

FAMILY LAW COSTS application made by the wife for party/party costs in the sum of \$2,785 to be paid by the husband application for costs is opposed by the husband application refused. Family Law Act 1975 (Cth) s 117 APPLICANT: Ms Cao RESPONDENT: Mr Gwerder FILE NUMBER: MLC 4238 of 2014 DATE DELIVERED: 3 October 2014 PLACE DELIVERED: Melbourne PLACE HEARD: Melbourne JUDGMENT OF: Thornton J HEARING DATE: 3 October 2014 REPRESENTATION COUNSEL FOR THE APPLICANT: Ms Stavrakakis SOLICITOR FOR THE APPLICANT: Berry Family Law COUNSEL FOR THE RESPONDENT: Ms Davison SOLICITOR FOR THE RESPONDENT: Davison Family Lawyers ORDERS (1) BY CONSENT there be orders in accordance with the minutes of proposed orders marked Exhibit A sealed and attached hereto AND IT IS DIRECTED that such minutes remain upon the Court file. (2) The solicitor for the applicant wife engross the minutes and deliver them by electronic transmission to my Associate within seven days. (3) The wife's application for party/party costs be dismissed. (4) Each party bear their own costs. AND THE COURT NOTES THAT: The substantive proceedings remain listed for a conciliation conference on 20 October 2014 at 2.15 pm. IT IS NOTED that publication of this judgment by this Court under the pseudonym Cao & Gwerder 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 MELBOURNE FILE NUMBER: MLC 4238 of 2014 Ms Cao Applicant And Mr Gwerder Respondent EX TEMPORE REASONS FOR JUDGMENT This is an application by the wife for party/party costs of \$2,785 to be paid, which comprise of \$985 being scale costs for the instructing solicitor and \$1,800 for the brief fee for counsel today for the wife's Application in a Case filed 22 September 2014. The application for costs is opposed by the husband. The wife's application is based on an assertion that the husband has failed to comply with the orders made by Registrar Marrone on 15 July 2014. Firstly, the wife submits that the husband has been late in relation to the filing of a Response to the Initiating Application which was, in fact, filed on 22 September 2014 and which was not in conformity with the orders made by Registrar Marrone that it be filed on 5 August 2014. Secondly, the wife submits that the statement of financial circumstances filed by the husband three days late, on 8 August 2014, did not comply with the rules or with the order made by Registrar Marrone in that it did not provide all

the details of the statements for two superannuation funds that he had deposited to in his financial statement where he provided amounts of the superannuation funds but not the details and not the statements of two of those funds. The wife's case is that an Application in a Case was required to be filed due to the non-compliance by the husband and that the solicitors for the husband were notified on 27 August 2014 that the wife would be issuing an Application in a Case if compliance with the orders of 15 July 2014 was not forthcoming. I accept that the husband's Response was not filed until 22 September 2014, which is certainly not in compliance with the orders of the registrar. However, I am not necessarily satisfied that this places the wife at any great disadvantage, having regard to the fact that it was an Application in a Case in relation to interim matters. The wife's Application in a Case sought compliance with paragraphs 12 and 19 of the orders of Registrar Marrone made on 15 July 2014, with which the husband has complied, and that the husband provide to the wife the computer located at the former matrimonial home, that in the event the husband fails to comply with the above, the wife's application proceed on an undefended basis and that the husband pay the wife's costs of the Application in a Case on an indemnity basis. In my view, the wife's application and submissions essentially focus on the lack of discovery in relation to the two superannuation funds that are referred to in the financial statement of the husband which was filed three days late, and I do not think there is anything significant in the three days. The response to the application for costs from counsel for the husband is that the husband was not in possession of those statements for the two superannuation funds, one of which was a fund to which he was entitled for a period of only four months and that he was not in possession of that statement for that fund and also he was not in possession of the documents for the other fund. In those circumstances, he has not been in a position to provide the information. The question of costs is always a discretionary matter under section 117 of the Family Law Act 1975 (Cth) (the Act). The general rule is that each party should bear his or her own costs of the proceedings. I accept, to some extent, that there has been an issue of non-compliance with the late filing of the Response of the husband but I do not consider that that is a major issue which prejudices the wife in an interim application. Aside from that, there is also the question of whether I should consider that there is anything that justifies an order for costs under s

117(2A) of the Act which mandates the factors to which the Court should have regard in considering whether to make an order for costs at all. Counsel for the wife relies upon s 117(2A)(c) and (d) of the Act. Section 117(2A)(c) refers to the conduct of the parties to the proceedings and subsection (d) refers to whether the proceedings were necessitated by the failure of a party to the proceedings to comply with previous orders. I do not consider that there is sufficient reason here to go beyond the general rule having regard to the conduct of the parties in this case because I consider that the husband's financial statement filed 8 August 2014 has outlined the detail of the amount that was involved in relation to the three superannuation funds, notwithstanding that there was not any further material provided for two of them but that was not available to the husband at the time and I accept that assertion. In relation to a costs order, it is always a discretionary matter for the Court and whilst it is only party/party costs that have been sought and not indemnity costs, it is a matter of discretion. I also take into account that there have been other aspects which have really progressed the case today where the parties agreed to matters over and beyond what were required, and the need for attendance at Court in relation to that has, in fact, assisted the wife. In such circumstances, the conduct of the parties should be taken into account. It is inappropriate as a matter of discretion to make an order for costs against the husband in those circumstances but particularly where he was not in possession of the material that was sought by the wife. I refuse the application for costs and order that each party is to bear their own costs. I certify that the preceding eleven (11) paragraphs are a true copy of the ex tempore reasons for judgment of the Honourable Justice Thornton delivered on 3 October 2014. Associate: Date: 14 October 2014