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**IN THE FAMILY COURT
AT NELSON**

**I TE KŌTI WHĀNAU
KI WHAKATŪ**

**FAM-2020-042-000208
[2022] NZFC 12052**

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	GAIL DOREEN PHILLIPS Applicant
AND	STUART COLIN BOLITHO Respondent

Hearing: In chambers on the papers

Appearances: S J Zindel and R Brooke for the Applicant
L Yong for the Respondent

Judgment: 24 November 2022

**RESERVED JUDGMENT OF JUDGE R J RUSSELL
[as to costs]**

Introduction

[1] Following a one day hearing on 20 September 2022 I issued a reserved judgment determining each party's entitlement to relationship property following the breakdown of their relationship.

[2] In para [82] of my judgment I directed:

- (f) The costs of the filing fee, hearing fee and sealing fees paid to the court were to be shared equally.
- (g) All other costs are reserved. If sought, memoranda is to be filed within 21 days with a right of reply in a further 14 days following which the file is to be referred back to me in chambers for decision.

[3] Counsel have each filed a memorandum seeking an award of costs.

Mr Bolitho's claim for costs

[4] Ms Yong filed her memorandum first. She sought scale costs on a District Court Rules ("DCR") Schedule 4 2B basis amounting to \$20,150.50 should be paid to Mr Bolitho. She accepted that because Ms Phillips was legally aided the provisions of s 45 of the Legal Services Act 2011 ("the LSA") applied and that a costs order could not be made unless there were exceptional circumstances shown.

[5] It was submitted exceptional circumstances were Ms Phillips' failure to comply with timetabling directions and that she now had the financial ability to meet a costs award because her Invercargill property, which was her separate property, had been sold and the sale proceeds were held in her solicitor's trust account.

[6] In the alternative, Ms Yong sought a certification under s 45(5) of the LSA that costs would have been ordered against Ms Phillips but for her grant of legal aid, enabling Mr Bolitho to make an application to the Legal Services Commissioner to use his/her power to pay the costs from the Legal Services fund.

[7] Ms Yong noted litigation was initially commenced in the District Court by Mr Bolitho alleging claims of undue influence and undue enrichment and conversion against Ms Phillips. Ms Phillips then filed an application in the Family Court for the division of relationship property.

[8] It was noted that pre-trial directions had been made for Ms Phillips to supply details of her immigration records, declarations made to the IRD/WINZ and details of

her bank statements. This information had not been supplied by the judicial settlement conference date which meant that the first conference had to be adjourned and a second conference was required. In the end the settlement conference produced no agreement and further timetabling directions for the filing of affidavits were made and a defended hearing was required.

[9] Ms Yong noted the outcome of my decision, the legal principles relating to costs, the principles in s 45 of the LSA and cited relevant case authority. She noted Ms Phillips had sold the Invercargill property in September 2021 and received net proceeds of \$220,000 plus a net \$47,109 from the judgment. She contended this meant Ms Phillips was able to meet a costs order.

Ms Phillips response/claim for costs

[10] In his 11 page memorandum Mr Zindel responded to Ms Yong's submissions. He submitted the DCR required consideration to be given to which party was successful in the proceedings. He accepted costs should follow the event for a successful party. If each party had a broadly similar level of success, he submitted costs should lie where they fall.

[11] Mr Zindel said Ms Phillips had incurred legal aid repayment costs of \$18,566.21 which could be claimed if it were determined she was the successful party.

[12] Mr Zindel proceeded to address the exceptional circumstances provisions in s 45 of the LSA. In terms of who was successful, Mr Zindel's submission is that each party enjoyed some degree of success on the various issues which needed to be determined. He assessed who was successful in the outcomes relating to the s 21A agreement, superannuation, s 13 extraordinary circumstances, and s 20E adjustments recorded in my judgment.

[13] Mr Zindel also addressed the delay allegations made by Ms Yong. He submitted the information directed to be obtained was sought but there were delays in obtaining the information which were beyond her control. He also cited her work

pressures and commitments and COVID demands. He also accepted some responsibility as Ms Phillips' solicitor for the delays which had occurred.

[14] Mr Zindel submitted that the delays which did occur caused little prejudice and that the hearing proceeded as was scheduled.

[15] Mr Zindel submitted that Ms Phillips' Invercargill property sale proceeds should not be viewed as a cash pool available to meet an award of costs because they were earmarked to be put towards another property which she intended to buy. At the age of 66 years, it was submitted that Ms Phillips was not well off and needed all of the financial resources available to her to rehouse herself.

[16] Mr Zindel concluded his submissions by saying Ms Phillips had not conducted the proceedings in an egregious manner nor had caused abuses to the court process. He submitted that if jurisdiction is found, any award of costs made against Ms Phillips should be no more than "a nominal amount of \$1,000".

The law

[17] The relevant principle of the Act 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.

[18] 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.

[19] 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 Court Rules 2002, 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) 14.2—principles applying to determination of costs:
 - (b) 14.3—categorisation of proceedings:
 - (c) 14.4—appropriate daily recovery rates:
 - (d) 14.5—determination of reasonable time:
 - (e) 14.6—increased costs and indemnity costs:
 - (f) 14.7—refusal of, or reduction in, costs:
 - (g) 14.8—costs in interlocutory applications:
 - (h) 14.9—costs may be determined by different Judge:
 - (i) 14.10—written offers without prejudice except as to costs:
 - (j) 14.11—effect on costs:
 - (k) 14.12—disbursements.
- (3) This rule is subject to the provisions of the Family Law Act under which the proceedings are brought.

[20] It must be remembered the appropriate District Court Rules only apply as far as applicable and with all necessary modifications.

[21] Rule 14.2 of the DCR sets out the general principles applying to determination of costs:

14.2 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.

General principles relating to costs

[22] *Fisher on Matrimonial and 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.

[23] 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;
- (ii) rendering proceedings unnecessarily complex and protracted as a result of stalling tactics or procedural ploys;
- (iii) failure to comply with directions or time frames for filing of documents;
- (iv) unwillingness to provide full and frank disclosure conduct unnecessarily increasing the costs of proceedings eg by providing inadequate or false information concerning assets and liabilities;
- (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;
- (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;
- (xv) loss of appeal (para 19.47).

Footnotes omitted

[24] There is the established principle that costs should follow the event. That principle was adopted by Harrison J in *Anderson v Anderson*.¹ In that decision His Honour noted:

¹ *Anderson v Anderson* HC New Plymouth CIV-2004-443-25, 16 July 2004.

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

Principles to be applied where costs are sought against a party who is in receipt of legal aid

[25] In *Brookers on Family Law*, the authors note the principles are to be applied in this way:²

Where a Court seeks to award costs against a legally aided person, the position is regulated by s 45 Legal Services Act 2011. A personal costs order cannot be made against a legally aided party unless there are “exceptional circumstances”: s 45(2). When exceptional circumstances are found, the amount of the costs order must still be reasonable in all the circumstances.

In deciding whether there are “exceptional circumstances” s 45(3) states the Court may take into account conduct by the aided person, including:

- (a) any conduct that causes the other party to incur unnecessary cost;
- (b) any failure to comply with the procedural rules and court orders;
- (c) any misleading or deceitful conduct;
- (d) any unreasonable pursuit of issues on which the aided person fails;
- (e) any unreasonable refusal to negotiate a settlement or engage in alternative dispute resolution;
- (f) any other conduct that abuses the processes of the court.

The legally aided person's liability under a costs order must not exceed an amount that is reasonable having regard to all the circumstances including the means of the parties and their conduct in connection with the dispute: s 45(1).

Any order for costs made against a legally aided person must specify the amount that that person would have been ordered to pay had s 45 not affected their liability: s 45(4).

If as a result of the operation of s 45 no order for costs is made against a legally aided person, the Court may make an order specifying what order for costs would have been made against that person: s 45(5). The purpose of s 45(5) is to enable a successful opponent to a legally aided person to seek reimbursement of his or her costs from the Ministry of Justice under s 46 Legal Services Act 2011.

² *Brookers on Family Law – Child Law*, above n 1, at [CC142.15].

Discussion

[26] I have carefully considered the submissions made by counsel and have re-read my judgment of 29 September 2022. I have noted Mr Bolitho made an offer to settle issues in the proceedings prior to the hearing by paying Ms Phillips \$40,000. In the end he had to pay her \$47,109. Ms Phillips has therefore obtained more from the judgment than Mr Bolitho's pre-trial offer, although I accept this does not include the additional legal costs which the hearing required.

[27] I have concluded that neither party can be regarded as being significantly more successful than the other as a result of my judgment. Mr Bolitho succeeded on the jet boat issue. Ms Phillips succeeded on the superannuation issue. The 80/20 s 13 adjustment which I ordered was an outcome midway between each party's pre-trial stance on this issue with Mr Bolitho contending a 90/10 division would be appropriate and Ms Phillips contending a 55/45 division would be appropriate if extraordinary circumstances were found to exist. The s 20E adjustments were largely made by agreement.

[28] All of this means that the principle set out in the DCR and case authority that for a successful party costs should follow the event, does not apply in this case.

[29] In my judgment I have recognised that each party should contribute to the court hearing fees and costs by directing that these be shared equally. I consider each party's solicitor/client costs should lie where they fall, and each should bear their own costs of and incidental to these proceedings.

[30] Given the issues in this case, I consider it was unlikely that it would have been able to settle readily, and I regarded this as one of those cases which had to be heard and determined by the Court.

[31] For the sake of completeness, I record that while some delay is acknowledged on the part of Ms Phillips, and Mr Bolitho will have incurred some additional costs because of this, the reasons have been explained. The extra costs incurred because of

the delay are not significant in the total scheme of the costs incurred in this case and would not trigger the exceptional circumstances provisions in s 45.

Outcome and orders

- (a) There will be no order as to costs. Each party is to bear their own costs of and incidental to these proceedings except for those directed to be shared in paragraph [82](f) of my reserved judgment.

- (b) The file will be closed.

Judge RJ Russell
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 24/11/22 at 11 am