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 WWW.JUSTICE.GOVT.NZ/FAMILY/LEGISLATION/RESTRICTIONS.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2012-404-000200
[2012] NZHC 1388

BETWEEN	FT Appellant
AND	JML Respondent

Hearing: 13 June 2012

Counsel: G S G Erskine for Appellant
A M Swan for Respondent

Judgment: 19 June 2012

JUDGMENT OF KEANE J

This judgment was delivered by on 19 June 2012 at 4pm
pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

Date:

Solicitors:
Carter & Partners, Auckland for Appellant
Walker Associates, Auckland for Respondent

[1] In a decision, dated 21 September 2010, in the Family Court, Manukau, Judge M L Rogers divided the final aspects of the relationship property of FT and JML. As a result of that decision, and her earlier decision, dated 31 July 2008, JML, whose assets these nominally were, became liable to pay to FT $1,145,225.50 on account of her half share.

[2] At the date of the second decision JML had already paid to FT, as a result of the aspect of the Judge's first decision that he had chosen not to appeal, $388,581.50. He has since paid to her the balance, and interest since the date of the second judgment. No issue now remains as to these two judgments, the second of which has never been appealed, except for the question of costs.

[3] Immediately the Judge gave her second decision FT applied for costs and, though JML did not respond, the Judge did not then and has not since, formally issued any decision in response. When asked in November 2011, she recalled that she had declined FT costs in a handwritten minute soon after FT applied. The minute cannot be found and the Judge later said that, a year having passed, she could not recall what her reasons were.

[4] FT appeals the decision the Judge recalls making, declining her costs, on the basis that it cannot stand in the absence of reasons. FT contends that she was the ultimately successful party and was entitled to costs, calculated according to the District Court costs rules, on the overriding principle that costs follow the event. The Judge had either to make an award in that principled and particular way, she contends, or explain why she had decided not to do so.

[5] JML contends that the Judge had a general discretion whether to award costs and if, as happened, she elected not to make any award, she did not need to explain why. It was only if she made an award that she had to ground it in the District Court costs rules. The reasons why she declined to make any award, he contends further, are to be found implicitly in her second judgment, where she gave her reasons for declining interest.

Evolution of case

[6] FT and JML lived together for some 13 years and they have three children. When they ceased living together in June 2005 they agreed that their relationship property should be divided equally. They could not fully agree on its extent or value.

[7] In issue were JML's shareholdings and current account balances in three companies in which JML, his father and brother, held all the shares. FT and JML agreed that his half share in Ranch One and his one third share in Ranch Two were relationship property. They could not agree their value. JML claimed his one third share in Stone, the third company, to be separate property.

[8] In her initial decision, dated 31 July 2008, Judge Rogers held that JML's shareholding in Stone was relationship property. In fixing the value of his shares in Ranch One at $277,122 and in Ranch Two at $629,288, she adopted his values as opposed to the rather higher values FT contended for. In fixing the value of the Stone shareholding at $556,694.50, she averaged the contending valuations. (FT's value was $727,200, and JML's value was $386,189.) She fixed JML's total current account balances at $664,023.

[9] The Judge declined to make a money order in favour of FT. She gave JML time to pay to FT her share of the current account balances, and to acquire FT's interests in the three companies, without having to sell the shares in each. She held also that if he elected not to take up the shares and FT chose not to take them up either, they were to be sold on the open market.

[10] On 9 September 2008 JML paid FT $388,581.50 on account of her half interest in his shares in Ranch One and in the current accounts. Neither elected otherwise to act on the Judge's directions and the shares did not sell when offered on the open market. They cross-appealed.

[11] FT appealed the Judge's decision declining to make a money order in her favour, or to award her interest up to the date of judgment. JML appealed the Judge's decision to average the Stone share valuations. On 31 March 2009 Wylie J granted

both appeals. He set the Judge's decision aside and remitted the case to her to reconsider Stone's share value and to make orders dividing the relationship property in such a way as to achieve a clean break. To assist the Judge in fixing Stone's share value, he directed that there was to be an independent valuation at the parties' cost.[1]

[12] The primary focus of the second hearing was to be the value of the Stone shares but JML wanted the independent valuation to extend to the two other companies. On 22 June 2009 Wylie J declined to recall his decision to widen that order. He awarded costs against JML.

[13] Then, when JML failed, or as he says proved unable, to meet half the cost of the independent valuation, Judge J G Adams required him on 18 November 2009 to pay that into Court. Otherwise, the Judge said, the value of the Stone shares would be fixed at $727,200, FT's proposed value. There would then be no need for any independent valuation.

[14] Before the hearing before Judge Adams certainly, JML offered FT a further $340,000 in final settlement. For in a Calderbank letter, dated 22 September 2009, FT rejected that offer. Relying on Judge Rogers' first decision, and what she expected to achieve at the second hearing, FT claimed to be entitled to $1,128,628.70, and four and a half years interest, $380,912.18, in all $1,509,540.08. She was prepared to accept $460,000, but only within the ensuing two days.

[15] JML did not take up that offer and, after a hearing in mid 2010, Judge Rogers issued her second decision on 21 September 2010, that under appeal. She required JML to pay FT $756,644 for her interests in Stone and Ranch Two. This was $305,644 more than FT had been prepared to accept in her Calderbank offer.

[16] By far the largest part of that award was the Stone share interest default value fixed by Judge Adams, $727,200. JML had not paid into court his contribution to the cost of the independent valuation. The valuation had never been made. JML had not appealed Judge Adam's decision. The Judge held that unless it were a value fixed at a judicial conference, she lacked power to revoke it. Even then, she held also, to

---

1 Property (Relationships) Act 1976, s 38.

revoke it would be unjust to FT. To value the Stone shares, she said, she would have needed still the independent valuation. There had already been considerable delay.

[17] The Judge denied FT's claim for interest from the date on which the case was remitted on appeal for rehearing. She allowed FT four per cent interest from the date of her second judgment to the date of payment. As to costs, she said this:

> The applicant has signalled a desire to apply for costs in these proceedings. Clearly such an application will now need to consider the comments I have made in dealing with the claim to interest. Any such application is to be filed and served within 14 days with the respondent's response to be filed within 14 days thereafter. The question of costs will be determined on the papers.

[18] In October 2010 FT applied for costs, contending that she had succeeded entirely. She claimed, at the least, scale 3C costs for both hearings, $65,268, and her expert's fee, $25,795.25. She sought indemnity or increased costs after 22 September 2009, the date of her Calderbank offer, $35,565. As the Judge recalls she declined FT costs on any basis.

Two threshold Issues

[19] There are two threshold issues on this appeal. The first is whether the Judge's decision, as she recalls it, is able to stand and I cannot see that it can. While the Judge recalls declining FT costs, and of course I accept that, the absence of any record seems to me fatal in itself. The fact of a decision has at the very least to be verifiable objectively.

[20] Even where a decision is given and is then to be deemed valid, it will always be open to challenge if it is unsupported by reasons.[2] And a decision whether to award costs must be as reasoned as any other. The factors that guide how costs are to be calculated may not come fully into play until the decision to make an award has been made. At that point insufficient reasons have been found fatal.[3] A decision to decline costs may not engage those factors fully in the same way. But that is a no less

---

2 *R v Awatere* [1982] 1 NZLR 644, 648 (CA); *Lewis v Wilson & Horton* [2003] 3 NZLR 546 at [74] - [76].

3 *NRT v RB* [Costs] [2008] NZFLR 745 at [10] - [21].

significant decision; and a party, who has succeeded in the case, must be at least entitled to know why costs have not followed the event.

[21] If then the Judge's remembered decision does have some spectral standing, I see no alternative but to set it aside. The Judge gave no retrievable reasons for declining costs; and her oblique reference in her second decision to the reasons why she declined interest cannot supply that lack. She had then still to receive, let alone consider, FT's cost application. I come then to the second issue and that is whether I should, as FT wishes, decide costs myself or, as JML wishes, remit costs to the Judge.

[22] A primary principle of the Property (Relationships) Act 1976 is that all questions under the Act are to be resolved 'as inexpensively, simply and speedily as is consistent with justice'.[4] That must be no less so as to the issue of costs. And I am also influenced on this issue by two things the Judge said herself. In her second decision she said that any Judge could have resolved the issues still extant. Then, when asked in November 2011 what her reasons for declining FT costs were, she said she could not recall.

[23] I am then as well placed as the Judge would now be to decide whether to award costs and in what amount; and that is surely the swiftest, simplest and least expensive course consistent with justice. I now set about doing so.

Power to award costs

[24] Section 40 of the Property (Relationships) Act 1976 confers a general discretion whether to award costs and in what amount, but subject to a critical proviso. Section 40 says this:

> Subject to any rules of procedure made for the purpose of this Act, in any proceeding under this Act the Court may make such order as to costs as it thinks fit.

---

4 Property (Relationships) Act 1996, s 1N; Family Court Rules 2002, r 3.

[25] The rules that s 40 recognises may govern any exercise of the discretion it confers are in the first instance the Family Courts Rules 2002. Rule 207(1) of those Rules confirms that the Court has a discretion as to costs. Rule 207(2) then imports rr 4.2 - 12 of District Courts Rules 2009 as the discretionary factors that may be taken into account. Rule 207(3) makes the rule itself 'subject to the provisions of the Family Law Act under which the proceedings are brought'.

[26] The effect of r 207 is, I think, still as Randerson J described it in *Radisich v Taylor*, despite the changes made to the rules of the District Court, especially, since 2008:[5]

> ... the legislative intention is ... clear that, in proceedings in the Family Courts, costs are to be dealt with in accordance with the District Courts Rules as applicable and with all necessary modifications, subject, of course, to any contrary statutory provision. It follows that the authorities dealing with the costs rules in the general Courts are also applicable.

[27] It remains to add that an award of costs in the District Court is, as it is in this Court, ultimately discretionary. Awards made will normally be to scale but, as r 207 recognises, awards may be above or below scale.

[28] The more immediate issue is whether, though s 40 enables costs to be awarded, and on a basis which the rules prescribe, the decision whether to award costs at all is subject to the primary discretionary principle that an award should normally follow the event. It used to be assumed that it did not. In the early 1990s the usual rule used to be this:[6]

> The usual rule in matrimonial property cases is that each party bears his or her own costs. The rationale behind that practice is that the resolution of the disputes between the parties is something of benefit to both of them and in a sense neither should be regarded as the winner or the loser.

[29] More recently, that has ceased to be so, and not just in cases where misconduct, in the broadest sense, has been a relevant factor. In a 2004 case the now usual rule was said to be this:[7]

---

5 *Radisich v Taylor* HC Auckland CIV 2007-404-7578, 16 April 2008 at [23].
6 *Gerbic v Gerbic* (1992) NZFLR 481 at 504.
7 *Anderson v Anderson* HC New Plymouth CIV 2004-443-25, 16 June 2004 at [33].

> The guiding, indeed overriding principle ...whatever the jurisdiction is that costs follow the event. Misconduct only operates as a disqualifying factor.

[30] In that case the issue had been as to the status of current accounts. The party whose submissions had prevailed was denied costs in the Family Court but obtained them on the appeal on that basis alone in a sum the Judge fixed in the exercise of his discretion. (On the appeal, by contrast, he made a scale award.)

[31] This more recent case may constitute a high water mark. More usually the issue is not whether the winning party is disentitled to an award as a result of misconduct. It is whether the winning party should have an award because of the misconduct of the losing party.[8]

[32] But what is at least clear is this. 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.

[33] FT's claim to scale 3C costs for both hearings and her actual or heightened costs after the date of the Calderbank letter must then be set not just against what she finally obtained, but what had been in issue and why she succeeded as she did.

Issues and outcomes and costs

[34] There was never any issue that the relationship property was to be divided equally. Nor was there any issue that JML's Ranch One and Ranch Two shares were relationship property, and the opposed valuations were not far apart. In valuing those shares the Judge preferred JML's values. The principal issue was whether the Stone shares were relationship property and what their value was.

---

8 Kirsty Swadling 'Proceedings Under the Act' in R L Fisher *Fisher on Matrimonial and Relationship Property* (3rd ed, LexisNexis, Wellington, 2011) at [19.41] - [19.42].

[35] On that issue FT made her most decisive gains. At the first hearing the Judge found the shares to be relationship property and JML did not challenge that on the appeal. At the second the Judge ascribed to the shares the value FT had contended for. But that was only because Judge Adams' default value applied. What the actual value of the shares then was remained at large.

[36] At the first hearing, the values contended for were wide apart. JML's value was $386,189, $341,101 less than Judge Adams' default value - the value FT then contended for. The two valuations were not easy to reconcile and after carefully analysing them the Judge found herself driven to averaging them. On the appeal Wylie J held that to be wrong in principle but he did direct the independent valuation.

[37] At the second hearing, had the default value not applied, the Judge would have had to value the Stone shares, grappling not with two, but with three, valuations. She would have had to assess how decisive the market value should be. As she said, Stone was a closely held family company. The value of the shares to JML was likely to be greater than to any usual investor, including FT. Whether Stone's share value had fallen would, as it was when the Judge assessed interest, also have been an issue.

[38] Though the Judge was spared that task, these unanswered questions did have a bearing on FT's claim for costs. They at least put in issue whether she was truly the more successful party, or whether she might have benefited from a windfall.

[39] Quite distinctly, the Judge would have had to consider whether FT ought to have costs because, as FT contended, JML had held her out of her entitlement. There the Judge's reasons for declining interest are in point. She found that, while there had been delay, it was no more attributable to JML than to FT and that there had been significant administrative delays.

[40] Then, the Judge would have had to consider the Calderbank letter in which FT offered to accept $305,644 less than she obtained eventually. But that again only

came about because of the default value fixed by Judge Adams two months after the offer was made and the offer itself was only open for two days.

[41] Finally, the Judge would have had to assess whether in refusing to accept the default value, and in electing to seek to have it set aside, JML advanced a legitimate challenge, or was obdurately holding FT out of what she was entitled to. That she decided this point against him, ultimately as a matter of discretion, is not decisive as to that issue.

Conclusions

[42] Why the Judge declined FT costs cannot now be retrieved and my own view is that, when these various factors are set one against the other, FT is entitled to an award of costs, but not the full award she seeks on a scale 3C basis for both hearings and on an indemnity basis after the Calderbank letter.

[43] On the only truly contested issue finally, the status and value of the Stone shares, FT certainly succeeded on the status issue at the first hearing. But the larger issue then was the value issue and as to that the average struck favoured her no more than it did JML. At the second hearing she did succeed on the value issue, but that was by default, and there the Calderbank offer does not assist her.

[44] FT, I consider, should have a less than scale award, $30,000. But because she had from the outset to contest the value of all three shareholdings, and the current accounts, the possibility that she benefited unduly from the Stone share default value should not preclude her from receiving also as a disbursement her expert's fee, $25,909.05. As to the appeal itself, costs will lie where they fall.

_____

P.J. Keane J