said, it is difficult to escape the conclusion that the commencement of the application without jurisdiction was the primary causative factor of costs incurred.

[35] The unsuccessful applicant has submitted that if the court was minded to making an award of costs against her, it should consider costs calculated according to a 2B basis under Schedule 4 of the District Court Rules. Mr Casey calculates costs on a 2B basis as amounting to $2,225.00.

[36] Given my view that the respondent defended proceedings which lacked jurisdiction, when he could have opposed jurisdiction earlier, I am not minded to a view that this is the case where costs in accordance with 2B are merited. Some discount must be made to take into account that both parties partook in the mistaken continuance of proceedings.

Decision

[37] In all the circumstances of this case and applying the guiding principles, I order that the applicant is to pay to the respondent the sum of $2,000.00 (including GST and disbursements) as a contribution to the costs incurred by the respondent. This includes allowance for his costs incurred in the submissions on costs.

Delivered at 10.45 am 26 May 2017

P.J. Callinicos
Family Court Judge