

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

**NOTE: PURSUANT TO S 35A OF THE PROPERTY (RELATIONSHIPS) ACT 1976, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE**

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**IN THE FAMILY COURT  
AT NEW PLYMOUTH**

**I TE KŌTI WHĀNAU  
KI NGĀMOTU**

**FAM-2021-070-000074  
[2023] NZFC 3092**

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	[EDDIE BROOKE] Applicant
AND	[ROSIE JORDAN] Respondent

Appearances: J W Howell for the Applicant  
P B Williams for the Respondent

Judgment: 5 April 2023

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**RESERVED JUDGMENT OF JUDGE S J COYLE  
[IN RELATION TO ISSUE OF INTER PARTES COSTS]**

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[1] On 14 February 2023 I issued an amended reserved judgment in relation to an application to extend time pursuant to s 24 of the Property (Relationships) Act 1976. The result was that I made an order extending the time for Mr [Brooke] to file his application for orders relating to the provision of the parties' relationship property. Additionally, by consent an order was made transferring the proceedings from the Tauranga Family Court to the New Plymouth Family Court. As a consequence of an extension of time for filing, Ms [Jordan]'s applications to discharge the order that the notice of claim not lapse were dismissed.

[2] Ms [Jordan] now seeks costs against Mr [Brooke]. Her application for costs is opposed by Mr [Brooke]. Notwithstanding that the proceedings have been transferred to the New Plymouth Family Court, it is appropriate that I, as the hearing Judge, decide the issue of inter partes costs.

### **Position of Ms [Jordan]**

[3] Ms [Jordan] seeks categorisation, in accordance with the District Court Rules, on a 2B basis, and seeks, in accordance with the District Court Rules, scale costs of \$7,162.50. Mr Williams, for Ms [Jordan], acknowledges that both parties had successful applications; Mr [Brooke]'s application to extend time was granted, and Ms [Jordan]'s application to transfer the proceedings to New Plymouth was granted by consent.

[4] However, Mr Williams submits that costs lie where they fall with each party would not result in a just outcome. The basis upon which he makes the submission are the following:

- (a) Firstly, he points to the delay in Mr [Brooke] filing relationship property proceedings by 18 months, exceeding the 36 month statutory time limit by 50 per cent. In Mr [Brooke]'s submission this is inconsistent with principle 1N(d) of the PRA 1976 which requires proceedings to be resolved as inexpensively, simply and speedily as is consistent with justice.

- (b) Secondly, Mr Williams submits that there was a finding by me of abusive behaviour by Mr [Brooke] towards Ms [Jordan]; conversely there were no findings of misconduct or abuse in relation to Ms [Jordan].
  
- (c) Thirdly, Mr Williams submits Ms [Jordan] does not have the means to pay her costs as she has been ineligible for legal aid to date (although she has recently become unemployed due to health issues and may now be eligible for legal aid as I apprehend Mr Williams' submissions). Thus, whilst she has been privately paying to date, in Mr Williams' submission she simply does not have enough monies to do so, and the only way in which her legal fees can be paid is through an award of costs.

[5] For Mr [Brooke], Mr Howell opposes a cost award. In his submission allegations of abusive language are irrelevant. Furthermore, in Mr Howell's submission, the issue of the conduct of parties must relate to the conduct of the parties during the course of the proceedings. Thus, he submits that Ms [Jordan]'s attempts to assert unconscionable behaviour said to have occurred prior to the commencement of these proceedings as a reason supporting a costs award is misconceived. In his submission Ms [Jordan]'s reference to a finding that Mr [Brooke]'s communication was "intimidating, abusive and threatening" related to communication pre-proceeding and not communications during the course of the proceedings. I agree with Mr Howell's submission that whatever a party's behaviour was prior to proceedings is not relevant to a determination of costs in the course of proceedings.

[6] Nor do I accept that Mr [Brooke] filing his application out of time is a matter that is relevant in terms of the issue of costs. For it is inherent in the interlocutory application itself (leave to extend time) that Mr [Brooke] did not file within the statutory timeframe. And in relation to that application, Mr [Brooke] was entirely successful in that he was granted leave to file the proceedings 18 months after the expiration of the statutory three year period.

## The Legal Position

[7] Section 40 of the Property (Relationships) Act 1976 provides that the Court can make any order in relation to costs as it thinks fit. That section needs to be read in conjunction with r 207 of the Family Court Rules 2002, which states that a decision to award costs is a discretionary decision and can be made with reference to the provisions of the District Court Rules 2014 specified in r 207(2) FCR.

[8] There are a number of decisions which show the Judges of the Family Court are increasingly approaching the issue of costs on a principled basis.<sup>1</sup> More recently, Duffy J in *Ormsby v Selm and Ormsby* undertook a thorough review of the principles applicable to an award of costs in the Family Court.<sup>2</sup> At [41] of her Honour's judgment she recorded:

I am satisfied, therefore, that the recent cases in [the High Court] dealing with costs awards in the Family Court consistently support costs awards being made in the Family Court in accordance with general costs principles.

[9] A further statement of the relevant principles is set out by Mander J in *Bowden v Bowden*.<sup>3</sup> Notwithstanding the wider applicability of the District Court Rules, guidance is still found in the common law.<sup>4</sup> In *S v I*<sup>5</sup> the High Court endorsed the comments of his Honour Judge Callinicos in *AS v JM (Costs)* where the Judge held:<sup>6</sup>

While there may be some difference in philosophy as to whether a more civilly oriented approach is taken to costs matters in the Family jurisdiction, there remains a constant thread through the decisions when the Court is considering a party who has been unreasonable. All the decisions make it clear that where a party has acted unreasonably, prolonged the proceedings, or has been the recipient of adverse credibility findings then they cannot expect to escape close attention when the Court exercises its discretion on costs issues.

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<sup>1</sup> *Wishart v McKewen* [1998] 16 FRNZ 528 (FC); *JJF v AJF* FC Christchurch FAM-2008-009-3326, 13 January 2011; *Sydney v Sydney* [2012] NZFC 2924 (FC).

<sup>2</sup> *Ormsby v Selm and Ormsby* [2015] NZHC 641.

<sup>3</sup> *Bowden v Bowden* [2017] NZHC 1841 at [13].

<sup>4</sup> *R v S [Guardianship]* [2004] NZFLR 207; (2003) 22 FRNZ 1017.

<sup>5</sup> *S v I* (2009) 28 FRNZ 13 (HC).

<sup>6</sup> *AS v JM* [2004] NZFLR 57 at [17].

[10] I have also considered the approach of her Honour Judge Smith in *JJF v AJH*.<sup>7</sup> I adopt the reasoning and approach set out at [13] to [15] inclusive and [31] of that decision. Like her Honour, in terms of fixing quantum, it is my view that the use of the scale costs contained in the District Court Rules provide for a more transparent and predictable rationale. Justice Duffy held as much in the *Ormsby v Selm and Ormsby* decision.

[11] The relevant principles of the District Court Rules 2014 are those set out in r 207(2)(a) to (k) inclusive of the FCR. Rule 14.2 states the general principles that must apply to the determination of costs and of relevance to this case are the following:

#### **14.2 Principles applying to determination of costs**

- (1) 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.

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<sup>7</sup> *JJF v AJH* FC Christchurch FAM-2008-009-3326, 13 January 2011.

## **Discussion**

[12] Applying the above legal principles, it was Mr [Brooke] who was successful, not Ms [Jordan]. I accept she was successful in relation to the transfer application, but as recorded in my judgment that was resolved by consent at the outset of the hearing. Additionally, at the outset of the hearing she acknowledged that if the application to extend time was granted, then her applications in relation to the notice of claim should be dismissed.

[13] The real and sole application that required determination was Mr [Brooke]'s application for leave to file out of time in which he was wholly successful. His application was not without merit as found by me. While his explanation for delay raised some concerns, he had clear merits in his application, and Ms [Jordan] was not overly or unduly prejudiced by his pursuing the application out of time. In terms of the case law, a delay of 18 months should not have been fatal to the application being granted, unless Mr [Brooke]'s claim was entirely devoid of any prospects of success. That was not the case in the facts before me.

[14] Additionally, as set out above, I accept Mr Howell's submissions that conduct pre-commencement of proceedings is irrelevant. Furthermore, for the reasons set out above the fact that Mr [Brooke] filed his applications 18 months out of time is not in and of itself a justification for costs.

## **The Result**

[15] In the circumstances as set out above I am not satisfied that Ms [Jordan] has persuaded me that a cost award should be made against Mr [Brooke]. Costs award can only be made on principled basis. That she has difficulty in paying her solicitor's fees in relation to her resisting an application in which her opposition was entirely unsuccessful, is not a principled basis to make an award for costs in her favour.

[16] I decline to make an order for costs and her application for costs is dismissed.  
Costs should simply lie where they fall.

S J Coyle  
Family Court Judge

Signed this 5<sup>th</sup> day of April 2023 at

am / pm