NOTE: PURSUANT TO S 35A OF THE PROPERTY (RELATIONSHIPS) ACT 1976, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE HTTP://WWW.JUSTICE.GOVT.NZ/COURTS/FAMILY-COURT/LEGISLATION/RESTRICTIONS-ON-PUBLICATIONS.

IN THE FAMILY COURT
AT NAPIER

FAM 2013-041-000268
[2016] NZFC 4406

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	SUSAN MARY MABIN Applicant
AND	JOHN PETER WARNOCK Respondent

Hearing:	On the Papers
Appearances:	J McDowell for the Applicant Respondent appears in Person
Date of Decision:	8 June 2016

RESERVED DECISION OF JUDGE P J CALLINICOS
[Property (No. 2)]

Introduction

[1] On 25 February 2016 I delivered a decision determining an application for division of property under the Property (Relationships) Act 1976. For all the reasons presented in that decision the circumstances arising from the respondent's retention of almost the entire range of relationship property from separation on 10 March 2010 and his significant prevarication and stalling of a division have culminated in a problematic situation.

[2] I determined the total net value of property to be $235,796.00, meaning an equal entitlement of $117,898.00. However, given Mr Warnock had unilaterally retained control of all significant assets I calculated a net adjustment under s 18B due from him to Ms Mabin of $57,320.16, a sum which must be added to her half share.

[3] I also invited submissions on costs as the respondent's position from separation to hearing and his rejection of a very reasonable settlement offer (one much less than Ms Mabin's full entitlements above) had unquestionably led to unnecessary costs being incurred by the applicant.

[4] For reasons I present below, I have determined that the respondent must also pay to the applicant the sum of $21,772.96 by way of an award of costs and disbursements in the proceedings.

[5] Collectively, those determinations culminate in Mr Warnock having to account to Ms Mabin the total sum of $196,991.12, a figure which is not far short of the total value of all property. Unfortunately, the respondent must accept responsibility for the fact his delays and position have led to the additional adjustments (i.e. s 18B and costs) of over $79,000.00 accruing on top of what the applicant's substantive entitlement was. The only source from where that additional award can come is from his share of the property.

[6] The problematic situation to which I refer, derives from the fact that Mr Warnock has retained, and still retains all the property and time alone will tell whether it will realise anywhere near the valuation figures which underpinned the

determinations. Again, the respondent alone is the base of that problem, for the applicant has been seeking realisation and division of all property since separation.

[7] This problem was identified in my substantive decision, in which I recorded how the division originally sought by the applicant could have had a very poor outcome for her, dependent upon eventual realisation returns. I therefore invited her to consider the shape of the final order, following which Mr McDowell filed a memorandum and draft order. The applicant accepts that much depends upon the quantum value of realisation of real estate and that it is entirely possible that she will not receive the full sum as calculated in my decision, and the respondent little if anything.

[8] Before confirming the final order I need to address the issue of costs.

Determination of Costs

[9] I have received the applicant's submissions on costs. It is a modest claim in the context of the inordinate difficulties the applicant has had to confront in receiving this determination of her entitlements.

[10] In terms of the legal principles, the starting point for determinations as to costs between the parties must be decided under s 40 of the Property (Relationships) Act 1976, which provides a wide discretion. Like most of the Family Law statutes the Act provides no statutory criteria as to what factors should be taken into account in the exercise of that discretion.

[11] Rule 207 of the Family Courts Rules 2002 ("FCR") introduced to the Family Court jurisdiction the costs provisions in the District Courts Rules 1992 ("DCR") which are found in DCR 4.2 through 4.12. Costs issues are decided under the Court's overriding discretion exercised by reference to a range of principles in the Rules and to Schedules 2 and 2A, which are designed to assist in calculation of time allocations. The schedules are sometimes not easily applicable to family law proceedings. The rules also contain guiding principles on increased and indemnity costs.

[12] From the substantial case law available on the general approach to costs matters (such as the cases of *Aalders v Stevens*[1] , *A v A*[2] and *R v S*[3]) and from the District Courts Rules, the Court is guided by reference to such factors as:

1. The outcome of the proceedings. As a general principle a party who fails with respect to their position should pay costs to the successful party.

2. The complexity or otherwise of the matters in issue.

3. The way in which the parties and their legal advisors conducted the proceedings.

4. Whether proceedings were made unnecessarily complex or protracted because of stalling tactics or procedural ploys adopted by party.

5. The means of the parties.

6. The actual costs incurred by the parties.

7. The overall interests of justice.

8. Where issues arise in respect of children, the Court should also have regard to the impact any order as to costs will, or might, have on the children's welfare.

[13] In *AS v JM [Costs]*[4] matters of costs in child care and domestic violence context was considered by me. After referring to the principles applying to costs as derived from *R v* S, I stated at paragraph [17];

> "[17] While there may be some difference in philosophy as to whether a more civilly oriented approach is taken to costs matters in the Family

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1 *Aalders v Stevens* (1992) 5 FRNZ 198
2 *A v A* [1999] NZFLR 447
3 *R v S* [2004] NZFLR 207)
4 *AS v JM [Costs]* [2004] NZFLR 57

> 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."

[14] Such view was expressly endorsed by Heath J in *AS v JM [Costs]*[5]. That approach to costs is even more applicable in the context of the fiscal quality of property disputes.

[15] For the reasons found in her Counsel's submissions, the applicant has sought indemnity costs. In terms of the law pertaining to indemnity or increased costs, the legislative criteria is now contained in District Court Rule 4.6. While the various criteria justifying either indemnity or increased costs are expressly stated in that Rule, there is also guidance from case law. The most significant decision in terms of precedent is that of the Supreme Court in *Prebble v Awatere Huata (No 2)*[6] in which the Supreme Court observed at paragraph [6] that indemnity costs have not been awarded in New Zealand except in rare cases, generally entailing breach of confidence or flagrant misconduct.

[16] In the subsequent Court of Appeal decision *Saunders v Central Grain & Produce (Southland) Limited & Others*[7], the Court of Appeal commented upon the degree of misconduct that would be required to merit a full award. At paragraph [28] it referred to *Prebble* and stated:

> "…in general, orders for costs are to be a reasonable contribution to actual costs and that a reasonable contribution to costs is just in most cases. However, the general approach yields where it does not deliver a just result and in such cases the Court will exercise its discretion to make an order that is just."

[17] As to the degree of behaviours that might amount to something "flagrant", the Court of Appeal stated:

> "[30] "Unnecessarily" in r 48C(4)(a) takes its meaning and flavour from the adverbs which precede it: "vexatiously, frivolously, improperly". To

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5 *AS v JM [Costs]* [2004] NZFLR 57 at [54]
6 *Prebble v Awatere Huata (No 2)* [2005] 2 NZLR 467
7 *Saunders v Central Grain & Produce (Southland) Limited & Others* [2009] NZCA 148

> provide a proper basis for indemnity costs, the misconduct must be "flagrant": *Prebble v Awatere Huata* at [6]."

[18] "Flagrant" is defined in the Collins English Dictionary as "(i) blatant; glaring; outrageous". Given the views expressed in these decisions and the ordinary meaning of "flagrant", in order for indemnity costs to be awarded there must be behaviours by the errant party that are of a rare, outrageous and extreme level. Such a view is confirmed by reference to cases where the issue of indemnity quality has arisen: see *Hedley v Co-Operative Dairies Limited*[8], where the High Court stated, at paragraph [8]:

> "... Indemnity costs are awarded where truly exceptional circumstances exist."

[19] The High Court made reference to the decision *Colgate Palmolive Co v Cussons Pty Ltd*[9] in which Sheppard J outlined a variety of principles applicable in cases involving indemnity costs. Circumstances that might warrant an order of indemnity costs include the making of allegations of fraud when the person alleging such knows them to be false, where there has been particular misconduct that causes loss of time to the Court and other parties, where proceedings were commenced for some "ulterior motive", where proceedings have been commenced in wilful disregard of known facts or clearly established law, where allegations have been made that "ought never to have been made", or the undue prolongation of a case by groundless contentions. In addition the Court felt that the "imprudent refusal of an offer to compromise" might also merit costs.

[20] Against that summary of the leading principles on these matters I turn to assess the case before me.

[21] Having regard to the general principles I have outlined I make the following determinations. Put simply, the actions of the respondent, while concerning in terms of the consequences for the applicant, fall well below meeting the high threshold for indemnity costs. I detected no malice in Mr Warnock's approach to matters. Rather, he had put his head in the sand and could not confront the reality that the parties'

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[8] *Hedley v Co-Operative Dairies Limited* (2002) 16 PRNZ 694
[9] *Colgate Palmolive Co v Cussons Pty Ltd* (1993) 118 ALR 248

asset and income situation was one that rendered his goal of buying Ms Mabin out completely unrealistic. That goal underpinned his prevarication which, in turn, caused the applicant to have to go to great lengths to obtain the Court's determination.

[22] These matters were never complex in themselves. What has become complex is the mechanism as to how to manifest a division in a way which was just to both parties having regard to all the circumstances. In terms of their means, neither have great financial resources by income or asset. Everything they have is represented in the property for division.

[23] The applicant's actual legal costs were $17,050.00 (at legal aid rates) and disbursements (as detailed in paragraph 10 Mr McDowell's memorandum of 30 March 2016) of $5,872.31. Legal costs calculated on a schedule 2B basis amount to $15,900.65, a figure not much less than actual costs.

[24] In all the circumstances, assessed according to the legal principles, while Mr Warnock's approach to matters would merit increased rather than indemnity costs, such is the proximity between actual and scale costs that this is a situation where an award according to scale is appropriate.

[25] I therefore order the respondent to pay legal costs to the applicant in the sum of $15,900.65 and disbursements of $5,872.31, together totalling $21,772.96.

Decision

[26] As noted at [5], the effect of my determinations is that the applicant is entitled to the total sum of $196,991.12 in settlement of her half share in the relationship property, compensation under s 18B and her costs and disbursements.

[27] Consequent upon the invitation to her of how that award be realised, Mr McDowell filed a memorandum on 30 March 2016 and draft order. He notes that even if the real property sold for the value established by the Court, the applicant would be left with a shortfall. In order to reduce that possibility she seeks the final order permits her occupation and possession of the real property and the plant and

equipment in order that she alone has control of the assets in order to realise them without the hindrance of Mr Warnock that led to this unfortunate endpoint. If it transpires that there is a surplus after realisation, payment of all debts and costs and allowance for the judgment sum to Ms Mabin, then any surplus will pass to Mr Warnock to retain along with the boat and vehicle he has retained.

[28] I therefore make orders as sought in terms of the draft order filed. The Registrar is to seal and issue that order.

Delivered at am/pm June 2016

P J Callinicos
Family Court Judge