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 WELLINGTON

FAM-2014-085-002736
[2016] NZFC 2151

BETWEEN	DALIDA HIMANSUEVNA SAHA Applicant
AND	MARK ALEXANDER KININMONTH Respondent

Hearing:	22 January 2016
Submissions:	22 February 2016
Appearances:	F M Gush and L Pratley for Applicant J Briscoe for Respondent
Judgment:	18 March 2016

JUDGMENT OF JUDGE A P WALSH ON COSTS

Introduction

[1] On 11 February 2015, the applicant applied to set aside an agreement (the agreement) completed pursuant to s 21A Property (Relationships) Act 1976 (the Act). On 22 September 2015, an order was made requiring the applicant to pay $10,000 as security for costs.

[2] The applicant applied to discontinue the proceedings on 13 January 2016. She sought:

(a) No order as to costs being made against her;

(b) The sum of $10,000, paid to the Court as security for costs, be returned to her in full.

[3] Proceedings were discontinued on 22 January 2016, but the issue of costs was reserved. The respondent sought an order requiring the applicant to pay costs on a 2B basis utilising the $10,000 security for costs payment.

Costs Sought by Respondent

[4] The respondent sought total costs of $14,591.50 in accordance with Schedules 4 and 5 District Court Rules 2014 (DCR). The schedule was divided showing the daily recovery rate of $1,550 per day until 30 June 2015 and $1,780 from 1 July 2015.

[5] The calculation of costs was as follows:

Original application to sustain Notice of Claim

Step:	Allocated days or part days:	Total time at $1,550 per day:
6	Preparing and serving Notice of Opposition (dated 26 May 2014)	1.5
9.8	Preparing and filing of Memorandum in anticipation of Judicial Conference	0.25
9.9	Appearance at Judicial Conference 30 May 2014	0.3
9.8	Preparing for Judicial Conference	2.5
9.9	Appearance at Judicial Conference 27 June 2014	0.3
9.16	Sealing Order	0.2
	Total:	**5.05**
	5.05 x 1550 = $7,827.50	

Application to Set Aside Agreement

Step:	Allocated days or part days:	Total Time at $1,780.00 per day:
6	Preparing and serving Notice of Opposition 24 July 2015	1.5
9.10	Preparing and filing Application for Security for Costs	0.4
9.8	Preparing and filing Memorandum in anticipation of Judicial Conference	0.25
9.9	Appearance at Judicial Conference 2 October 2015	0.3
9.11	Preparing and filing Opposition to Interlocutory Application (Discontinuance and Refusal of Costs)	0.4
9.8	Preparing and filing memorandum for Judicial Conference	0.25
9.9	Appearance at Judicial Conference 22 January 2016	0.3
	Total:	**3.8**
	3.8 x 1780 = $6,764.00	
		7,827.50
		6,764.00
	TOTAL COSTS:	**14,591.50**

Disbursements

	Title Searches	25.00

Positions of the Parties

[6] In her submissions Ms Gush referred to three relevant Family Court Rules (FCR):

1. FCR 5A provides a rule in DCR does not apply to proceedings in the Family Court unless that rule is specifically applied by these rules.

2. FCR 195A(6) provides the discontinuance of an applicant's substantive application does not affect the determination of costs in respect of that application.

3. FCR 207 provides costs are at the discretion of the Family Court.

[7] FCR 207(2) sets out applicable DCR. Ms Gush noted DCR 15.20 (Costs on Discontinuance) is not listed. Accordingly, DCR 15.20 did not apply under the FCR.

[8] Given these FCRs, Ms Gush submitted it was not mandatory costs be awarded on the discontinuance of the proceedings; whether there was an award and the quantum of any award of costs remained discretionary.

[9] Ms Gush argued the issue of costs was not straightforward for these reasons:

(a) While the respondent assumed he had an entitlement to costs, he had failed to address properly what was at the heart of the proceedings – his failure to pay maintenance and child support, either under the Property Agreement or in accordance with the order made in the Japanese Court.

(b) The whereabouts and domicile of the respondent was unknown. In an affidavit sworn September 2015, he had indicated he intended to return to New Zealand before the end of the year. Subsequently in an affidavit sworn 20 January 2016, he described his domicile as *"of Tokyo, Japan, currently of Rotorua, New Zealand Computer Consultant"*.

(c) The financial circumstances of the respondent were unknown. Although the respondent claimed he was unemployed, Ms Gush maintained he had some form of employment and sources of income.

(d) When he was made redundant the respondent claimed he was not *"obliged to continue to pay maintenance"* and *"in Japan ... he only had to pay maintenance while working"*. Ms Gush argued he had produced no evidence from his Japanese lawyer confirming that was legally correct. She contended there would be no incentive to pay child support if a liable parent could ignore a court order on the basis that he or she was *"not working"*.

(e) In any event the respondent's redundancy payment would be considered part of his income; for that reason his statement that he did not have to pay child support lacked credibility.

[10] Ms Gush noted under s 32 of the Act, it is mandatory for the Family Court to consider child support, and any voluntary agreements in any proceeding. An award of costs could only be considered in relation to a proceeding. It was therefore necessary for the Court to consider whether the respondent had met his financial obligations to the applicant and their daughter. The costs discretion could only be exercised once the Court was fully informed of all the circumstances leading up to the proceedings, as well as the effect an award of costs on either party.

[11] Ms Gush submitted it was clear the respondent had not been paying maintenance and child support under the agreement since early 2014. This alleged default resulted in the applicant applying for a child support order in Japan of ¥300.000 per month. The respondent now owed at least NZ$46,000 and the question was how the applicant could enforce either the agreement, or the Japanese Court Order as his whereabouts and financial circumstances had not been disclosed. On the basis the respondent had returned to New Zealand, the applicant had decided to enforce the Japanese Court Order by filing proceedings in the High Court under that Court's inherent jurisdiction, to obtain judgment and enforce payment out of the respondent's interest in the property at Maketu.

[12] Before the Court could consider whether to award costs, the respondent should be required to file an affidavit disclosing full details of sources of income, copies of his last tax return, copies of bank and credit card statements and details of his redundancy payment. The respondent should also be required to provide documentary evidence he was not required to pay child support under the Japanese Court Order.

[13] It would be wrong in law for the Court to consider an award of costs against the applicant *"without receiving the full circumstances of these proceedings"*. Ms Gush contended the $10,000 security for costs should remain with the Court pending the outcome of the respondent's application for costs. If he failed, or he refused to provide information, she submitted his application for costs should be dismissed and the security payment be returned forthwith to the applicant's solicitors.

[14] Mr Briscoe submitted the application of the applicant had been misconceived; there was no basis for the application under the Act. The proceedings, to be filed by the applicant in the High Court, could take their course. The issues in the High Court proceedings were quite separate.

[15] The respondent had been put to considerable costs in opposing the applicant's application. He had been *"100% successful"* in these proceedings which included opposing the initial application to sustain the notice of claim, obtaining an order for security of costs and the applicant discontinuing her application to set aside the agreement. As to the proceedings pending in the High Court, it remained to be seen whether the applicant would be successful in seeking to enforce the Japanese Order which referred to *"sharing of the marriage fee"*. Mr Briscoe argued the nature of such an order and whether it was applicable to the respondent who was unemployed, would need to be determined. The respondent intended seeking security for costs in respect of any proceedings filed in the High Court.

[16] Given the nature of the proceedings in the High Court, Mr Briscoe submitted it was not appropriate for the Court to defer consideration of costs, or order a stay of

payment after costs had been determined. He requested the Court fix costs and direct the $10,000, held as security for costs, be paid to the respondent.

[17] Counsel for the applicant was merely speculating as to what might happen in the High Court. Mr Briscoe noted the submissions, filed for the applicant, referred to the Japanese Court Order as being an order relating to child support, but that did not appear to be correct. The order referred to a *"marriage fee"* and also to expenses for the child.

[18] Mr Pratley filed a memorandum 15 February 2016 addressing the quantum of costs sought by the respondent. In his memorandum of response, Mr Briscoe referred to s 40 of the Act relating to costs and factors relating to the application of FCR 207. He did not respond to specific issues raised by Mr Pratley in quantifying costs sought by the respondent. He noted it had not been anticipated counsel for the applicant would file a further memorandum as it had not been directed by the Court. The schedule prepared by him was in accordance with Schedule 5 of the DCR. He acknowledged an award of costs was discretionary, however, the schedule was a guideline to what was an appropriate award taking into account the actual costs incurred by a party.

[19] In his memorandum 15 February 2016, Mr Pratley advised proceedings had since been filed in the High Court at Rotorua. The applicant sought judgment against the respondent for outstanding monies due to her under the Japanese Court Order. The amount claimed in the New Zealand High Court proceedings was approximately NZ$54,400 being 14 months to date of unpaid *"sharing of marriage fee"*. An order was also sought in respect of ongoing liability under the Japanese order. The claim in the High Court was by way of statement of claim and notice of proceeding; judgment summary was not being sought.

[20] Mr Pratley submitted the Court should defer consideration of costs, but if it was minded to direct the applicant to pay costs, a stay was then appropriate pending the outcome of the High Court proceedings. If, however, the Court wished to dispose of the issue of costs, he invited the Court to retain in its trust account the sum of $10,000 held as security for costs (or pay that to a solicitor's trust account

and be held by that solicitor on an undertaking to hold the same as stakeholder) pending the outcome of the High Court proceedings. He argued otherwise the respondent could gain the benefit of a costs award even though it was alleged in the pending High Court proceedings he had not complied with the Japanese Court order.

[21] Mr Pratley argued the 2B costs, as calculated by Mr Briscoe, seemed high given the fact the proceedings had only reached a preliminary stage when the applicant sought to have the proceedings discontinued. He submitted the Court should have regard to the following factors when determining the quantum of costs:

(a) He noted in respect of the notice of opposition dated 26 May 2014, costs of $2,325 had been claimed, being 1.5 days at $1,550 per day. Although he was not acting for the applicant at that stage, Mr Pratley conceded extensive evidence had been filed.

(b) The claim for preparing a memorandum for a judicial conference – 0.25 days at $1,550 per day, ie. $387.50 seemed reasonable.

(c) Claiming $465 (0.3 days at $1,550 per day) for each of the two conferences seemed high. Conferences normally took approximately 15 minutes.

(d) A claim of 2.5 days (at $1,550 per day) amounting to $3,875 for preparation for judicial conference, appeared to be excessive. Mr Pratley noted that if a charge-out rate of $400 including GST was applied, that equated to 9.7 hours. He argued it would be extraordinary to take that long to prepare for a 15 minute list conference.

(e) The charge of $310 for sealing an order appeared to be reasonable.

(f) In respect of the second part of the schedule, at $1,780 per day, the costs relating to preparing and filing applications for security of costs

and change of venues at $1,424 (0.4 days – twice) appeared to be high.

(g) There were two charges of $534 (0.3 days each) for attendances at two judicial conferences. Mr Pratley argued these charges appeared to be excessive, noting each conference was held on a regular Judge's list in the Wellington Court. Normally the actual time spent was unlikely to result in an actual fee of $534 (or $465 using the pre-July 2015 scale), particularly where counsel attended by telephone.

(h) The two claims of $445 (0.25 days) made in respect of preparing memoranda for each judicial conference appeared to be *"about right"*.

(i) The disbursement of $25 for title searches seemed high, but given the small amount involved Mr Pratley did not take that issue further.

[22] Mr Pratley submitted costs claimed needed to be actual, or scale whichever was the least. Sums claimed for some steps, appeared to be more than what would be the actual expected charge. Overall costs sought by the respondent amounting to $14,616.50 were too high, particularly as the applicant sought leave at a preliminary stage to discontinue the proceedings.

The Law

[23] Section 40 of the Act provides:

> The Court may make such order as to costs as it thinks fit.

[24] Mr Briscoe argued the previous general principle in relationship property proceedings that both parties bore their own costs was no longer applicable. The Courts were increasingly treating costs effectively the same as in ordinary civil proceedings. He noted the observations of Goddard J in *Jack v Jack* [2014] NZHC 2502 at [9] where she observed:

> The current approach is that costs should follow the event rather than being confined to costs involving misconduct.

[25] FCR 207 refers to provisions of the DCR. Mr Briscoe noted DCR 14.2 included the following principles:

- The party who fails should bear costs to the party who succeeds;
- A costs award should not exceed actual costs;
- Costs should be predictable and expeditious.

[26] DCR 14.8 contains the principle that unless there are special reasons, costs in interlocutory matters should be fixed where an interlocutory application was determined; such costs were payable when they were fixed.

[27] It is clear from FCR 207, costs in any proceeding including any step in a proceeding, or any matter incidental to a proceeding are at the discretion of the Court. FCR 207(2) provides, in exercising that discretion the Family Court can take into account any of the specified DCR.

[28] I accept Ms Gush's submission DCR 15.20 which relates to costs on discontinuance, is not specified under FCR 207(2).

[29] I have considered the issue as to whether costs in these proceedings should be settled independently of the proceedings filed in the High Court and irrespective of any child support owed by the respondent. I have determined the Family Court should resolve finally the issue of costs taking into account these factors:

(a) The security for costs payment related directly to the application filed by the applicant under the Act to set aside the agreement.

(b) Separate rules in the High Court relate to costs in respect of proceedings filed in that jurisdiction.

(c) Any costs award in the High Court jurisdiction will be determined by the High Court. Such proceedings are separate and independent of the proceedings in the Family Court.

[30] I do not consider it is appropriate to stay any payment of costs pending the outcome of the High Court proceedings. It is unclear when those proceedings are likely to be heard. At this stage I consider there can only be speculation as to the outcome of those proceedings which are separate and independent of the proceedings in the Family Court.

[31] I have considered the application s 32 of the Act, but note there is no provision in s 32 requiring the Court to consider child support and maintenance payments when determining the issue of costs.

[32] While the Court does have a discretion under s 40 of the Act relating to an award of costs, that discretion must be exercised in a principled way. I accept Mr Briscoe's submission there is now a clear trend in relationship property cases for the Court to determine costs in a similar way to costs determined in civil jurisdiction. While 2B costs are calculated in accordance with Schedules 4 and 5 DCR, the Court must still have regard to actual costs incurred. When I reviewed Mr Briscoe's calculations, I considered adjustments were necessary in reducing costs claimed in respect of the following matters:

- As to appearances at the judicial conferences on 30 May 2014 and 27 June 2014 such conferences usually last for approximately 15 minutes. The costs as calculated amount to $465 for each conference. I consider that claim is too high.

- The costs relating to preparing for the judicial conference amount to $3,875. I accept Mr Pratley's submission these costs appear to be excessive having regard to the preparation required for a 15 minute judicial conference.

- The costs claimed for preparing and filing an application for security for costs and application for change of venue totalled $1,424. Given the nature of those applications I consider that amount is high.

- The costs for the judicial conference on 2 October 2015 amounting to $535 are high having regard to the conference usually lasting approximately 15 minutes. I accept the conference on 22 January 2016 extended beyond 15 minutes.

[33] Having regard to the matters I have set out, in the exercise of my discretion under s 40, I order the applicant to pay the respondent costs amounting to $8,750. I direct those costs are to be paid forthwith out of the sum of $10,000 paid as security for costs. The balance of funds can then be released to the applicant.

A P Walsh
Family Court Judge

Signed at am/pm this day of 2016