

FAMILY LAW COSTS Where the mother makes an application for costs up to a certain value where that value is held in the mother's solicitors trust account where the mother submits that the conduct of the father caused her to incur additional costs where a costs order is made. Family Law Act 1975 (Cth) Family Law Rules 2004 (Cth) APPLICANT: Ms Florin RESPONDENT: Mr Jokela FILE NUMBER: BRC 11727 of 2011 DATE DELIVERED: 28 October 2014 PLACE DELIVERED: Brisbane JUDGMENT OF: Forrest J HEARING DATE: Submissions received: 28 July, 2 September and 11 September 2014 REPRESENTATION COUNSEL FOR THE APPLICANT: Ms Carew QC SOLICITOR FOR THE APPLICANT: Mr Jones Jones Mitchell Lawyers FOR THE RESPONDENT: Self-represented ORDERS (1) That the respondent father pay ninety thousand dollars (\$90,000) towards the applicant mother's costs of and incidental to these parenting orders proceedings with the respondent father's liability pursuant to this Order to be fully discharged by the payment to the applicant mother of the sum of ninety thousand dollars (\$90,000) currently held in the trust account of the applicant mother's solicitors, Jones Mitchell Lawyers, being money that was deposited there by the applicant mother upon the sale of a vessel. IT IS NOTED that publication of this judgment by this Court under the pseudonym Florin & Jokela (Costs) has been approved by the Chief Justice pursuant to s 121(9)(g) of the Family Law Act 1975 (Cth). FAMILY COURT OF AUSTRALIA AT BRISBANE FILE NUMBER: BRC 11727 of 2011 Ms Florin Applicant And Mr Jokela Respondent REASONS FOR JUDGMENT At the start of a one day trial of competing parenting orders applications on 28 April this year, I made a parenting order with the consent of the parties, the parents of two little boys. They had agreed on many matters, most particularly that the boys continue to live with their mother in Australia and spend time with their father during school holidays, either in Australia or in Europe where their father lives, or elsewhere overseas. After that parenting order was made, there remained some issues upon which the parties were in dispute that I was still required to hear and determine. Cross-examination of the parties took place. Submissions were received and my Judgment was delivered on 19 May 2014. A further parenting order, adding to the earlier one, was made. On 16 June 2014, the mother applied to the Court for an order that the father pay her costs of the proceedings on an indemnity basis but only up to an amount of \$90,000, or, in the alternative, on

a party/party basis but only up to an amount of \$90,000. The mother filed a lengthy affidavit in support of her application. In that affidavit, she explained the apparent basis for seeking a costs order that limited the amount to be paid to the sum of \$90,000. She said: From the commencement of proceedings on 23 December 2011 up until judgment was delivered on 19 May 2014, I have incurred in the order of \$392,154 in legal fees. In December 2011, I arranged for \$90,000 to be deposited into Jones Mitchell Lawyers trust account, being proceeds of sale of a [vessel] registered in my sole name. Those funds were deposited on the basis that they would not be released until Jones Mitchell Lawyers received either confirmation in writing from both parties or an Order of the Court directing that those funds be released. On December 2011 my lawyers, Jones Mitchell Lawyers, wrote to [the father] confirming that the \$90,000 had been deposited into their trust account and would remain frozen. ... I am informed by my lawyers, Jones Mitchell Lawyers, that the amount of \$90,000 remains frozen in their trust account. [The father] and I have not been able to reach agreement in relation to how those funds are to be dealt with and as far as I am aware there is no Order in Australia or overseas in relation to those funds. Later in the same affidavit, the mother said: I am, however, only seeking costs up to an amount of \$90,000, being the funds frozen in Jones Mitchell Lawyers trust account as I do not anticipate that I will be able to recover any funds from [the father] personally. As I understand the mother's application (by reading her supporting affidavit evidence), although she has not specifically sought such an order in her Application in a Case, in addition to the costs order she seeks, she asks for an order that the \$90,000 held in her solicitors trust account be paid to her in discharge of the father's obligation to pay costs under such a costs order. The father demonstrates that is his understanding of the mother's application, too. In his affidavit he said: [The mother] is seeking one off payment of AUD 90,000 towards her legal costs, those funds to be released from her lawyer's trust account. He opposes the mother's application for an order that he pay her costs. However, neither in his affidavit nor in his written submissions does the father make any reference or submission specific to the question of whether, if a costs order is made against him, his liability to make such payment should or should not be discharged by an order that the mother receive the \$90,000 held in her solicitors trust account. Should a costs order be made? Of course, where the

Court is of the opinion that there are circumstances that justify it in doing so, the Court may depart from the general position that each party to proceedings under the Family Law Act 1975 (Cth) bears his or her own costs. In such circumstances, the Court may make such order as to costs as the Court considers just (s 117(1) and (2)). In considering what order as to costs, if any, should be made the Court is required to have regard to the matters set out in s 117(2A) of the Family Law Act. Whilst six of the matters set out are specific, the final one gives the Court the fiat to have regard to such other matters as the court considers relevant. For the mother, it is submitted that the unreasonable behaviour of the father has caused the mother to incur additional costs and that this fact constitutes circumstances that justify the making of an order against him. It is submitted that the father's conduct, variously categorised, supports such a finding. In Ms Carew's written submissions for the mother those categories are listed as: (a) payment of the single expert report writer's fees; (b) the father's failure to negotiate and the giving of conflicting advice; (c) the father's erratic appearances in Australia; (d) the father's Hague Convention proceedings; (e) the father's change of plans, failure to provide instructions to his lawyers and his reneging on consent orders; (f) the father's behaviour in relation to the change of the children's school; (g) unnecessary and inaccurate complaints by the father; (h) drawn out negotiations in relation to the proposed consent orders; (i) the father's failure to comply with court orders and directions; (j) the father's generally unreasonable behaviour. In addition though, Ms Carew submits that the mother's particular financial circumstances relevantly also support a costs order being made against the father, as well as the father's relative lack of success in the proceedings when the outcome compared to that which he was seeking at the commencement. The father's behaviour. The mother's evidence about the father's behaviour ranges over much ground. Essentially, it all goes towards supporting her submission that he incurred additional costs and outlays because of his behaviour that she would not otherwise have had to bear. In respect to the costs of the single expert family report writer, for example, the mother's evidence is that she had to ultimately pay the sum of \$2,200 for the jointly commissioned updated family report, after the event, so that the completed report could be released, when the father would not pay his half share. She also had to pay the total of \$1,732.50 for the same single expert for a mediation he conducted with the couple.

This happened despite apparent agreement that the father would pay his half of those expenses, as well as repeated assertions by him that he would agree to which, I accept, he clearly did not honour. There is evidence, that I accept, that the father elected not to communicate with the mother's solicitors when the dispute first erupted (several months after the father had returned to Europe from the Gold Coast), simply turning up on the Gold Coast expecting to spend time with the children without any prior negotiation around that issue when he knew solicitors had become involved. I also accept the mother's evidence that the father conducted himself in a way that increased her reliance on lawyers at that time, by following her in a menacing manner, waiting around outside her residence and trying to persuade her to enter into long term parenting arrangements with haste and under pressure. I accept that his behaviour prompted the mother to hire a private security person at this time as she experienced it as intimidating, threatening and menacing. Whilst I have no doubt that the father was suffering emotionally and missing his children, he was legally represented at the time, both in Country E and in Australia. Despite that, I am satisfied that his behaviour certainly contributed to the additional reliance on her own solicitors by the mother and a consequential increase in her costs. The evidence also satisfies me that the father's position in respect of travelling to Australia, and the circumstances under which he wanted to see the two boys, did change erratically and at short notice in 2012, creating more need for the mother to rely on her solicitors around that time. However, interim proceedings brought by the father at that time did secure some time for him with his boys. Additionally, the father's apparent lack of communication with his own solicitors demonstrated by the evidence about what happened around the time of a scheduled mention of the matter in September 2012 led to further legal expense for the mother. The father, who had participated in the proceedings in this Court to that time, then, apparently no longer content to accept this Court's jurisdiction in respect of the boys who had been living in Australia at that time for nearly 2 years, having been brought by both parents to Australia and who had started living here whilst the mother commenced university studies, agitated with the Country E government to commence proceedings for the return of the boys to Country E pursuant to the Hague Convention on the Civil Aspects of International Child Abduction. Those proceedings ultimately were determined by the Australian Government to be

abandoned by the father, but even at the trial before me, I was not convinced that the father had given up the belief that he could enliven them again, if he wanted to. I am satisfied that his conduct in this regard led to additional legal fees being incurred by the mother. The father agreed to orders being made on 10 September 2012 that provided for family report interviews to take place at times specific to when he confirmed that he would be in Australia. He then caused changes to be made to those arrangements in a unilateral fashion, causing the mother more legal expenses having her solicitors attempt to deal with the changes, before ultimately advising (not through his solicitors) that he was not coming to Australia at that time anyway due to ill health. The father's solicitors subsequently ceased acting for him. The parties then fell into dispute about the choice of school the boys were to attend in 2013. What I considered at the trial was unreasonable conduct on the part of the father around this issue, caused the mother further concern and need to revert to her solicitors before the issue was ultimately resolved the way she had proposed. Indeed, the father conceded at the trial that the mother's decision in that regard had proven to be a fairly good one. It was, as has been submitted by Ms Carew, the father's position in respect of this change of school issue, that was a major factor in the single experts change of position in respect to the issue of parental responsibility and one of the factors that led me to determine that the boys' best interests would be served by the conferral of sole parental responsibility on the mother. There is evidence, that I accept, that the father complained by email to the mother's solicitors in April 2013 about not having spoken to the children when he had actually spoken to them only about an hour before sending the email. This sort of behaviour caused the mother unnecessary legal expense. I accept the submission that the evidence establishes that between May and September 2013 the father did not respond to various proposals put to him by the mother's solicitors, refused to communicate with the mother's solicitors, and agreed to come to Australia on certain dates and then changed his mind. It seems, on the father's own evidence, that he was putting his commitments to skipper vessels in Europe ahead of dealing with the parenting issues. His behaviour in this regard caused the mother to incur additional legal expenses. I accept that the father did not comply with various directions and orders of the Court throughout 2013 or was often late in doing so. I accept that these actions caused

the mother additional legal expense. Complaints, ultimately unsubstantiated, were made to the Legal Services Commission by the father about the mother's solicitors. This caused the mother additional legal expense. The father's own actions in turning up outside the mother's solicitor's offices out of office hours and leaving messages on the solicitor's answering machine caused the mother additional legal expense. A number of the matters that were left for the Court to determine at the trial after agreement had been reached on many matters were issues pursued by the father that were not in any of the orders that he had formally sought and upon which he adduced little, if any, evidence. They were heard and determined simply because he raised them and I considered it in the child's best interests in such circumstances to hear and determine them. This added to the legal expenses of the mother. I am also satisfied that the father did use the asserted co-existence of property proceedings and Hague Convention proceedings in Country E as a means of pressuring the mother for concessions that he sought in respect of parenting matters and that most of the orders ultimately made, by consent or after determination by the Court, could have been made earlier but for the father's approach to the proceedings in this manner. After consideration of these matters, I am satisfied, having regard to the fact that costs orders are about indemnifying the litigant in whose favour they are made in respect of liabilities he or she has incurred with his or her own lawyers, that the circumstances in this case do justify a departure from the general position that each party to proceedings in this Court shall bear his or her own costs. I consider that where additional legal costs are demonstrably incurred by a party through the unreasonable conduct of the other party, recoupment of those costs from the party whose unreasonable conduct has caused the incurring of the expense is appropriate and just. I am satisfied that a costs order should be made in this case. What should the costs order be? There is a degree of artificiality in an application for an order that the father pay the mother's costs of the proceedings on either an indemnity basis or a party/party basis but, in either case, limited to the amount of \$90,000. If, however, the sentiment behind asking for such an order is one that the father's unreasonable behaviour is certainly responsible for a portion of the mother's legal expenses and that \$90,000, being only 22% of the total of \$392,000 in legal costs and outlays incurred by the mother until the time of the delivery of the

Judgment, represents a reasonable apportionment of those expenses additionally incurred by her due to the father's unreasonable conduct, as I expect it is, it is more readily understood. I am certainly not of the view that the father ought be held somehow responsible for all of the mother's legal expenses in this case, but I am satisfied that he ought be ordered to pay her a sum of money that represents a portion of the costs she has incurred to indemnify her for those additional costs that she did incur as a consequence of the unreasonable behaviour that I am satisfied he did display from time to time throughout the proceedings. The Family Law Rules 2004 (Cth) permit me to make an order that a party is entitled to costs of a specific amount. As such, I can order that the mother is entitled to costs of \$90,000 or some other specific amount. Clearly, it would be a time-consuming, laborious task to try to go through the mother's entire costs incurred over 2 years, listed out item by item, in an endeavour to assess whether each item of cost may or may not have been a cost incurred due to particularly unreasonable behaviour of the father. I will not make an order that requires that sort of process as it will just incur further costs for the mother that she would be unlikely to recoup from the father in this case. As such, I consider the fixing of the costs the mother is entitled to in a specific amount is the most appropriate and just means of determining this application. Relevant also, is the fact that the mother and the two boys are financially supported, and have been financially supported since the father left Australia over three years ago, solely by the mother's parents. They too, have been the source of the money she has paid her solicitors for their work. Apart from an amount of \$5,000 the father paid the mother when he first came back to Australia and his financial support of the boys on the limited occasions they have been with him, he has made no other contribution to the financial support of the boys. His attitude to that matter demonstrated by his actions and his evidence given at the trial left me despairing as to his commitment to, and acceptance of, the responsibilities of parenthood. He would have me believe that he is in poor financial circumstances himself. As I said to the father at the trial, the circumstances presenting just leave me with no room but to consider that he is simply not being truthful and frank with the Court about his financial position and that he is actually a man of some financial substance. I accept the submission that any order that the father pay the mother a specific amount of costs is probably going to be

impossible to enforce against him if the money that is held in the trust account of the mother's solicitors is not accessible. Apart from any interest the father has in that money, he has no other property in Australia that I am aware of. He asserts the mother has the proceeds of sale of the property they owned in Country E. I deny that. I do not, at this time, find that she does, but even if she does, the parties' respective rights and entitlements to that remain to be determined in property adjustment proceedings, whatever jurisdiction such proceedings might be held in. The \$90,000 in the solicitors trust account is the sale proceeds of the vessel the parties travelled on to Australia from Europe. The mother says that the vessel was registered in her name and that it was sold by her with the father's consent before the proceeds were deposited by her, without court order, into her solicitors trust account, where it has remained untouched to this day. The father has not disputed the mother's assertion that the vessel was registered in her name. I understand that he merely argues that the money should remain untouched until such time as the parties agree on what is to happen with it. Although as the registered owner of the vessel that was sold the mother might have an argument that the sale proceeds of the vessel are legally hers in any event, she nevertheless seeks an order that fixes the father's liability to pay her costs in the proceedings at \$90,000 and discharges his liability by allowing her to access that money that is held in trust. In the circumstances of this case, I am quite satisfied that fixing the amount of costs the father is to pay the mother in the specific amount of \$90,000 and discharging his liability for that by ordering that the mother can access the \$90,000 that is held in the trust account of her solicitors to meet that much of her costs, is appropriate and just. Of course, whether there is merit in such an argument or not, the father's rights to argue at some time in the future, in this jurisdiction or another, that this determination is a matter of some relevance in the determination of property adjustment orders that are just and equitable as between him and the mother remain undisturbed. I make the costs orders set out at the commencement of these Reasons.

I certify that the preceding thirty-five (35) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Forrest delivered on 28 October 2014. Associate: Date: 28 October 2014



