EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS]

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IN THE FAMILY COURT
AT TAURANGA

I TE KŌTI WHĀNAU
KI TAURANGA MOANA

FAM-2017-070-000211
[2020] NZFC 5086

IN THE MATTER OF	THE FAMILY PROCEEDINGS ACT 1980
BETWEEN	[TRACEY CARTER] Applicant
AND	[GARRY CARTER] Respondent

In-chambers:

Appearances: E Eggleston for the Applicant
D Eades for the Respondent

Judgment: 3 July 2020

RESERVED DECISION OF JUDGE S J COYLE
[INTER PARTE COSTS]

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[1] On 25 February 2020 I issued a reserved judgment in relation to the making of a final spousal maintenance order pursuant to which I made a final spousal maintenance order for past maintenance requiring Mr [Carter] to pay Ms [Carter] the sum of $37,356.00.

[2] Mr Eggleston, counsel for Ms [Carter], foreshadowed an intention to apply for costs and I accordingly made directions for filing of submissions in relation to the issue of costs. Whilst Mr Eggleston's costs were due to be filed within 28 days of the release of the judgment, he in fact did not file his submissions until 9 June 2020; in his submissions he provides evidence of the agreement to Mr Eades to the submissions being filed out of time. Pursuant to directions that I made, Mr Eades then had a further 14 days to respond; no submissions have been filed by Mr Eades on behalf of Mr [Carter].

[3] At the time of the spousal maintenance order being made, Mr Eades had foreshadowed on behalf of Mr [Carter] an intention by Mr [Carter] to declare himself bankrupt. Thus, the order for payment of past spousal maintenance on the face of it, would not have been enforceable. However, it is recorded in my judgment at [17] an order for spousal maintenance does not "survive" a bankruptcy, and remains a debt owed by Mr [Carter] to Ms [Carter] at the expiration of his period of bankruptcy.

[4] What Mr Eggleston seeks by way of costs is a 'but for' order pursuant to s 45(5) of the Legal Services Act 2011. Throughout the proceedings Mr [Carter] was legally aided, and thus the making of a cost order against him must consider the relevant principals of the LSA. If Mr Eades had filed submissions I had asked that he address in his submissions whether an order for costs against Mr [Carter] would similarly survive his bankruptcy or not. Mr Eggleston has addressed this issue in his submissions advising that a 'but for' order is not a liability against Mr [Carter] personally, and as a consequence it will subsist despite his bankruptcy[1].

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[1] S 46(6) of the Legal Services Act 2011; see also *Black v Black* [2016] NZHC 2492 at [55] to [57]

The Legal Position

[5] Section 45 of the Act provides as follows:

> (1) If an aided person receives legal aid for civil proceedings, that person's liability under an order for costs made against him or her with respect to the proceedings must not exceed an amount (if any) that is reasonable for the aided person to pay having regard to all the circumstances, including the means of all the parties and their conduct in connection with the dispute.
>
> (2) No order for costs may be made against an aided person in a civil proceeding unless the court is satisfied that there are exceptional circumstances.
>
> (3) In determining whether there are exceptional circumstances under subsection (2), the court may take account of, but is not limited to, the following conduct by the aided person:
>
> (a) any conduct that causes the other party to incur unnecessary cost:
>
> (b) any failure to comply with the procedural rules and orders of the court:
>
> (c) any misleading or deceitful conduct:
>
> (d) any unreasonable pursuit of 1 or more issues on which the aided person fails:
>
> (e) any unreasonable refusal to negotiate a settlement or participate in alternative dispute resolution:
>
> (f) any other conduct that abuses the processes of the court.
>
> (4) Any order for costs made against the aided person must specify the amount that the person would have been ordered to pay if this section had not affected that person's liability.
>
> (5) If, because of this section, no order for costs is made against the aided person, an order may be made specifying what order for costs would have been made against that person with respect to the proceedings if this section had not affected that person's liability.
>
> (6) If an order for costs is made against a next friend or guardian *ad litem* of an aided person who is a minor or is mentally disordered, then—
>
> (a) that next friend or guardian *ad litem* has the benefit of this section; and
>
> (b) the means of the next friend or guardian *ad litem* are taken as being the means of the aided person.

[6] If, as sought by Mr Eggleston, I make an order pursuant to s 45(5), then Ms [Carter]'s ability to claim the costs off the commissioner for legal aid is pursuant to s 46 of the Act.

[7] Pursuant to s 45(2) the Court cannot make an order against Mr [Carter] given that he is in receipt of civil legal aid unless the Court is satisfied there are exceptional circumstances.

[8] In Mr Eggleston's submission no exceptional circumstances (required to be proven under s 45(2)) need to be established for a finding under s 45(5) of the LSA. Mr Eggleston referred to a decision of mine, *ND v GGHFC*[2] in which I followed (recognising the conflict in High Court authorities) the decision of Penlington J in *X v Y*.[3] I stated at [13] and [14] of *ND v GGHFC*

> [13] Thus, it is my view that the reference to exceptional circumstances only relates to consideration of an order for costs. With exceptional circumstances cannot be made out, or for other reasons an order for costs is not appropriate, the court is nevertheless empowered to make an order specifying what order for costs may have been made pursuant to [s 45(5)] of the Act.
>
> [14] Therefore follows that I see [s 45(2) and (5)] as being disjunctive and not conjunctive. That is the approach taken by Penlington J, and the approach that I prefer when considering the plain and ordinary meaning of the section.

[9] I also note a more recent High Court decision, *RMJ v BJG*[4] which held that an order may be made pursuant to s 45(5) LSA when exceptional circumstances have not been found to exist under s 45(2).

Should an order be made against Mr [Carter] pursuant to s 45(5).

[10] Mr Eggleston submits that an order should be made pursuant to s 45(5) on the basis that

(a) Ms [Carter] was entirely successful with her application seeking $47,356 as a lump sum payment.

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2 *ND v GGHFC* Queenstown FC FAM 2007-002-1384, 4 December 2009.
3 *X v Y* [2000] 2 NZLR 748 (HC).
4 *RMJ v BJG* [2017] NZHC 2470.

(b) Ms [Carter] made a Calderbank offer on 19 February 2020 which provided for a lump sum payment of $35,000. Mr [Carter] in hindsight would have been better off accepting that offer; but by not accepting it Ms [Carter] was put to the expense of a hearing.

(c) Ms [Carter] is in straightened financial circumstances and has borne the costs of the hearing on a solicitor client basis. She should not have been put to the significant costs of seeking retrospective maintenance, in Mr Eggleston's submissions, when it was clear that Mr [Carter] had the means to pay.

[11] I accept those submissions in their entirety. For it seems to me that if Mr [Carter] had accepted the Calderbank offer, then Ms [Carter] would not have been put to the expense of a hearing. For the reasons set out in my judgment I found that Mr [Carter] had the means to pay should he have made payments at the time to Ms [Carter] by way of spousal maintenance. Ms [Carter], given the subsequent bankruptcy of Mr [Carter], is going to have to wait until the discharge of his bankruptcy for payment of that outstanding spousal maintenance debt, and it is not a fair and just result that she should not only have to await payment of the spousal maintenance award, but in the interim have to meet her legal costs.

[12] If Mr [Carter] had not been in receipt of civil legal aid I would have made a cost award against him. Mr Eggleston does not seek indemnity costs but rather seeks costs on a 2B basis pursuant to the District Court Riles, which as set out in his submissions amounts to a total figure of $10,277.50.

[13] But for the inability pursuant to s 45(2) to make the cost award against Mr [Carter], I would have made costs in favour of Ms [Carter].

[14] Accordingly I make an order that pursuant to s 45(5) that I would have made a cost award against Mr [Carter] in the sum of $10,277.50 if s 45 had not affected Mr [Carter]'s liability.

[15] I would urge the Commissioner pursuant to s 46 of the Act to look favourably on Ms [Carter]'s anticipated application under s 46(2), and I would urge the Commissioner to exercise the discretion contained in s 46(5) and make a payment in the sum of $10,277.50 to Ms [Carter].

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Judge SJ Coyle
Family Court Judge

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