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

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IN THE FAMILY COURT
AT WAITAKERE

I TE KŌTI WHĀNAU
KI WAITĀKERE

FAM-2017-090-000282
[2018] NZFC 8518

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	[CARLOS GLASS] Applicant
AND	[STEPHANIE BOND] Respondent

Hearing:	14 February 2018
Appearances:	S Morris for the Applicant J Noble for the Respondent
Judgment:	1 November 2018

RESERVED JUDGMENT OF JUDGE S J MAUDE
[Chambers decision as to award of costs]

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[1] On 28 February 2018, I issued a reserved decision as to relationship property proceedings heard by me between Mr [Glass] and Ms [Bond].

[2] I recalled my judgment on 14 May to correct an error, the resultant decision issued on that day.

[3] Mr [Glass] seeks a costs award against Ms [Bond].

[4] Ms Morris in seeking a costs award for her client calculated by reference to two distinct periods of time:

(a) From 29 March 2017 to 9 February 2018.

(b) From 9 February 2018 to conclusion of the proceedings.

Her rational for calculating the award sought separately for the two periods was that on 9 February 2018, Mr [Glass] made a without prejudice save as to costs offer to settle the proceedings which, if accepted, would have provided to Ms [Bond] an outcome almost identical to that arrived at by the Court.

[5] The amounts sought are:

(a) In respect of period 1 on a schedule 2B basis, $8544.00

(b) In respect of period 2 on a schedule 2B basis with a 50 percent uplift, $14,017.50.

(c) Disbursements, being original filing fee and hearing fees, $2512.00.

Total: $25,073.50

The law

[6] Section 40 of the Property (Relationships) Act 1976 (the Act) gives to the Court jurisdiction to make awards of costs in respect of proceedings under that legislation. The section reads as follows:

> **40 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.

[7] Rule 207 of the Family Court Rules enables the Court to have regard to the regime set out in the District Court Rules.

[8] District Court Rules 14.2 and 14.6 are of particular relevance with relation to the application before me against the background nevertheless of the Family Court holding an overarching discretion as to the awarding of costs.

Rules 14.2 and 14.6 read as follows:

> **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.
>
> (2) Despite subclause (1)(f), costs for legal professional services provided in relation to a proceeding may be awarded to a party under this Part even though the services are provided under a conditional fee agreement.
>
> (3) In subclause (2), conditional fee agreement means an agreement under which a party to a proceeding and a person who provides legal professional services agree that, in relation to the liability of the party to the proceeding for some or all of the person's fees and expenses, these are payable depending on the outcome of the proceeding.

14.6 Increased costs and indemnity costs

(1) Despite rules 14.2 to 14.5, 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**).

(2) The court may make the order at any stage of a proceeding in relation to any step in the proceeding.

(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, a notice for further particulars, a notice for interrogatories, or any 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 14.10 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) 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 a 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) 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.

[9] Asher J in *Johnson v Johnson* observed: [1]

> [35] Over recent years the principles in relationship property disputes have become more established, and the approach to costs has settled and been made predictable. The development of scales and detailed rules in the District Court and High Court Rules as to increased or indemnity costs have made calculations more certain. As was stated by Keane J in *FT v JML*:[2]
>
> > These days the winning party in property relationship cases has a more recognised right to an award on the principle that costs follow the event than was so even a few years ago. Conversely, the losing party's misconduct may not now need to be so egregious to justify an award.
>
> [36] His approach was developed by Duffy J in *Van Selm v Van Selm*. She observed:[3]
>
> > While costs decisions are discretionary, the Court should apply the [District Court] regime in the absence of some reason to the contrary. Any departure must be a considered and particularised exercise of the discretion.
>
> [37] The same approach has been adopted in other High Court cases.[4]

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[1] [2016] NZHC 1606.
[2] *FT v JML* [2012] NZHC 1388 at [32].
[3] *Van Selm v Van Selm* [2015] NZHC 641, (2015) 30 FRNZ 163 at [44].
[4] See for example *Martin v Marsh* [2015] NZHC 416 at [7], and *Gibbs v Gibbs* [2015] NZHC 3043 at [52].

> [38] Therefore the District Court and in this case the High Court costs regime applies. In applying those principles there must be particular recognition of the emotional, and at times complex commercial and legal problems that arise when relationships end.[5] Even reasonable parties in that situation can have difficulty in finding a solution. Nevertheless, when a party takes a significant contested position in property relationship litigation, and can be seen as unsuccessful in that litigation, it can be expected that there will be the same costs consequences as there would be in civil litigation.

Mr [Glass]'s position

[10] Ms Morris placed emphasis on District Court Rule 14.6(3)(b)(v).

[11] On 29 March 2017, Mr [Glass] offered settlement on the basis that from the parties' relationship property pool of then approximately $600,000.00 he would receive $150,000.00 and retain his Kiwibank account at value of $52,264.84.

[12] On 9 February 2018, Mr [Glass] made a second proposal that he receive $100,000.00 together with his Kiwibank account.

[13] The outcome of these proceedings was that Mr [Glass] received relationship property to a value of $197,257.00 and Ms [Bond] to a value of $408,547.77.

[14] Ms Morris urges that if Ms [Bond] had accepted the first offer made by her client, she would have received a sum of $398,540.71, a sum but $10,000.00 less than the Court's outcome, and that, had she accepted the second offer, she would have received $448,540.71, approximately $40,000.00 more than the sum she received as a result of the Court's judgment.

[15] Ms Morris accordingly urges that her client should receive a costs award on a category 2B basis, but with a 50 percent uplift in respect of the period of time subsequent to her client's second offer of settlement.

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[5] The particular difficulties in dealing with personal relationships is reflected in Care of Children Act costs claims, in which the motives of the parents and best interests of the child can be relevant: see, for example *B v B* (2008) 27 FRNZ 289 (HC).

Ms [Bond]'s position

[16] The thrust of Mr Noble's opposition to Ms Morris' submissions was:

(a) While Mr [Glass] had succeeded in having the 2014 agreement executed by the parties set aside with the issue of division of relationship property then to be considered afresh, his client had succeeded in her claim for provision pursuant to s 15 of the Property (Relationships) Act (Income Disparity Compensation).

(b) Each party had a success such that he submitted costs should lie as they fall.

(c) It was, Mr Noble submitted, not unreasonable for Ms [Bond] to hold to the position taken by her that the December 2014 agreement executed after each party had received independent legal advice should be defended.

Consideration

[17] This Court retains a discretion as to the awarding of costs, notwithstanding its ability to take account of the regime set out in the District Court Rules.

[18] Notwithstanding the above, the authorities make it clear that in cases relating to relationship property division, where the ability of parties with counsels' assistance to assess prospects of success is greater than in other family jurisdiction cases, there must be a strong tendency for costs to follow the event of success.

[19] Costs following the event must be all the more likely where a clear without prejudice offer is made prior to hearing that, as it transpires, becomes one proximate to the Court's ultimate outcome.

[20] It is appropriate that I consider also the provisions contained within the December 2014 agreement that Ms [Bond] sought to defend.

[21] The agreement, as observed by me in my judgment, afforded to Mr [Glass] 12.9 percent of the relationship pool, reflecting a 37.1 percent compromise in return for Ms [Bond]'s non-pursuit of compensation in respect of income disparity.

[22] I concluded in reaching an overall view as to fairness that 12.9 percent provision for Mr [Glass] at separation, leaving him approximately $40,000.00 out of the then pool of $310,000.00 relationship property, created a serious injustice.

[23] In my view, careful consideration of Mr [Glass]'s 9 February 2018 offer to settle should have led to settlement.

Mr [Glass] should not be required to bear the costs burden of Ms [Bond]'s decision not to settle.

[24] While Mr Noble correctly submitted that assessment of outcome with relation to income disparity compensation claims is not so formulaic as to enable certainty of prediction, what is abundantly clear is that had Ms [Bond] stood back and asked the question in February 2018, was provision of $40,000.00 for Mr [Glass] at the time that the parties' agreement was signed provision that created serious injustice, she would have, with the benefit of advice, found it impossible to come to an answer of no. She would also have concluded that the offer was reasonably proximate to likely outcome.

That determination would, and should, have led to the conclusion that any income disparity compensation award would inevitably in its calculation take account of what in the circumstances Mr [Glass] should reasonably pay to her.

[25] What I must also do is take account of the parties' circumstances.

[26] Ms [Bond] has received income disparity compensation pursuant to my judgment, and was found by me as able to return to full-time work by February 2019, until which date she has been compensated for disparity of income.

[27] There is nothing to suggest an inability for Ms [Bond] to meet an appropriate costs award.

[28] I do, however, come to the conclusion that a 50 percent uplift above the category 2B figure for the period subsequent to February 2018 is too high.

In my view, the uplift should be 25 percent.

[29] As to disbursement costs, my clear view is that Ms [Bond] should not be required to meet Mr [Glass]'s original filing fee. She should, however, be required to meet the setting down for hearing fee.

[30] The result is that I order that Ms [Bond] pay to Mr [Glass] costs in the following sum:

(a) For the period 29 March 2017 to 9 February 2018, $8544.00.

(b) For the period 9 February 2018 to conclusion, $11,681.25.

(c) Disbursements, $1812.00.

Total: $22,037.25

S J Maude
Family Court Judge

Signed 1 November 2018 at pm