

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

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**IN THE FAMILY COURT
AT CHRISTCHURCH**

**I TE KŌTI WHĀNAU
KI ŌTAUTAHI**

**FAM-2023-009-001103
[2024] NZFC 5260**

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	[VASANTI MOHINI] Applicant
AND	[GOUTAM ASIF] Respondent

Hearing: 12 April 2024

Appearances: R van Eekelen for the Applicant
No appearance by or for the Respondent

Judgment: 30 April 2024

RESERVED JUDGMENT OF JUDGE T E MCKENZIE

[1] The parties were in a relationship for approximately ten years. They were both originally from [country A]. During the course of their relationship, they had a child, [Meera] born on [date deleted] 2015. They purchased what would become the relationship home at [address 1] in April 2019.

[2] They separated in June 2019 at which time the applicant, Ms [Mohini], obtained an interim parenting order, a temporary protection order, and occupation

orders in respect to the relationship home. Those orders were unopposed by Mr [Asif] and the orders became final in November 2019.

Substituted Service

[3] The applicant then sought to determine relationship property. She filed her application, along with an application for substituted service, in July 2023. By this time, Mr [Asif] had left New Zealand and his physical whereabouts were unknown. In an affidavit dated 13 June 2023, Ms [Mohini] proposed that she believed he was living in either [country A], [country B], or [country C] and sought for him to be served with her relationship property application by way of WhatsApp. He engaged in email communication with Ms [Mohini] but declined to provide his residential address or even his country of residence.

[4] The application for substituted service was granted. In an affidavit dated 19 September 2023, Ms Hamilton as counsel for Ms [Mohini], confirmed that she had sent two emails to Mr [Asif] attaching documents on 31 July 2023 and received delivery receipts. In addition, she attempted to send documents by WhatsApp, the first document was received, the second was blocked. Finally, from a separate and unknown number the documents were served on Mr [Asif] on 1 August 2023.

[5] Against that history, I am satisfied the Mr [Asif] has been served with the application, is aware of the nature of it, and has taken no steps to engage.

The applicants position

[6] She is seeking final resolution of relationship property. She has remained in the former relationship home, meeting the outgoings, repaying relationship debt, and providing the full-time care of the parties' daughter in the absence of any child support or financial maintenance from Mr [Asif].

Relationship property

[7] At the time of their marriage the parties were not resident in New Zealand but moved here in 2012. Mr [Asif] was granted a partnership visa and was employed as a [details deleted], while Ms [Mohini] was employed as a [details deleted].

[8] From joint savings the parties purchased the property at [address 1]. It was purchased for \$355,000 using joint saving of \$71,000 as the deposit and the balance was financed by way of a bank mortgage.

[9] There was no evidence as to the value of the property at separation. However, Ms [Mohini] obtained a valuation from Ford Baker at the time she instructed counsel, which established the value of the property as being \$540,000. At the time of separation, the mortgage balance was \$268,000, and as at the hearing date was \$249,976.

[10] In addition to relationship home, the parties owned a Toyota Auris which sold after separation for \$4,500. Mr [Asif]'s bank balance at time was \$1,028.69, and Ms [Mohini]'s bank balance was \$200.66. The total relationship property amounted to \$277,729.35 of which a one-half share amounts to **\$138,864.67**.

Relationship debt

[11] The parties had two credit cards and a loan to Harmony Finance.

Harmony Loan (Section 20)

[12] Ms [Mohini] claims that shortly prior to the separation, she was instructed by Mr [Asif] to withdraw funds from this loan to enable him to send money back to his family in [country C]. He agreed that he would repay the loan together with the interest as his sole and separate responsibility. Ms [Mohini] did so, transferring \$6,000 from the loan balance to an overseas account at his direction. She produced evidence of the transfer of the \$6,000 to Value Mart, to enable the transfer overseas.

[13] Mr [Asif] neither repaid the \$6,000 nor the interest accrued, and Ms [Mohini] is seeking compensation of \$10,031.35 for this loan, claiming it be Mr [Asif]'s sole and separate property. That \$10,031.35 is made up of \$6,000 originally borrowed, together with the interest based on the \$6,000 being 40.37 per cent of the total of the Harmony loan.

[14] This portion of the loan is clearly the personal debt of Mr [Asif], pursuant to s 20 of the Property (Relationship) Act 1976 (the “PRA”), and as such Ms [Mohini] is entitled to be compensated for the sum of **\$10,031.35**.

[15] In addition, there is a:

- a) Credit card loan to the ANZ which amounts to **\$2,561**, being \$2,356 principle and \$205 interest.
- b) Q card/MasterCard debt which has a balance of \$4,926.20 with an interest component of \$2,973.17 making a balance owing of **\$7,789.93**

c) Harmony Loan

Mr [Asif]’s component of the debt	\$10,031.35
Half the principle balance of \$8,875	\$4,437.50
Interest on the balance	\$2,977.33

Total adjustment in favour of Ms [Mohini] \$17,446.18

[16] Total adjustment due to be credited \$17,446.18 (Harmony), \$7,789.93 (Q card) and \$2,561 (ANZ card) totalling **\$27,797.11** adjustment due.

Section 18B/Post separation Contributions

[17] Ms [Mohini] has made a number of claims for post-separation contributions pursuant to s 18B. Section 18B states:

18B Compensation for contributions made after separation.

- (1) In this section, relevant period, in relation to a marriage, civil union, or de facto relationship, means the period after the marriage, civil union, or de facto relationship has ended (other than by the death of one of the spouses or partners) but before the date of the hearing of an application under this Act by the court of first instance.
- (2) If, during the relevant period, a spouse or partner (party A) has done anything that would have been a contribution to the marriage, civil union, or de facto relationship if the marriage, civil union, or de facto relationship had not ended, the court, if it considers it just, may for the purposes of compensating party A—

- (a) order the other spouse or partner (party B) to pay party A a sum of money:
 - (b) order party B to transfer to party A any property, whether the property is relationship property or separate property.
- (3) In proceedings commenced after the death of one of the spouses or partners, this section is modified by section 86.

Background

[18] The claims pursuant to this section has been categorised in two distinctive ways; financial and non-financial.

[19] The established facts are that since separation, Mr [Asif] has made no contribution of any nature to either the relationship assets or to the parties' child. The unchallenged evidence of Ms [Mohini] is that she has had the sole care of their daughter for the five years since separation and Mr [Asif]'s contact has been sparse.

[20] During this period of time, she has been employed in different positions, working up to 60 hours per week, sometimes with two jobs, to meet the household outgoings and to service the relationship debt.

[21] She has over this time taken in boarders, to offset the costs further, and it has only been recently when she has commenced a new relationship, that matters have improved for her financially.

[22] Mr [Asif] has chosen not to engage in any meaningful way to settle these matters. As I intend to make an award of costs, his lack of engagement in resolution of these matters is not a consideration for me at this time.

Financial contributions

[23] Ms [Mohini] claims her financial post-separation contributions of a specific nature are the following:

Mortgage repayments	\$30,346.85
Insurance	\$6,609.50

Rates	\$7,285.00
Maintenance	\$4,795.00
Interest on debt	\$5,577.33
Total	\$54,614.56

[24] On the one hand, she has totally maintained the property by residing in it, she has kept it safe and liveable. It has clearly increased in value since it was purchased by almost \$200,000.

[25] On the other hand, she has lived in her own familiar environment and has paid not just her half of the outgoings but Mr [Asif]'s. There is, in my view, an obligation to meet an occupational rental figure of some amount, having lived in the property with all the advantages attached, and which might otherwise have been rented out and capable of generating income. However, I have no evidence as to the amount or the viability of such rental. That is a matter that could have been raised by Mr [Asif] had he participated in the proceedings. Although I do not have an exact figure, I am entitled to and do take that into account.

[26] I discount immediately the claim of \$5,577 for interest on relationship debt as I consider that I have awarded that already pursuant to the earlier award relating to debt.

[27] I must also take into account the evidence of Ms [Mohini] that during this time she received between \$15,000 – \$16,000 by way of board payments. I must take into account the fact that she now has her new husband residing in the property.

[28] She is clearly entitled to have recognised her financial contribution in some way, but I must take into account that she has had the benefit of the occupation of relationship home along with its own ability to produce income.

[29] It is not a simple matter to reach an appropriate figure, but I consider that an appropriate award adjustment would be **\$30,000** representing a contribution to

maintenance, rates, insurance and a portion of the mortgage repayment already calculated.

Non-financial

[30] The Applicant seeks a further award for her non-financial contributions.

[31] She has single-handedly raised the parties' daughter since separation, a period of over 8 years. It would not be an overstatement to express that Mr [Asif] has effectively abandoned his wife and daughter. Whilst I accept the existence of the protection order would not have assisted his immigration status, that does not explain or excuse his total disconnection from his daughter and wife, and his abandonment of his rights and obligations as a father and guardian.

[32] The unchallenged evidence is that during this time, he did not pay child support in any manner nor contribute in any other way to her support.

[33] Ms [Mohini] did not have any respite from the day-to-day duties of caring for her. There was no time when Ms [Mohini] could place their daughter in the care of her father, for some time out as a parent. He did not participate in guardianship conversations or in any manner share the burden guardianship obligations sometime bring.

[34] He has had irregular and sporadic electronic communication, arranged with Ms [Mohini] and at times she has been required to tolerate what could only be described as unnecessary abuse.

[35] It has not been an easy journey for Ms [Mohini], having been the victim of family violence. Mr [Asif] took no responsibility to resolve the parties' relationship property matters and has simply left her responsible for final resolution. Whilst I am easily satisfied that an adjustment should be made in terms of s 18B, the real question for determination is the amount of this adjustment. Counsel for Ms [Mohini] has referred me to a number of authorities on this point.

[36] Firstly, she established that s 18B could be utilised to provide a lump sum compensation figure for a party who is caring the child of the relationship after separation; and that such a figure was not limited to merely financial provision for that child.

[37] Secondly, she referred me to decision of *IAT v SJG* where the High Court upheld the Family Court's decision to recognise a lump sum compensation figure for both the care provided and the standard of living which had been sacrificed by the care giving parent.¹ In that decision the adjustment represented 85 per cent of the care of two children, being a figure of \$40,000.

[38] Counsel also referred me to the decision of Judge Doyle in *Holmes v Holmes* where an award of 100 per cent was made in favour of Applicant for the actual expenses incurred by the husband in raising four children for five years.²

[39] I consider that it has easily been established that an award for non-financial contribution should be made. I do not consider that a comparison of the amount of awards with other cases is helpful. Each case must be determined on its own fact scenario and merits.

[40] In this situation, I consider the relevant facts to be:

- a) There was a history of family violence and the necessity for the applicant to seek a final protection order for her protection.
- b) Mr [Asif] abandoned his wife and daughter, left New Zealand soon after the separation, never to return.
- c) Mr [Asif] has chosen not to engage in the proceedings in any form and has been on occasions deliberately evasive as to service.

¹ *IAT v SJG* [2013] NZHC 2976

² *Holmes v Holmes* [2019] NZFC 4370 at 437

- d) Ms [Mohini] is in New Zealand as an immigrant, where English is her second language and where she faced additional and compounding difficulties on her own.
- e) She and her daughter have been completely abandoned by Mr [Asif], who has chosen to engage on a superficial basis with his daughter; and
- f) Despite the existence of the Protection order, has continued to be threatening and abusive on occasions.

[41] In those circumstances I accept that there should be compensation for actual costs incurred, which in this instance are claimed to be \$28,818.38; and \$30,000 for the non-financial contributions. That total amounts to **\$58,818.38**, or \$226 (per week) over the five-year period. That is an entirely acceptable figure.

[42] It is not possible to link the financial contributions to a formulaic child support assessment, due to the absence of engagement by Mr [Asif]. His income, living circumstances and other relevant matters are completely unknown.

[43] It is also likely that this will be the only opportunity for payment of any type to be extracted from him, given his non-involvement, his lack of cooperation, and his residency.

Adjustment

Assets	\$	\$	\$
1. Relationship home at [address 1]	540,000.00		
Less Mortgage	268,000.00		
Equity in home		272,000.00	
2. Toyota Auris – sale proceeds		4,500.00	
3. Mr [Asif]’s bank balance		1,028.69	
4. Ms [Mohini]’s bank balance		200.66	
Total assets		277,729.35	
		Half share of assets	<u>\$138,864.67</u>
 Debts			
1. ANZ Credit card	2,356.00		

Interest	205.00	
		2,561.00
2. Q Card	4,916.20	
Interest	2,873.73	
		7,789.93
3. Harmony loan		
Mr [Asif]'s personal debt	6,000.00	
Interest	4,031.35	
		10,031.35
Half the principle balance	4,437.50	
Interest on balance	2,977.33	
		17,445.18
Total adjustment to be credited:		
ANZ card	2,561.00	
Q Card	7,789.93	
Harmony Loan	17,445.18	
Total adjustment for debts		27,792.11
non-financial contribution		30,000.00
financial contribution		30,000.00
Adjustment for actual costs		28,818.38
		\$116,615.49
		Due to Mr [Asif] \$22,249.19

[44] On the basis of the awards I have already made, Ms [Mohini] would owe Mr [Asif] **\$22,249.19**.

[45] Counsel submitted that in the event a payment of any amount was required to be made to achieve equal division, that I should consider an offset against a costs award.

[46] That seems a very pragmatic approach. Again, given Mr [Asif]'s complete lack of engagement at any level, it would seem sensible that all matters were brought to an end before final payment were made.

Costs

[47] Section 40 enables the Court to make orders as to costs subject to rule 207(1) of the Family Court Rules 2002. That rule enables the Court to determine costs at any

step and the District Court Rules 2014, r 14.2 to r 14.12 establishes various principles that apply to such an award. Those principles are not exhaustive but include:

- a) The party who fails should pay costs;
- b) The award should reflect the complexity and significance;
- c) The costs should be reasonable for each step; and
- d) The costs should be predictive and expeditious.

[48] Counsel have submitted that costs should be payable by apply code 2 recovery rate to be the time considered reasonable on a schedule 4, band B, basis. That would result in a cost award of \$10,218.50.

[49] However, in this case, counsel are seeking costs on an increased cost basis or an indemnity basis.

[50] In the case of increased costs, I am required to consider r 14.6(3)(b); that section sets out the considerations a may determine as relevant:

- a) failing to comply with the rules/direction of the Court;
- b) pursuit of an unnecessary step or unmeritorious argument;
- c) failing to admit facts/evidence/documents or legal argument;
- d) failing to comply with an order for discovery/further particulars/notice for interrogatories, or any other similar requirement under these rules;
- e) failing, to accept an offer of settlement.

[51] In respect to indemnity costs, I am required to consider:

- a) Whether a party has acted vexatiously, frivolously, or improperly?

b) Whether the party has ignored an order?

c) Some other reason?

[52] I accept that the threshold for the awarding indemnity costs is a high one.

[53] Fisher on Matrimonial Property and Relationship Property at paragraph 19.41 opined:

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 parties earlier settlement proposal. Indemnity costs have been ordered on occasions where there has been something in the other parties actions that is vexatious, frivolous, improper, or unnecessary.

[54] Fisher also sets out a number of factors for consideration, in the awarding of indemnity costs:

- a) Creation of delays impeding resolution;
- b) Rendering proceedings unnecessarily complex and protracted as a result of stalling tactics or procedural ploys;
- c) Failure to comply with directions or timeframes for filing of documents;
- d) Unwillingness to provide full and frank disclosure, conduct unnecessarily increasing the costs of proceedings;
- e) Providing information only at the eleventh hour;
- f) Overzealous pursuit of misconceived inquires;
- g) The introduction of irrelevant and spurious allegations of misconduct;
- h) Unreasonable attitude blocks realising claim;

- i) Total failure to establish any claims; and
- j) Abdication of responsibility and admitted prevarication.

[55] In these circumstances I accept that Mr [Asif]'s utter failure to engage in correspondence with counsel, or with Ms [Mohini] personally, has impeded the resolution of matters prior to Court and necessitated the issuing of Court proceedings.

[56] In addition, he was evasive in respect to the need for service, which led to an application for substituted service. He was well aware of the attempts by Ms [Mohini] and her counsel to effect service and he chose to be resistant to the same.

[57] Similarly, he has failed to engage in any attempt at resolution.

[58] Against that background I am satisfied that indemnity costs should follow. I have been advised that the total indemnity costs plus disbursements amount to \$38,742.68.

[59] In those circumstances, having made that award, that has removed any liability for Ms [Mohini] to pay monies to Mr [Asif]

[60] It does have the result of Mr [Asif] theoretically being in a position of owing money to Ms [Mohini]. Whilst I accept that these orders result in Mr [Asif] being required to pay the difference, which according to my calculations would be in the vicinity of \$16,000, I accept that without knowledge of his whereabouts that is unlikely to ever be repaid.

[61] On that basis the application is wholly successful.

[62] Counsel are now invited to file an order for sealing, I have noted the draft order which will simply require the insertion of the awarded figures. Counsel are asked to file that amended order and upon sealing, the file may be closed

Judge T E McKenzie
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 01/05/2024