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 TAURANGA

FAM-2015-070-000140
[2016] NZFC 1931

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	DELICE QUESHIRE Applicant
AND	CLEVELAND QUESHIRE Respondent

Appearances:	W Weal for the Applicant E Eggleston for the Respondent
Judgment:	10 March 2016

CHAMBERS DECISION OF JUDGE S J COYLE
[in relation to issue of inter-partes costs (Property (Relationships) Act 1976)]

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[1] In my minute of 11 December 2015 I recorded the resolution of the parties' relationship property dispute arising out of orders that had been made by the Court concerning the sale of properties owned by the parties. Orders had to be made following application by Ms Queshire, to force the sale of three properties, and Ms Queshire now seeks costs. Accordingly pursuant to my minute I directed that a memorandum as to costs be filed.

[2] Mr Eggleston is now without instructions and has sought leave to withdraw as counsel. In chambers I have granted him leave to withdraw pursuant to r 88 of the Family Courts Rules 2002. No submissions have been filed by Mr Queshire in relation to the issue of costs. I am required therefore to determine whether to make a cost contribution award in Ms Queshire's favour.

[3] Accompanying the memorandum of Ms Weal in support of the application for costs is an application for filing submissions over time. I grant leave for the submissions to be filed late; the reasons advanced by Ms Weal in support of her memorandum are meritorious and justify the exercising of the Court's discretion in favour of admitting the submissions albeit late.

Background

[4] Mr and Ms Queshire separated in November 2014, and their two children now live with Ms Queshire. Following their separation there have been numerous applications before the Court in relation to proceedings under the Domestic Violence Act 1995 ("DVA"), Care of Children Act 2004 ("COCA") and the Property (Relationships) Act 1976 ("PRA").

[5] This cost application relates to urgent applications made by Ms Queshire on 26 August 2015 and 19 October 2015; the August application related to an order concerning a former family home, with that order being granted on a without notice basis. The October application related to orders concerning a property in [location deleted] and another property in Hamilton, and again orders for sale remain on a without notice basis. It is in relation to those three applications that Ms Queshire seeks costs.

The Property (Relationships) Act 1976

[6] Section 40 of the PRA provides that in any proceedings under the PRA the Court may make such an order as to costs as it thinks fit. Additionally r 207 of the Family Courts Rules 2002 provides authority for the Court to determine the issue of costs with r 207 stating as follows:

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) 14.2—principles applying to determination of costs:

(b) 14.3—categorisation of proceedings:

(c) 14.4—appropriate daily recovery rates:

(d) 14.5—determination of reasonable time:

(e) 14.6—increased costs and indemnity costs:

(f) 14.7—refusal of, or reduction in, costs:

(g) 14.8—costs in interlocutory applications:

(h) 14.9—costs may be determined by different Judge:

(i) 14.10—written offers without prejudice except as to costs:

(j) 14.11—effect on costs:

(k) 14.12—disbursements.

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

[7] Across the board Judges of the Family Court are increasingly approaching the issue of costs on a principled basis.[1]

[8] In adopting a principled basis the Court has consistently done so with reference to r 207 of the Family Courts Rules referred to above. Latterly Duffy J in *Van Selm v Van Selm*[2] undertook a thorough view of the principles applicable towards a cost in the Family Court. At [41] of Her Honour's judgment she recorded:

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[1] *Wishart v McEwan* (1998) 16 FRNZ 528; *JJF v AJH* FC Christchurch FAM-2008-009-003326, 13 January 2011; *Sydney v Sydney* [2012] NZFC 2924

[2] [2015] NZHC 641

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

[9] The principles applying to the determination of costs as set out in the District Courts Rules 2014 ("DCR") r 14.2 which states as follows:

> **14.2 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.

[10] Notwithstanding the wider applicability of the DCR, in my view guidance is still found in the common law. In *S v I* [3] the High Court endorsed the comments of His Honour Judge Callinicos in *AS v JM (costs)*[4] where the Judge held at [17] of his judgment:

> While there may be some difference in philosophy as to whether a more civilly orientated approach is taken to costs matters in the family jurisdiction, there remains a constant thread throughout the decisions when the Court is considering a party as being unreasonable. All the decisions make it clear that where a party has acted unreasonably, or prolonged the proceedings, or has been the recipient of adverse credibility findings then

[3] (2009) 28 FRNZ 13
[4] [2004] NZFLR 57

> they cannot expect to escape close attention when the Court exercises a discretion on cost issues.

[11] Thus, when I look at the authorities to which I have referred the following principles can be distilled;

(a) While there is a more civilly based approach to costs, the governing criteria are the aims and objects of the act in question.

(b) Costs unlike in the civil jurisdiction do not automatically follow the event in Family Court cases (although the recent Duffy decision would tend to indicate that costs should in relation to proceedings under the Property (Relationships) Act 1976, as to do so may be a disincentive to bring legitimate cases to the Family Court. In my view this is a particularly important principle in relation to proceedings under both the DVA and COCA.

(c) Notwithstanding the above, when an unmeritorious or unreasonable case is argued, costs awards are likely to face greater scrutiny by the Court in terms of exercising its discretion to make a cost award.

[12] Finally following the approach of Her Honour Judge O'Dwyer in *VTW v ACT*[5] I also need to consider:

(a) The outcome of the proceedings;

(b) The matter that is in issue;

(c) The conduct of the parties;

(d) The means of the parties;

(e) The actual costs incurred;

(f) The overall interests of justice.

[5] FC Queenstown FAM-2006-012-1032, 20 April 2010

[13] Ms Weal seeks indemnity costs pursuant to r 14.6(4)(b) of the DCR or alternatively increased costs pursuant to 14.6(3)(b) of the DCR.

The applicant's case

[14] On 26 March 2015 Ms Queshire applied for relationship property orders. At the same time she applied for and was granted an order reducing the time of filing a notice of defence to 10 days. Despite that order Mr Queshire did not file his response to 8 June 2015; no reason was provided for the delay in filing.

[15] Then on 29 July 2015 the parties attended a judicial settlement conference in which agreement was reached as to the making of orders resulting in the full and final settlement of relationship property proceedings. At that conference both parties were represented by counsel and orders were made accordingly.

[16] However on 26 August 2015 Ms Queshire was forced to apply for orders under the Act in relation to the former family home at [address deleted], Hamilton. It had been sold and settlement notices had been issued by the purchasers. However Mr Queshire did not sign the form necessary to complete the settlement to the solicitors acting on the sale (the A&I form). He indicated that he would only sign the A&I form if Ms Queshire dropped the complaints that she had made against him and "got him out of prison". It would appear that he was referring to complaints Ms Queshire had made to the police when Mr Queshire breached the protection order.

[17] As Ms Weal sets out in her submissions at the time Mr Queshire was able to continue to instruct his counsel in relation to COCA proceedings and he later instructed counsel in relation to the PRA proceedings. He therefore had the ability to instruct counsel but in Ms Weal's submission was simply using the necessity of signing the A&I form as some form of leverage to have Ms Queshire discontinue the complaint to the police that he had breached the protection order. As a consequence of the order made in August 2015 the [address deleted] property settled, but penalty interest accrued in the sum of $3465.89. Ms Weal seeks that Mr Queshire repay that amount to Ms Queshire in full as part of the cost award.

[18] The parties had two other properties; one at [address deleted], Thames and [address deleted], Hamilton. Again Mr Queshire was obstructive in the sale of those properties. Mr Queshire refused to sign a listing form regarding the [location deleted] property. He also attempted to have the tenant in the [location deleted] property evicted and when that failed he applied for an occupation order which he ultimately discontinued. In relation to the [address deleted] property Mr Burham advised he wanted to purchase the property himself and refused to co-operate with the real estate agents and to sign an agreement for sale and purchase when a third party offer had been made. Ms Queshire had therefore had to apply to the Court for orders to effect the sale of those properties.

Actual costs

[19] The actual costs to Ms Queshire in applying for the 26 August 2015 application was $924.10 plus GST being a total figure of $1062.72. In relation to that as mentioned above Ms Weal seeks indemnity costs including a penalty interest payment made. Ms Queshire's costs in applying for the October orders amounted to $860 plus GST being $989. Thus the total amount of costs sought is $5517.61. It is clear from 14.2(f) of the DCR an award of costs cannot exceed the actual costs incurred by a party claiming costs.

[20] In my view I cannot include as a cost award the indemnity costs arising out of the penalty interest component of the [address deleted] agreement for sale and purchase. The basis upon which penalty interest has arisen is as a consequence of the contractual arrangements between Mr and Ms Queshire and the purchasers of that property and have become due and owing because of the failure to settle on the settlement date. Ms Queshire has a contracted liability to pay those costs and her recourse against Mr Queshire is pursuant to the PRA and an adjustment to the agreed cost award because of the post-separation actions of Mr Queshire.

[21] In my view it is entirely appropriate that Ms Queshire is entitled to costs. Following the reasoning of Judge Callinicos in the decision referred to above, Mr Queshire should not expect anything other than an award of costs given the necessity of Ms Queshire's applications is occasioned as a direct consequence of his aborting

attempts to sell the three properties. The scale costs on a 2B basis (which is the appropriate categorisation) would exceed the actual cost paid by Ms Queshire. Whilst not specifically set out by Ms Weal in her submissions, when I look at the potential claims that Ms Queshire could have made, it is quite clear to me that the amount she could have claimed pursuant to the scale would exceed her actual costs. I have no information as to whether Mr Queshire has the means to pay or not but I note that he is to obtain some monies by way of settlement from the parties' relationship property although the amount previously agreed is now unclear as a consequence of Mr Queshire's actions.

[22] I therefore determine that for the reasons set out above Mr Queshire should pay Ms Queshire's costs in relation to the August 2015 and October 2015 applications in the sum of $2051.70 inclusive of GST.

Result

(1) I order that Mr Queshire pay Ms Queshire's costs in the sum of $2051.70.

S J Coyle
Family Court Judge