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**IN THE FAMILY COURT
AT BLENHEIM**

**FAM-2015-006-000095
[2016] NZFC 3675**

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	JAMIE NORTON Applicant
AND	BRONTE NORTON-FRANCIS Respondent

Hearing:	In chambers on the papers
Counsel:	J A Eves for the Applicant D P Neild for the Respondent
Judgment:	10 June 2016

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

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[1] These are proceedings under the Property (Relationships) Act 1976 between Jamie Norton and Bronte Norton-Francis. In particular it is an application by Mr Norton for an award of costs under s 40 of the Act.

Background

[2] The parties signed a relationship property agreement on 28 January 2011. Ms Norton-Francis then moved to Switzerland. Mr Norton brought proceedings seeking to enforce the provisions of the agreement. These proceedings were served on Ms Norton-Francis in Switzerland. She took no formal steps in answer to the application, although Mr Neild did represent her at the hearing.

[3] On 23 March 2013 I conducted a formal proof hearing and made orders under the Act as follows:

> [14] Against this background, and subject to the authority issue referred to in para [15] being clarified, I make the following orders and directions:
>
> (a) Upon payment to Ms Norton-Francis of the sum of $61,870 the following is to vest in Mr Norton:
>
> (i) All of the shares held by Ms Norton-Francis in [name of company deleted].
>
> (ii) The undivided one half share of the property which she owns at [address deleted] being that contained in Certificate of Title [Certificate of Title number deleted].
>
> (b) Ms Norton-Francis is to resign a s a director of [name of company deleted] upon payment to her of the $61,870. In the event there is issue or difficulty with this then further application can be made to have the registrar appointed to sign the necessary documents to give effect to this order on her behalf.
>
> (c) When payment of the sum of $61,870 is made, Mr Norton is to provide to Ms Norton-Francis either evidence of the release of her personal covenants under mortgage number [mortgage number deleted] to the ANZ National Bank or alternatively, if the bank will not release Ms Norton-Francis' covenants, a indemnity is to be provided by Mr Norton to Ms Norton-Francis indemnifying her from any costs, claims or damages which may arise in respect of any default under the mortgage.
>
> (d) Costs are reserved.

[4] An order has now been sealed by the registrar, which provides for payment to Ms Norton-Francis in the sum of $61,870 and for the transferring and vesting of other property, the full details about which are included in my judgment of 23 March 2016 which can be read alongside this costs decision.

[5] Mr Norton has now applied for an award of costs.

The case for Mr Norton

[6] In her submissions, Ms Eves has summarised the background which I have outlined. She has submitted that costs should be ordered pursuant to Schedule 4 of the District Court Rules 2014 as follows:

Legal Fees			
(i)	Preparing, filing and serving originating application in Switzerland – 2 days at $2,640.00 per day		5,280.00
(ii)	By Formal Proof		
	-	Preparation half day at $2,640.00 per day	$1,320.00
	-	Attendance half day at $2,640.00 per day	$1,320.00
Disbursements			
(i)	Court filing fee		$700.00
(ii)	Office administration expenses, photocopying, cellphone calls, etc		$50.00
Total solicitor costs and disbursements			$8,670.00

The case for Ms Norton-Francis

[7] In his memorandum, Mr Fletcher's primary submission was that costs should lie where they fall because both parties had a measure of success in the application. He points out that Mr Norton was seeking to pay $41,964 and noted that the ultimate order was for $61,870. He pointed out that the difference related to the deduction of

notional liquidation costs and the status of one of the two properties which the parties owned.

[8] In the event that costs are awarded, Mr Fletcher submits that these proceedings are not a category 3 proceedings as Ms Eves had submitted, but rather were category 2B costs. Mr Fletcher submitted that the issue is one of enforcement of an existing agreement, and was not a substantive hearing. He submitted the issue to be determined was not complex. Mr Fletcher also submitted that Mr Norton had not supplied evidence of the actual costs incurred.

[9] Mr Fletcher, in his submissions, recalculated the costs on a Schedule 2B basis as follows:

Description	Time	Value
Preparing and filing interlocutory application and supporting affidavits	0.4	712.00
Filing and serving memorandum in anticipation of judicial conference	0.25	445.00
Appearing at judicial conference	0.3	534.00
Preparation for formal proof (half day only claimed by plaintiff)	0.5 day	890.00
Appearance for formal proof	0.25	445.00
		$3,026.00

[10] He concluded his submissions in this way:

> 8 Given the relatively routine nature of the matter, the lack of complexity, the expectation of the parties in the Relationship Property Agreement to delay division to increase the value of the assets, and an award to the respondent greater than that offered by the plaintiff, costs should lie where they fall or at most be modest.

The law

[11] 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.

[12] 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.

[13] 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 Courts Rules 2002, the District Courts Rules 2009 ("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) 4.2—principles applying to determination of costs:

(b) 4.3—categorisation of proceedings:

(c) 4.4—appropriate daily recovery rates:

(d) 4.5—determination of reasonable time:

(e) 4.6—increased costs and indemnity costs:

(f) 4.7—refusal of, or reduction in, costs:

(g) 4.8—costs in interlocutory applications:

(h) 4.9—costs may be determined by different Judge:

(i) 4.10—written offers without prejudice except as to costs:

(j) 4.11—effect on costs:

(k) 4.12—disbursements.

(3) This rule is subject to the provisions of the Family Law Act under which the proceedings are brought.

It must be remembered the appropriate District Courts Rules only apply as far as applicable and with all necessary modifications.

[14] Rule 4.2 of the DCR sets out the general principles applying to determination of costs:

4.2 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.

Application for increased costs/indemnity costs

[15] Where costs in excess of the DCR scale costs are sought or where indemnity costs are sought, consideration needs to be given to r 4.6 DCR. It provides:

> **4.6 Increased costs and indemnity costs**
>
> 4.6.1 Despite rules 4.2 to 4.5, the court may make an order—
>
> (a) increasing costs otherwise payable under those rules ("increased costs"); or
>
> (b) that the costs payable are the actual costs, disbursements, and witness expenses reasonably incurred by a party ("indemnity costs").
>
> 4.6.2 The court may make the order at any stage of a proceeding in relation to any step in the proceeding.
>
> 4.6.3 The court may order a party to pay increased costs if—
>
> (a) the nature of the proceeding or the step in the proceeding is such that the time required by the party claiming costs would substantially exceed the time allocated under band C; or
>
> (b) the party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in the proceeding by—
>
> (i) failing to comply with these rules or a direction of the court; or
>
> (ii) taking or pursuing an unnecessary step or an argument that lacks merit; or
>
> (iii) failing, without reasonable justification, to admit facts, evidence, or documents or accept a legal argument; or
>
> (iv) failing, without reasonable justification, to comply with [an order for discovery], notice for further particulars, notice for interrogatories, or other similar requirement under these rules; or
>
> (v) failing, without reasonable justification, to accept an offer of settlement whether in the form of an offer under rule 4.10 or some other offer to settle or dispose of the proceeding; or
>
> (c) the proceeding is of general importance to persons other than just the parties and it was reasonably necessary for the party claiming costs to bring the proceeding or participate in the proceeding in the interests of those affected; or

(d) some other reason exists that justifies the court making an order for increased costs despite the principle that the determination of costs should be predictable and expeditious.

4.6.4 The court may order a party to pay indemnity costs if—

(a) the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding; or

(b) the party has ignored or disobeyed an order or direction of the court or breached an undertaking given to the court or another party to the proceeding; or

(c) costs are payable from a fund, the party claiming costs is a necessary party to the proceeding affecting the fund, and the party claiming costs has acted reasonably in the proceeding; or

(d) the person in whose favour the order of costs is made was not a party to the proceeding and has acted reasonably in relation to the proceeding; or

(e) the party claiming costs is entitled to indemnity costs under a contract or deed; or

(f) the party claiming costs is a defendant and—

(i) the defendant served the defendant's response in accordance with rules 2.12 and 2.13 but the plaintiff did not serve the plaintiff's information capsule within the 30-day period stated in rule 2.14.1; or

(ii) the defendant served the defendant's information capsule in accordance with rule 2.15 but the plaintiff did not pursue the plaintiff's claim under rule 2.17 within the 90-day period stated in rule 2.17.4; or

(g) some other reason exists that justifies the court making an order for indemnity costs despite the principle that the determination of costs should be predictable and expeditious.

Application for an increase in the DCR scale costs

[16] The correct approach for calculating an increase in DCR scale costs can be found in *Holdfast NZ Ltd v Selleys Pty Ltd* (2005) 17 PRNZ (CA) at [43] – [45] and [48]. To succeed, an applicant must:

(a) First categorise the proceedings as category 1, 2 or 3: at [43];

(b) Work out a reasonable time for each step in the proceeding: at [44]. (This involves reference to the appropriate daily recovery rates under r 4.4 and Schedule 3 to the DCR.

(c) Apply (as part of this exercise) for extra time for a particular step under r 4.6.3(a): at [44]; and

(d) Then, and only then, step back, look at the amount of costs the applicant would recover following the process to this point and then argue for additional costs if it is considered that r 4.6.3(b) can be relied on: at [45].

[17] The principles set out by Randerson J in *Radisich v Taylor* HC Auckland, CIV-2007-404-007578, 16 April 2008 are relevant. His Honour noted:

> [28] ... In *Holdfast*, the Court of Appeal made it clear at [46] - [48] that where conduct of a party of the kind described in the Rules is established, the Court's normal response should be to provide an uplift on scale costs for the particular step or steps at issue. An uplift of up to 50 percent should ordinarily be regarded as the maximum logically required by the scheme of the rules. While the Court of Appeal did not rule out the possibility of an uplift of more than 50 percent, the Court clearly regarded that as an unusual or exceptional course.

Application for indemnity costs

[18] To succeed in an application for indemnity costs an applicant must show that the respondent party has acted vexatiously, frivolously, improperly or unnecessarily in commencing, continuing or defending a proceeding or a step in the proceeding or has breached the other subclauses of r 4.6.4. The threshold that must be met before an order for indemnity costs is made is, however, a high one: see *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] 3 NZLR 188.

General principles relating to costs

[19] *Fisher on 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.

[20] 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; [1]

(ii) rendering proceedings unnecessarily complex and protracted as a result of stalling tactics or procedural ploys; [2]

(iii) failure to comply with directions or time frames for filing of documents; [3]

(iv) unwillingness to provide full and frank disclosure[4] conduct unnecessarily increasing the costs of proceedings eg by providing inadequate or false information concerning assets and liabilities; [5]

(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;[6]

(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; [7]

(xv) loss of appeal (para 19.47).

[21] There is the established principle that costs should follow the event. That principle was adopted by Harrison J in *Anderson v Anderson* (HC New Plymouth, CIV-2004-443-000025, 16 July 2004). In that decision His Honour noted:

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

Discussion

[22] I accept Mr Fletcher's submission that normally costs in relationship property proceedings at first instance should lie where they fall. This is because both parties receive benefit from their relationship property entitlements being determined by the Court in circumstances where they and their counsel are unable to agree.

[23] To be balanced against this general principle, however, is that the circumstances of this case are different. There was a s 21A agreement which needed to be enforced. Ms Norton-Francis did not file any formal response or affidavit evidence in the proceedings. Mr Norton was in effect left to drive the proceedings towards a hearing. At the actual hearing, however, she was represented by counsel (Mr Neild) who was able to represent her interests, albeit in a more limited way. The option of a judicial settlement conference and the option of fully instructed counsel being about to resolve the outstanding issues short of the formal hearing process was not able to occur because of Ms Norton-Francis' failure to fully engage in the Court process. Her decision to live overseas made resolution of the issues more difficult to achieve. Undoubtedly all of this has put Mr Norton to further time, cost and expense.

[24] I agree with Mr Fletcher's submissions that this is a case where Schedule 2B of the DCR is the appropriate scale upon which to base an award of costs. It is clear, however, that the DCR calculations are only a starting point to assess the appropriate award of costs. The Court has a general discretion in s 40 of the Act to make such order as to costs as it thinks fit.

[25] As noted Mr Fletcher's Schedule 2B calculations are an appropriate starting point and that Mr Norton has been successful in the outcomes that were sought. He has, however, had the benefit of having the relationship property agreement implemented and the property vested in him pursuant to my judgment. I accept, however, he has been put to extra time and cost for this to occur.

[26] I have concluded that an award of costs of $2,750 is appropriate. In addition to this should be paid a one half share of the filing fee of $700 and of any hearing fee that was paid. I have called for submissions on the issue of whether there should be an adjustment for accounting costs incurred. After considering the submissions filed by counsel and considering the email from the accountant, I have concluded the sum of $333 plus GST ($382.95) should be split equally between the parties.

[27] Finally, I note the request by Ms Eves for the registrar to be appointed to sign documentation, and Mr Fletcher's response. I have assumed the signed documentation has now been received and implemented, and no further action on this issue is required.

Outcome

[28] I order costs to be paid to Mr Norton in the sum of $2,750 plus disbursements of half the filing fee of $350, half the accounting fee of $191.47, plus a half share of the hearing fee which has been paid

R J Russell
Family Court Judge