FAMILY LAW COSTS Circumstances justifying order Adjournment of final hearingentirely attributable to applicant Court of the opinion circumstancesjustify the making of an order for costs in the respondents favour asagreed orassessed on a party/party basis. Family Law Act 1975 (Cth) s 79, 90UM,117. Family Law Rules 2004 (Cth) Prantage v Prantage [2013] FamCAFC 105; (2013) 49 Fam LR197 Colgate-Palmolive Co v Cussons Pty Ltd [1993] FCA 536; (1993) 118 ALR 248 APPLICANT: Mr Johnson RESPONDENT: Ms Cross-Ware FILENUMBER: MLC 10190 of 2013 DATE DELIVERED: 30 October 2014 PLACE DELIVERED: Melbourne PLACE HEARD: Melbourne JUDGMENT OF: Thornton J HEARING DATE: 17 October 2014 REPRESENTATION COUNSEL FOR THE APPLICANT: Mr St John QC SOLICITOR FOR THE APPLICANT: OFarrell Robertson McMahon COUNSEL FOR THE RESPONDENT: Mr North SC SOLICITOR FOR THE RESPONDENT: Watts McCray Lawyers ORDERS (1) Theapplicant pay the respondents costs of the hearing being the attendanceof the instructing solicitor on the day ofthe hearing, the costs forcounsels appearance, the hearing fee paid by the respondent andtwo-thirds of the preparation feesfor the instructing solicitors and counsel,on a party/party basis on scale as agreed within 28 days. (2) In default of agreement under order (1), the costs be assessed on aparty/party basis. IT IS NOTED that publication of this judgment by this Court underthe pseudonym Johnson & Cross-Ware has been approved by the ChiefJustice pursuant to s 121(9)(g) of the Family Law Act 1975 (Cth). FAMILY COURT OF AUSTRALIA AT MELBOURNE FILE NUMBER:MLC 10190 of 2013 Mr Johnson Applicant And Ms Cross-Ware Respondent REASONS FOR JUDGMENT RegistrarField listed the respondents application seeking a declaration that aCohabitation Agreement is a binding financialagreement pursuant to theFamily Law Act 1975 (Cth) (the Act) for determinationbefore me as a final one day hearing on 17 October 2014. The applicant soughtandwas granted an adjournment of the hearing to 10 February 2015. Thisis an application by the respondent for the costs thrown away, on an indemnitybasis, for the one day hearing. The applicationis contested by theapplicant. Background Theapplicant originally filed an Initiating Application in the Federal CircuitCourt on 21 November 2013, which sought an adjustmentof property between theparties under s 79 of the Act. The Response filed 12 March 2014 included anapplication seeking that the

applicants Initiating Application bedismissed. Thereis no dispute between the parties about the fact that they were never marriedand that the Court has no jurisdiction to makeany order under s 79 of the Act. On14 March 2014, Judge Riley ordered that the proceedings be transferred to theFamily Court. Therespondent filed an Amended Response in this Court on 15 May 2014 and,in accordance with the Family Law Rules 2004 (Cth) (theRules), the Amended Response underlined the amendments made to the ordersshe had sought in her originalResponse. The Amended Response continued torefer to the dismissal of the applicants Initiating Application filed 21November2013. However,as the applicant had deleted the references to his application for an adjustmentof property under s 79 of the Act when hefiled a Further Amended InitiatingApplication in this Court on 17 April 2014, the respondents applicationfor dismissal ofthe applicants Initiating Application became otiose. Uponhearing the applicant and respondent on 20 May 2014, Registrar Field made thefollowing order: Determination of the final orders sought by theRespondent in her Amended Response filed 15 May 2014, in particular adeclarationthat the Cohabitation Agreement dated 24 February 1998 is a bindingfinancial agreement pursuant to Family Law Act 1975, is listed for finalhearing with an estimated hearing time of 1 day ... on the 17 October 2014 at10.00 am. Therespondent was ordered to file and serve a written summary of argument and listof authorities she intended to rely upon no laterthan 10 September 2014. Therespondent complied with that order. Theapplicant was ordered to file and serve a written summary of argument and listof authorities he intended to rely upon no laterthan 3 October 2014. Theapplicant did not comply with the order until 13 October 2014. Theapplicant also filed a Reply on 9 October 2014 seeking: Thatthe Amended Response to Initiating Application of the Respondent filed 15 May2014 be dismissed.[1] Inthe event the Cohabitation Agreement between the parties dated 24 February 1998is declared to be binding pursuant to Part VIIIAB of the Family Law Act(the Act), such Agreement be set aside pursuant to s 90UM of theAct. Therespondent paid a hearing fee. Therewas disagreement between the parties as to the nature of the proceedings beforeme on 17 October 2014. Counsel for the applicantsubmitted that only theinterlocutory applications of the parties were before the Court and that he wasreplying to the respondentsapplication for dismissal of theapplicants Initiating Application filed 21 November 2013.

Counsel forthe respondent submittedthat the application for dismissal was superseded bythe applicants Further Amended Initiating Application filed 17 April2014and that the hearing before me was a final determination in precisely the termsordered by Registrar Field on 20 May. I determinedthat the matter before mewas a final hearing based on the clear terms of the order made by RegistrarField. Theapplicant sought an adjournment of the hearing on 17 October 2014. Theapplication was made partly on the basis that his solicitorshad misunderstoodthe nature of the hearing, but principally because the applicant was not in aposition to proceed, as he requiredfurther evidence from the solicitor who hadadvised him at the time when the Cohabitation Agreement was signed. Theapplicant sought to obtain that evidence to support what he asserts is anapparent disparity of dates surrounding the circumstancesof the respondentsigning the Agreement. Notwithstanding that the applicant had about six monthsto obtain this evidence, I accededto his counsels request for anadjournment as a matter of natural justice because his counsel was not preparedto proceedwith the hearing having regard to the state of the evidence for theapplicant. I considered that any prejudice to the respondentcould becompensated by way of costs. Inresponding to the costs application by the respondent, counsel for the applicantrelied on letters exchanged between the instructingsolicitors for the partiesafter the orders were made by the Registrar. Theseletters[2] were exchanged from 2 to 15October 2014 and evidence confusion on the part of the solicitors for theapplicant about the natureof the hearing fixed by the Registrar. Unsurprisingly,the solicitors for the respondent referred the solicitors for the applicant tothe clear terms of the order made. ExhibitC is a letter from the instructing solicitors for the respondent dated 3October 2014, drawing the attention of the solicitors for the applicant to thewording of the order made by Registrar Field on 20May 2014. The letterstates: We note that your client had previously sought an adjustmentof property between the parties pursuant to section 79 of the Family Law Act,despite acknowledging that he was a party to a de facto relationship. Section 79of the Family Law Act confers no power with respect to property of the partiesto a de facto relationship. Accordingly, on that basis, we were seekingto haveyour clients Application struck out as there was no reasonable prospectof him successfully prosecuting his sole claimfor financial relief as

pleaded.We note that your client has subsequently amended his Initiating Application torefer to the correctsections of the Act and rectified that defect. Further, there were lengthy discussions had on 14 April 2014 between thewriter, your clients Counsel, Mr St John SC and RegistrarFields (sic) atthe Telephone mention in this matter, during which your Mr St John agitated forthe parties to file Submissions/Outlineof Argument in respect of the thresholdissue given it was largely technical in nature. We find it curious that you nowappear topurport that the intention of the parties filing an Outline ofArgument was to deal with interim issues, this simply was not thecase. ... Further, as you are well aware, at the directions hearing on 20 May 2014 yourMs McMahon sought a direction from Registrar Fields(sic) that our client fileand serve a financial statement. The writer made submissions as to why same wasnot appropriate at thistime, namely that the Court did not have jurisdiction tomake directions relevant to any applications to alter the partiesproperty interests in circumstances where the Courts jurisdiction in thatregard had not yet been enlivened, as the Courthad not yet made a decision asto whether the Cohabitation Agreement is a Binding Financial Agreement under theAct. We referredyour Ms McMahon to the full courts decision in Norton& Locke in this regard. Registrar Field accepted the writerssubmissions on the issue and no such direction was made. If your client attempts to again agitate this issue at the final hearing on17 October 2014 we put you on notice that we will bringthis correspondence tothe Courts attention and rely upon same as to the issue of costs. Thecorrespondence reveals that the solicitors for the applicant did not read theorder made by Registrar Field until 3 October 2014. In Exhibit D, a letteraddressed to the solicitors for the respondent dated 9 October 2014, theapplicants solicitors wrote: We acknowledge that the form ofthe Order of Registrar Field dated 20 May 2014 provides for Adetermination of the final orderssought by the Respondent in her AmendedResponse filed 15 May 2014, etc. The form of that Order only becameapparent to usfollowing upon our letter to you of 3 October 2014. Regardlessof this misunderstanding by the solicitors, the applicant has been on noticesince the Response was filed in the FederalCircuit Court, that the issue of theCohabitation Agreement was raised by the respondent. Counselfor the respondent submitted that his clients costs resulting from theadjournment should be granted on an indemnitybasis because of the admittednegligence on the

part of the applicants lawyers in failing to appreciatethe orders made byRegistrar Field until 3 October 2014. Counselfor the respondent submitted that the applicant should have been in no doubtabout the orders made by Registrar Field andhad sufficient opportunity toexplore the issues of the execution of the Cohabitation Agreement with thesolicitor who advised himin 1998. Although not conceding that there shouldhave been any confusion about what was listed by Registrar Field, he pointed outthat no application had been made to this Court before the hearing date toclarify any matters or foreshadow the adjournment application. Counsel for therespondent submitted that from the filing of the respondents outline ofcase on 10 September 2014, the applicantshould have been in no doubt about thenature of the hearing. Counselfor the respondent was not in a position to provide details of costs on scale,but sought costs in the sum of $22,933, comprisingof the following: hispreparation fee for the previous day, being $4,400; hisappearance fee of $8,800; $4,330for the attendance of his instructing solicitor as agent; $4,598being comprised of $1,254 and $3,344 for two days of preparation for hisinstructing solicitors in Sydney; and thehearing fee of $805 paid by the respondent. Counselfor the applicant responded that this amount was excessive and greater than anyscale of fees would allow. Submitting thatthe question of costs should bereserved, he relied upon the fact that the financial position of the parties wasunknown and thereforecould not be considered in relation to any application forcosts. Counsel for the applicant submitted that if any order for costsweremade in favour of the respondent, at most, she would be entitled to costs thrownaway because the submissions prepared wouldremain the same and the outline ofcase should not change for the next hearing. The Relevant Law Unders 117(1) of the Act the general rule is that each party should bear his or herown costs of proceedings under the Act. However, the Courtis empowered to makean order for costs if it is of the opinion that there are circumstances whichjustify such an order.[3] It isentirely a matter for the discretion of the Court. Section117(2A) of the Act mandates the factors to which the Court must have regard inconsidering whether to make an order for costs. InPrantage & Prantage [2013] FamCAFC 105; (2013) 49 Fam LR 197(Prantage), the Full Court of this Court referred tothe settled law relating to indemnity costs, emphasising the well acceptedproposition thatindemnity costs orders are a very great departure fromthe normal

standard.[4] Moreover,at paragraph 94 of Prantage, Thackray and Ryan JJ stated: Werecognise that the Rules now expressly refer to orders for costs on an indemnitybasis. We recognise also that the rules in thisCourt are not precisely the sameas those in other courts; however, there is nothing in the Rules which indicatesthat the fundamentalprinciple applied in other jurisdictions should not also beapplied in this jurisdiction. Indeed rule 19.18 makes clear that thedefault position is that costs are awarded on a party/partybasis. CONCLUSION Indetermining that the costs of the respondent should not be reserved, I havetaken into account that there will be a delay in thehearing of about fourmonths. A consequence for the respondent occasioned by the delay in the hearingis that the applicant continuesto reside in the property in Melbourne which isregistered to the parties as tenants in common. This property was previouslytenantedand the respondent no longer has the benefit of the proceeds of anyrental. Inconsidering whether to make an order for costs, I have taken into account therelevant factors in s 117(2A) of the Act. Thereis no evidence about the financial circumstances of the parties to take intoaccount and neither party is in receipt of legalaid. However,the overriding factor here is the conduct of the parties in relation to theproceedings. The respondent has complied withthe procedural directions of theRegistrar and was in a position to proceed with the hearing. As for theapplicant, I am satisfiedthat he has failed to avail himself of a reasonableopportunity to make enquiries about the evidence which might be forthcoming fromthe solicitor who advised him at the time of the execution of the CohabitationAgreement in 1998. The applicant was not preparedfor the hearing. Iaccept that there appears to have been some misunderstanding on the part of theapplicants solicitors about the nature ofthe hearing, which wascommunicated to the solicitors for the respondent, but this was clarified by thelatter in correspondence. There is no explanation for why there was anyconfusion on the part of the solicitors for the applicant having regard to theunequivocallyclear terms of the order made by Registrar Field. There is alsono explanation for why the order was not read and/or understoodby thesolicitors for the applicant until 3 October 2014. Furthermore,in Exhibit D, the letter dated 9 October 2014, the solicitors for the applicantconceded that any confusion was onlypartly responsible for the delay in thefiling of the documents for the applicant in accordance with the directions

ofRegistrarField. That letter provided: We otherwise note that theconfusion as to what case our client faces has contributed to some, butadmittedly not all, of the delayin our client filing further documents andsubmissions. It is presently anticipated all such documents will be filed by theend ofthis week. Noparty made submissions that any order for costs should be made against thesolicitors for the applicant and the solicitors havenot been given anopportunity to be heard on this point. However, the reason for the adjournmentwas that the applicant was notready to proceed because of a lack of evidencefrom a relevant witness in support of his case, rather than a misunderstandingaboutthe listing. Inall the circumstances, I see no reason why the respondent should not becompensated by the applicant for her costs of the hearingby reason of theadjournment. The adjournment is entirely attributable to the applicantsfailure to obtain sufficient evidencefrom the solicitor who advised himregarding the Cohabitation Agreement. Asnoted above, the general rule is that when there are circumstances justifyingthe making of a costs order, costs should be orderedto be paid on a party/partybasis. InPrantage, Thackray and Ryan JJ referred, at paragraph 82, to that generalrule and the principles enunciated in Colgate-Palmolive Co v Cussons Pty Ltd[1993] FCA 536; (1993) 118 ALR 248. Their Honours went on to state that, where there issome unusual or special feature and when the justice of the case requires, theremay be a departure from this usual course depending upon the particular factsand circumstances of the case in question. Other caseswhere indemnity costshave been ordered may offer a guide, but I was not referred to any similarfactual circumstances here. Inthe circumstances of this particular case, I am not satisfied that it isappropriate to order that the applicant pay the respondentscosts on anindemnity basis. There are no unusual special features where the justice of thecase requires that there be a departurefrom the usual course in this case. Accordingly,I order that the respondent pay to the applicant the costs of the attendance ofthe instructing solicitor on the dayof hearing, the costs for counselsappearance, the hearing fee paid by the respondent and two-thirds of thepreparation feesfor the instructing solicitors and counsel on a party/partybasis as agreed, or in default of agreement to be assessed on a party/partybasis. I certify that the preceding forty (40) paragraphs are atrue copy of the reasons for judgment of the Honourable Justice Thorntondelivered on 30

October 2014. Associate: Date: 30October 2014 [1] The issue raised by theapplicant for the setting aside of any binding financial agreement, if it werefound to be such under theAct, was raised for the first time on 9 October 2014in his Reply. However the application does not particularise which of thegroundsunder s 90UM of the Act are relied upon for this claim. When theapplicant provides that information to the other party and the Response isfiled,it may then be appropriate for the Registrar to consider any issues ofdisclosure which remain outstanding between the parties. [2] Exhibits A, B, C, D, E, F andG. [3] Family Law Act 1975(Cth) s 117. [4] Prantage& Prantage [2013] FamCAFC 105; (2013) 49 Fam LR 197, at [85]. URL: http://www.austlii.edu.au/au/cases/cth/FamCA/2014/928.html