IN THE FAMILY COURT
AT INVERCARGILL

I TE KŌTI WHĀNAU
KI WAIHŌPAI

FAM-2018-025-208
[2021] NZFC 3580

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	JOHANNES JACOBUS ANTHONIUS VERNOOIJ Applicant
AND	OFFICIAL ASSIGNEE IN THE BANKRUPTCY OF SOPHIA VERNOOIJ Respondent

Hearing:	(on papers)
Counsel:	J Beck for the Applicant S McKenzie for the Respondent
Judgment:	23 April 2021

JUDGMENT OF JUDGE A R MCLEOD
[AS TO QUANTUM OF COSTS]

Introduction

[1] Mr and Mrs Vernooij married on 12 July 1997. The relationship between the parties broke down and they separated. On 5 October 2012, after four years of

protracted negotiations, Mr and Mrs Vernooij entered into a compromise agreement recording the division of relationship property between them ("the agreement").

[2] On 18 July 2018 Mr Vernooij applied to set aside the agreement. Given the lapse in time between the dissolution of the party's marriage and the filing of the claim by Mr Vernooij, the first issue to be determined was whether leave should be granted for Mr Vernooij to bring his claim to set aside the agreement.

[3] A two-day hearing was held on 20 and 21 July 2020. I issued a reserve decision on 16 December 2020, following the receipt of submissions. I determined that it was not just for the Court to grant leave for Mr Vernooij to bring his claim to set aside the agreement entered into on 5 October 2012, taking into account the circumstances as set out in my decision.

[4] Having found against Mr Vernooij on the question of leave, it followed that there was no need for the Court to address the substantive merits of the case and accordingly Mr Vernooij's application to have the agreement set aside was dismissed.

[5] I accepted the submissions of counsel for the respondent that costs decisions in relationship property cases should be treated the same way as costs decisions in ordinary civil proceedings and that costs follow the event. I determined that the proceedings were to be categorised as 2B costs.

[6] Before making a final decision as to the award of costs, including whether there should be any uplift pursuant to r 14.6 of the District Court Rules 2014 ("the DCR"), I invited counsel for the respondent to file, no later than 5 pm on 25 January 2021, a memorandum addressing r 14.2(f) of the DCR and schedule 4 of the DCR. Those submissions were duly filed by counsel for the respondent.

[7] Counsel for the applicant sought an opportunity to reply which was granted. Submissions were filed by counsel for the applicant on 26 March 2021.

Issues for determination

[8] The issues I must determine are:

(a) the quantum of the award of costs. This will require a determination of whether the costs of second counsel should be certified; and

(b) whether there should be an increase in the award of costs by way of either:

(i) an uplift on scale costs; or

(ii) indemnity costs.

Costs

[9] The Court may make such an order as to costs as it thinks fit.[1] While that discretion is broad, in order to ensure that that discretion is exercised in a principled way, regard should be had to the principles derived from the DCR.[2]

[10] I have already determined that the proceedings are to be categorised as category 2, band B.

First issue - quantum of costs

[11] Category 2B costs have been calculated by counsel for the respondent as being $28,363.50.[3] The calculated figure includes an allowance for second counsel in the sum of $1,432.50.

[12] The key question in determining whether to certify costs for second counsel is whether the nature of the proceeding was such to justify the use of junior counsel.[4]

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[1] Property (Relationships) Act 1976, s 40.
[2] Family Court Rules 2002, rule 207; District Court Rules 2014, rule 14.2 – 14.12; *Campbell* v *Goldie* [2019] NZHC 1573.
[3] Paragraph 3, submissions of counsel for the respondent dated 25 January 2021.
[4] *Nomoi Holdings Ltd* v *Elders Pastoral Holdings Ltd* (2001) 15 PRNZ 155 (HC) at [21].

The approach to determining whether costs associated with the second counsel should be granted is objective and focused on the nature of the proceeding, not the actual counsel and how they chose to conduct the litigation.[5] The litigation will usually need to have some unusual feature to justify an allowance for second counsel.[6]

[13] Counsel for the respondent submits that an allowance should be made for second counsel on the following grounds:

(a) both parties were represented by senior and junior counsel; and

(b) the preparation of evidence and submissions involved a review of four years of protracted negotiations which included a review of the full file of the respondent's prior counsel, and partial documentation disclosed from the applicant's prior counsel's file, and accounting and valuation advice.

[14] Standing back and viewing the situation objectively, I am not satisfied that there is any justification for certifying the costs of second counsel. Cases of this nature are not a rarity and there is no unusual feature in respect of the nature of the proceedings such that would justify an allowance of second counsel. The claim itself was not complex.

[15] On that basis I calculate the quantum of the award of costs on a 2B basis as being $26,931 (the original claim of $28,363.50 less the costs of second counsel claimed at $1,432.50).

Should there be an increase in the award of costs?

[16] An increase in the award of costs can be made one of two ways:

(a) by uplifting the scale costs; or

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[5] *Tao v Strata Title Administration Ltd* [2016] NZHC 1821 at [52].
[6] At [52].

(b) by way of indemnity costs, that being an award of the actual costs, disbursements and witness expenses reasonably incurred by a party.

[17] Counsel for the respondent seeks indemnity costs. The burden of persuading the Court that an award of indemnity costs is justified rests with the respondent.[7] An award of costs should not exceed the actual costs incurred by the party claiming costs.[8]

[18] Counsel for the respondent has set out in their submissions that the actual costs incurred by the respondent are $42,440.25. This sum includes invoices for fees in the sum of $35,370.75, disbursements in the sum of $1,319.50, and fees for a witness (Ms Virginia Wilson who was Mrs Vernooij's former counsel) in the sum of $5,750.

[19] In order to satisfy the Court that indemnity costs are justified, the respondent must satisfy one or more of the criteria set out in r 14.6(4) of the DCR. The threshold for an order of indemnity costs is a high one.[9] In this case the respondent argues that the applicant has acted vexatiously, frivolously, improperly, or unnecessarily in commencing and continuing these proceedings.

[20] Counsel for the applicant in essence argues that not only should scale costs not be awarded, but that there should not be either an increase in the scale costs or an award of indemnity costs because:

(a) the applicant's case had merit;

(b) the terms of the agreement were vague and there is no dispute that the applicant has been required to pay more than his initial liability under the agreement; and

(c) the applicant is required to produce receipts, which he does not have, and pay interest on the loan to his parents in excess of what was intended.

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[7] *Radfords Ltd v Advertising Works New Zealand Ltd* (HC) Auckland CIV-2006-404-325, 26 April 2006.
[8] District Court Rules 2014, r 14.2(1)(f).
[9] *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] 3 NZLR 188; (2006) 11 TCLR 544 (CA).

[21] On that basis counsel for the applicant submits that the agreement had sufficient problems to necessitate the proceedings.

[22] Further, counsel for the applicant submits that the applicant's financial situation is dire and an award of costs would push him over the edge.

[23] Unfortunately, there are significant flaws with the arguments put forward by counsel for the applicant. As correctly pointed out by counsel for the respondent, I concluded that the applicant's case was unmeritorious and inter alia held that[10]:

(a) Counsel for the applicant was dismissive in closing submissions in respect of the issue of the extension of time for filing the substantive application.

(b) The applicant's evidence was non-specific in respect of his delay in the filing of proceedings.

(c) The applicant failed to produce evidence in respect of matters that were raised.

(d) The applicant generally accepted the proposition that he only applied to set aside the agreement after he failed in his opposition to the summary judgment application.

[24] Had sufficient attention been paid to the threshold question of the extension of time for filing, it is difficult to see how, with adequate legal advice, the substantive application could have been advanced in the first instance.

[25] I accept the submissions of counsel for the respondent that it was necessary for the Official Assignee to participate and defend the application filed by the applicant as it was in the interests of the unsecured creditors.

[10] Submissions of counsel for the respondent dated 25 January 2021, paragraph 16.

[26] These proceedings were essentially commenced for an ulterior purpose. The applicant waited until summary judgment was entered against him and then applied to set aside the agreement on unmeritorious grounds. I therefore accept the submissions of counsel for the respondent that the applicant acted vexatiously by unnecessarily commencing and continuing these proceedings which were without merit.

[27] On that basis there will be an award of indemnity costs against the applicant in the sum of $42,440.25.

A R McLeod
Family Court Judge