IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

DP NO's 19/2016 & 25/2016

IN THE MATTER	of the Sections 23 and 25 of the Matrimonial Property Act 1976 of New Zealand (as that Act applies in the Cook Islands by virtue of the Matrimonial Property Act 1991-92)
AND **IN THE MATTER**	of Applications for Custody, Access and Maintenance
BETWEEN	**ROSEMARY JULIA WEBB** of Rarotonga, Teacher Aide **Applicant**
AND	**PAUL WEBB** of Rarotonga, Businessman **Respondent**

Hearing Date:	8 to 10 May 2017
Counsel:	Messrs I Hikaka & B Marshall for Applicant Mr S McAnally for Respondent
Judgment:	26 January 2018

JUDGMENT OF THE HONOURABLE JUSTICE DAME JUDITH POTTER
(COSTS)

[POTT0910.dss]

Introduction

[1] In its judgment dated 24 November 2017 the Court of Appeal allowed Mrs Webb's ("the applicant") appeal and vested in her the home at Arorangi having a value of $2.83M which the Court was satisfied was less than half the value of the matrimonial property. The Court of Appeal ordered that Mr Webb ("the respondent") make a reasonable contribution to the applicant's costs in both courts, costs in this Court to be determined by this Court.

Parties' positions

[2] Both parties have filed submissions as to costs.

[3] The applicant seeks an order that the respondent pay $94,496.97 as a contribution to legal costs and $5,147.09 for disbursements incurred. The contributions sought for costs are on the basis of 75 percent of fees of $92,818.50 incurred prior to the expiry of the Calderbank offer made on 5 May 2017, and 85 percent of fees of $29,274.25 incurred after the Calderbank offer expired on 8 May 2017.

[4] The respondent does not contest the full recovery of disbursements claimed nor the reasonableness of the legal fees incurred up to 9 May 2017, but submits there is no basis for his contribution to exceed the "base" two-thirds contribution of costs reasonably incurred.

Principles applying to costs awards

[5] The parties accept the principles that apply to costs awards which are usefully summarised in the judgement of Grice J in this Court in *Samatua v The Attorney General (Costs)*[1] at [12] and [13] as follows:

> [12] The general principle is that costs follow the event. In the usual course the award provides a reasonable contribution to the fees of the successful party. ...
>
> [13] The Court's discretion in awarding costs must be exercised judicially having regard to pertinent earlier decisions and what is fair and reasonable in the circumstances. The award should provide for a reasonable contribution to costs reasonably incurred.
>
> [14] The practical approach adopted in this jurisdiction is to take as a starting point for the quantum for an award of two thirds of the actual and reasonable legal fees together with full reimbursement of actual and reasonable disbursements.
>
> [15] Section 92 of the Judicature Act 1980-81 gives the court discretion to make such orders as it thinks fit for the payment of costs. Regulation 8 of the High Court Fees, Costs and Allowances Regulations 2005[2] allows the court to fix such additional costs to those prescribed as are fair and reasonable in the circumstances of each case. ...

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[1] *Samatua v The Attorney General*, Plaint No.5/12, Costs Judgment, Grice J, 25 January 2017

[2] Since repealed and substituted by the High Court Fees, Costs and Allowances Regulations 2016 with effect from 1 October 2016

> [16] The Cook Islands Court of Appeal has also noted that costs may be allowed to reflect the higher cost of New Zealand counsel where it is appropriate to brief New Zealand lawyers.
>
> [17] The practice of awarding two thirds of actual costs is not a guiding principle. McGechan J in the New Zealand case of *Holden v Architectural Finishes Ltd*[3] noted that the adoption of any percentages as a norm is erroneous. However he said a costs award in the range of 40 to 70% of actual costs provided some comfort that the costs were in the acceptable range. ...

The Calderbank offer

[6] By letter dated 5 May 2017 counsel for Mrs Webb declined an offer of settlement made by Mr Webb through his counsel on 3 May 2017. She offered, in consideration of payment by Mr Webb to her of $1.5M on or before 31 May 2017 to settle "…all claims in relation to the marriage by way of spousal maintenance, relationship property, at law or in equity in respect of any property that has been disclosed in these proceedings [including] any claim in respect of the Arney Road property in New Zealand." Mrs Webb would vacate the Arorangi property within one week of payment. She would take the contents of the National Mini Storage units[4] and personal effects and chattels in the Arorangi house.

[7] Mrs Webb's offer was not accepted and the hearing in this Court immediately followed expiration of the offer. Mr Webb was essentially successful in this Court but Mrs Webb succeeded on appeal.

[8] Mrs Webb submits the Calderbank offer is relevant to costs in the Court of Appeal and in this Court. Mr Webb contends that the Calderbank offer should have no significant bearing on costs in this Court, essentially because in this Court, Mrs Webb placed no reliance upon the provisions in the trust deeds which found favour with the Court of Appeal in determining the status of the two trusts in issue in these proceedings. He submits the Calderbank offer was made "in the context of a quite different case".

[9] The issues in this case were complex as the Calderbank letters dated 3 May 2017 and 5 May 2017 acknowledge, and the judgments in this court and the Court of Appeal confirm. The

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[3] *Holden v Architectural Finishes Ltd (*1997) NZLR 143.

[4] These were vested in Mrs Webb by consent order in the judgment of this Court dated 23 August 2017.

trusts were challenged and defended on a number of grounds and the provisions of the trust deeds were the subject of detailed submissions by both parties with emphasis and reliance varying in the course of argument. On the other hand, the Calderbank offer of 5 May 2017, though made late in the piece, was clear and straightforward in its terms. Acceptance by Mr Webb would have resulted in a sustainable outcome and saved considerable litigation (some of which relating to maintenance is ongoing), and costs for both parties. The offer must have some bearing on costs in this Court, given the judgment in favour of Mrs Webb in the Court of Appeal for, in effect, $2.83M.

Conduct of the respondent

[10] Mrs Webb submits that Mr Webb's conduct in this case, including failing to provide discovery, failing to pay Court ordered maintenance when due and seeking to evict her from the Arorangi property, presented additional stress and difficulty for Mrs Webb and is a factor that should tell against him in the award of costs.

[11] Mr Webb denies failing to conduct the proceeding in a proper manner and points to the assiduous efforts by both parties and their counsel following the directions conference in April 2017, to ensure the case proceeded to hearing on the allocated fixture date 9 May 2017. This aspect is acknowledged by counsel for Mrs Webb.

[12] Mr Webb further notes that the Court of Appeal drew adverse inferences against him for failing to provide proper discovery, in attributing a value to the Solar shares. He submits there is no justification for increasing costs for the same reason.

[13] Mr Webb's failure to make full and proper discovery undoubtedly created difficulties for Mrs Webb and her counsel in presenting to this Court proper and sufficient evidence to enable the Court to determine accurate values for all the relevant assets (not only the Solar shares), in order to implement an appropriate division of matrimonial property. Counsel for Mrs Webb were obliged to prepare and present assessments and deductions from inadequate evidence, in order to assist the Court as best they could, in determining the value of relevant assets. The relevant information and evidence were in the possession and control of Mr Webb.

[14] However, I must assume that the additional time and attendances required of counsel for Mrs Webb in presenting to this Court their best extrapolations from insufficient and

inadequate evidence and information, are reflected in the fees charged. (Ultimately, as explained in the Court of Appeal judgment at [84] and [85], a precise division based on values for all relevant assets was not required because Mrs Webb accepted an award of the Arorangi property as satisfying her claim in respect of matrimonial property.)

[15] I accept that Mr Webb's failure to pay Court ordered maintenance as due has been an ongoing stressful factor for Mrs Webb. It has also involved considerable Court time. Likewise, his attempts to evict her and their child Bethany from the Arorangi home.

Other relevant factors

[16] I also take into account that:

a) This case involved matters of considerable complexity and important questions of law;

b) The assets claimed to be matrimonial property had an estimated value exceeding $8M;

c) Considerable time and effort in preparation for the hearing of three days in this Court were required, exacerbated, as described above, by Mr Webb's failure to make full, proper and timely discovery;

d) Briefing of New Zealand counsel was appropriate, an aspect not in dispute;

e) Mrs Webb was successful in the Court of Appeal in achieving vesting in her of the Arorangi property valued at $2.83M.

Fees from 9 May 2017

[17] While Mr Webb does not dispute the disbursements claimed, nor the reasonableness of fees claimed prior to commencement of the hearing on 9 May 2017 ($92,818.50), through his counsel he queries whether the fees claimed from 9 May 2017 include attendances which should not properly be included in the award of costs. In particular:

a) Communications regarding custody and access relating to Bethany following the consent order in this Court.

b) Attendances relating to maintenance.

c) Mr Webb's application for costs following the judgment of this Court on 23 August 2017, in which he was successful. Submissions were filed but costs were not determined given Mrs Webb's appeal.

d) Mrs Webb's applications and contentions relating to interim occupation orders in respect of the Arorangi property (subsequently rendered irrelevant by the Court of Appeal judgment).

[18] In reply submissions lately filed dated 25 January 2018 counsel for the applicant responds to these queries as follows:

a) No amount of the fees relates to communications regarding custody and access.

b) Mrs Webb has been successful in her application for maintenance. Mr Webb's subsequent application to vary the maintenance orders does not mean maintenance "remains a live issue".

c) None of counsel's costs relate to Mr Webb's application for costs. Only $337.50 of solicitor's costs sought relate to Mr Webb's application.

d) Claims regarding misconceived argument in relation to interim occupation orders are rejected. An interim order for occupation was made.

[19] On the limited information available to the Court, for I do not have detailed costs statements, my views are as follows:

a) This is a matter of fact which can be confirmed by reference to relevant costs statements.

b) Mr Webb has filed an application for variation of maintenance which is current. I will fix costs following determination of this application for variation, which is opposed by Mrs Webb. Issues regarding maintenance ordered and the quantum of arrears of maintenance may properly be included in the fees charged.

c) The $337.50 is not properly chargeable.

d) Mrs Webb's applications for an occupation order following this Court's judgment dated 23 August 2017 were misconceived based on the judgment. The interim occupation orders were continued at [13] of my interim judgment dated 26 October 2017 because of Mrs Webb's appeal and the imminent hearing date for it.

[20] I leave counsel to resolve these aspects by agreement and to advise the Court of any amendment to the amount claimed for fees from 9 May 2017, being $29,274.24. However leave is reserved to apply with adequate detail to enable this Court to determine any outstanding issues, if agreement cannot be reached.

Conclusion

[21] Taking into account all the factors referred to above, in conducting the balancing exercise required of the Court in determining a reasonable contribution to costs by the respondent, I consider there should be some uplift to the "base" two-thirds contribution of fees reasonably incurred. I set the award at:

a) 70 percent of the fees incurred prior to 9 May 2017 being 70 percent of $92,818.50, namely $64,972.95.

b) 75 percent of the fees incurred from 9 May 2017 as agreed by the parties or determined by the Court pursuant to [19] and [20] above.

[22] These percentages are at the upper end and slightly above the comfort zone referred to in *Holden v Architectural Fisheries Ltd*,[5] but I consider are appropriate and justified in the circumstances of this case.

Orders

[23] The respondent shall pay to the applicant costs as follows:

a) 70 percent of the fees incurred prior to 9 May 2017 being the amount of $64,972.95.

b) The amount being 75 percent of the fees incurred from 9 May 2017 as agreed by the parties or determined by this Court pursuant to [20] above.

c) Actual disbursements as claimed amounting to $5,147.09.

Judith Potter, J.

Judith Potter, J

[5] See at [5] above.