

JBB v JBA
[2015] SGHCF 6

Case Number : District Court Appeal from the Family Courts No [X]
Decision Date : 29 July 2015
Tribunal/Court : High Court
Coram : Debbie Ong JC
Counsel Name(s) : Mahadevan Lukshumayeh (S T Chelvan & Company) for the appellant; Sandra Segeram Mahendra (Segeram & Co) for the respondent.
Parties : JBB — JBA

Civil Procedure—Costs in matrimonial proceedings

29 July 2015

Debbie Ong JC:

Introduction

1 This matter concerned costs in matrimonial proceedings. I had earlier dismissed the husband's appeal against the grant of an interim judgment of divorce. I decided to reserve judgment on the issue of costs as the submissions on it were relatively substantial and both sides had argued their respective cases rather passionately. Having considered the matter, on 6 July 2015, I awarded costs of the appeal fixed at \$2,000, inclusive of disbursements, to the wife. I now give the reasons for my decision as well as my views on the issue of costs in matrimonial proceedings.

Background facts

2 The parties were married in Singapore on 17 November 1994. In October 2012, the wife ("the Wife") commenced divorce proceedings based on the fact that the parties had lived apart for a continuous period of at least four years immediately preceding the filing of the writ (see s 95(3)(e) of the Women's Charter (Cap 353, 2009 Rev Ed)). This was challenged by the husband ("the Husband"), and in May 2013, the Wife amended her writ to rely on the fact that the Husband had behaved in such a way that she could not reasonably be expected to live with him (see s 95(3)(b) of the Women's Charter). The Husband filed a defence to contest the Wife's case.

3 The hearing lasted a number of days and in October 2014, the district judge ("the District Judge") granted an interim judgment of divorce and ordered that parties bear their own costs. The Husband appealed against the decision of the District Judge in granting the interim judgment of divorce. I dismissed the appeal.

4 I proceeded to hear submissions on costs. The parties' respective submissions can be summarised as follows: the Wife contended that costs should follow the event and there is no reason why there should be a different approach in matrimonial cases, while the Husband argued that there should generally be no order as to costs in matrimonial cases. I reserved judgment to mull over the issue. Having done so, I ordered the Husband to pay the Wife costs of the appeal fixed at \$2,000, inclusive of disbursements. The Wife had asked for costs of the hearing below, but I did not disturb the District Judge's order on costs. I will explain the reasons for my decision below, but before that, I

think it would be helpful to state my views on the court's discretion in the awarding of costs in matrimonial proceedings.

The law on award of costs

Costs in general

5 The award of costs is a matter in the court's discretion. The broad discretion of the courts in relation to costs was reiterated by the Court of Appeal in *Aurol Anthony Sabastian v Sembcorp Marine Ltd* [2013] 2 SLR 246 ("*Aurol*") (at [103]–[104]):

103 ... The power to award costs is fundamentally and essentially one that is discretionary. Even though the general principle is for costs to follow the event, the overriding concern of the court must be to exercise its discretion to achieve the fairest allocation of costs ...

104 The court has a very wide discretion in determining what the fairest allocation of costs is and in this regard it is not confined to considering the particular outcome of the litigation. ...

6 In *BMG v BMH* [2014] SGHC 112 ("*BMG*"), Choo Han Teck J observed that although the principle that "costs follow the event" is "uncontroversial as a general guiding principle, it is wholly misleading to extend it to one where 'costs must always follow the event'" given that the matter of costs is "first and foremost, within the discretion of the court" (at [9]).

7 The rationale underlying the general principle that costs should follow the event has been explained in recent cases. In the decision of the Court of Appeal in *Maryani Sadeli v Arjun Permanand Samtani and another and other appeals* [2015] 1 SLR 496, Andrew Phang Boon Leong JA observed (at [30] and [32]):

30 One fundamental aspect of our scheme of costs recovery is a ***cost-shifting rule*** which dictates that the ***successful litigant*** is ordinarily ***indemnified by the losing party*** for the legal costs incurred as between the successful party and his solicitor. This is commonly referred to as the principle that costs should generally follow the event ...

...

32 The Judge explained that this was a result of the policy considerations which inform the indemnity principle. As the Judge aptly observed, "while compensation is the immediate effect of applying the indemnity principle, the ultimate policy of the indemnity principle is rooted not in compensation but in enhancing access to justice" We also agree with the Judge's elaboration on two further (albeit "subordinate") policies of our law on costs which centre on the *need to achieve finality in litigation as well as the need to suppress parasitic litigation* (at [179]–[182] and [183] of the Judgment, respectively).

[original emphasis in italics, emphasis added in bold italics]

8 The explanation by Vinodh Coomaraswamy J in *Then Khek Koon and another v Arjun Permanand Samtani and another and other suits* [2014] 1 SLR 245 ("*Then Khek Koon*") for the rationale of the principle is also illuminating (at [155]–[156]):

155 The indemnity principle makes the vindicated winner whole for the costs of what he has shown, by the court's judgment, to be unmeritorious litigation. It therefore serves to compensate

the winner, rather than to punish the loser for his original wrongdoing....

156 In that sense, it could be said that the indemnity principle achieves the same compensatory function as an award of compensation under the substantive law. But while compensation is the immediate effect of applying the indemnity principle, the ultimate policy of the indemnity principle is rooted not in compensation but in enhancing access to justice. The indemnity principle facilitates a meritorious litigant's pursuit of justice by ensuring retrospectively that he attains justice at his opponent's expense rather than his own. ...

9 Thus, costs are generally ordered to follow the event because a successful party has had to institute proceedings in order to obtain what he deserved. Since the other party's conduct necessitated the litigation, it is fair that he bears the costs of the litigation.

Costs in matrimonial proceedings under the Family Justice Rules 2014 (S 813/2014) ("FJR")

10 The Family Justice Courts (which comprises the Family Division of the High Court, the Family Courts and the Youth Courts (see s 3 of the Family Justice Act 2014 (Act 27 of 2014)) have the "full power" to determine the issue of costs, which is a matter in the discretion of the court, subject to the "express provisions of any written law and of [the FJR]" (see r 851(2) of the FJR). In this regard, r 852(2) of the FJR states that costs should "follow the event" except where the court considers that "in the circumstances of the case some other order should be made as to the whole or any part of the costs". The FJR further stipulates other considerations that the courts ought to take into account when awarding costs, including:

- (a) any payment of money into court and the amount of such payment (see r 854(a) of the FJR);
- (b) the conduct of all the parties, including conduct before and during the proceedings (see r 854(b) of the FJR);
- (c) the parties' conduct in relation to any attempt at resolving the cause or matter by mediation or any other means of dispute resolution (see r 854(c) of the FJR);
- (d) the extent to which the parties have followed any relevant pre-action protocol or practice directions (see r 854(d) of the FJR; see, in particular, paras 20(8), 38(1)(b), 88(5), 90(8)(e), 90(10), 90(12)(f), 112 and 125(10) of the Family Justice Courts Practice Directions 2015);
- (e) the party's failure to establish any claim or issue which he has raised in any proceedings, and has thereby unnecessarily or unreasonably protracted, or added to the costs or complexity of, those proceedings (see r 856 of the FJR); and
- (f) anything done or omission made unreasonably or improperly by or on behalf of any party (see r 857 of the FJR).

I note that these considerations are matters that relate to the conduct of the parties in the legal proceedings.

Two Court of Appeal decisions in the nineties on costs in matrimonial proceedings

11 There have been a number of cases where the issue of costs in matrimonial proceedings was discussed. Two notable Court of Appeal decisions in the 1990s have given guidance to the issue. In

Shi Fang v Koh Pee Huat [1996] 1 SLR(R) 906 ("*Shi Fang*"), the wife was granted a *decree nisi* on the ground that the marriage had irretrievably broken down owing to the husband's desertion. The Court of Appeal explained that there was no reason why the wife should not be entitled to the full costs of the hearing of the divorce petition, and as the hearing of the ancillary matters was a continuation or part of the hearing of the divorce petition, the wife should also be entitled to the costs of such proceedings (at [56]).

12 In *Tham Khai Meng v Nam Wen Jet Bernadette* [1997] 1 SLR(R) 336 ("*Bernadette*"), the wife was granted a *decree nisi* on the ground that the marriage had irretrievably broken down due to the adultery committed by the husband. The wife's petition based on the husband's unreasonable behaviour, the husband's cross-petition based on the wife's unreasonable behaviour and the wife's supplemental petition based on the husband's adultery, were contested when it came on for hearing. On the day of the hearing itself, the husband agreed not to contest the supplemental petition and withdrew his cross-petition. A *decree nisi* was accordingly granted on the wife's supplemental petition based on the husband's admitted adultery with costs awarded to the wife. The Court of Appeal explained (at [49]–[50]):

49 The wife was granted the *decree nisi* on the ground that the marriage had irretrievably broken down owing to adultery committed by the husband. In granting the *decree nisi* the court below awarded to the wife the costs of hearing of the petition. The court, however, at the conclusion of the hearing of the ancillary matters made no order as to costs. With respect, we can find no reason why the wife should not be allowed the costs of such hearing. As the hearing of the ancillary matters was a continuation or part of the hearing of the divorce petition, the wife should be entitled to the costs of such hearing also: *Shi Fang v Koh Pee Huat* [1996] 1 SLR(R) 906, at [56]. Her costs should follow the same event. ...

50 In our experience, quite often the High Court considers the hearing of ancillary matters in isolation from the hearing of the petition in dealing with the question of costs. In our opinion, this is not correct. As we have said, the hearing of the ancillaries is part of or a continuation of the hearing of the petition. It therefore follows that where a party, whether petitioner or respondent, is awarded costs at the hearing of the petition, the same order as to costs should follow at the hearing of the ancillaries, unless the party to whom the costs were awarded at the hearing of the petition has acted unreasonably at the hearing of the ancillaries or for other good reasons.

13 It appears that the Court of Appeal in *Shi Fang* and *Bernadette* was articulating no more than the general principle that costs should follow the event. It would also appear that the "event" refers to the grant of the interim judgment of divorce. The Court of Appeal suggested that as ancillary matters was a continuation or part of the hearing of the divorce petition, the party who was successful in obtaining the divorce judgment should be entitled to the costs of such hearing of the ancillary matters. There are thus two sets of costs in matrimonial proceedings: one relates to the divorce proceedings and one relates to the proceedings in respect of the ancillary matters.

Costs for the different stages of matrimonial proceedings

Costs for divorce proceedings

14 Unlike civil proceedings, it is often difficult to differentiate the "winner" and the "loser" in matrimonial proceedings, both in respect of the divorce and the ancillary matters. Where divorce proceedings are *uncontested* and a judgment of divorce is granted, the defendant who has acted reasonably in the proceedings by not contesting would appear to still have "lost" since it was the plaintiff who had filed for the divorce. But in substance, he has not contested the divorce and was

prepared to concede to the outcome of the grant of divorce. Has such a party “lost” or “won”? However, if a defendant *contests* the divorce proceedings but a judgment of divorce is nevertheless granted, it could be said that the plaintiff has won and the defendant has lost *in the proceedings* for the purpose of costs.

15 Another relevant consideration in this inquiry is that the Women’s Charter provides for a “no-fault” divorce regime. The notion of “no-fault” divorce was first introduced with the amendment to the Women’s Charter in 1980, and has since been repeatedly affirmed by our courts (see *Tan Kay Poh v Tan Surida and another* [1988] 2 SLR(R) 515 at [5]; *Cheng William v Chai Mei Leng* [1999] 1 SLR(R) 1093 at [9]; *AQS v AQR* [2012] SGCA 3 at [39]). Under this regime, there is only one ground of divorce – the irretrievable breakdown of the marriage. Given this regime, neither party is treated as being the one at fault in the breakdown of the marriage. In principle, it should not matter how irretrievable breakdown is proved, whether by a fact involving fault of one party or not: the adoption of the “no-fault” regime leads to the conclusion that fault is irrelevant to the grant of divorce itself. In this sense, the regime does not support the concept of a “loser” and “winner” in divorce proceedings.

16 But despite what has been said above of the “no-fault” divorce regime in the Women’s Charter, s 95 requires that the sole ground of divorce be proved by one of the five facts in s 95(3). The requirement to prove one of these facts, which include three fault-based facts, has been said to have retained notions of fault in the regime. The UK Law Commission has stated that in such a system, these facts are “in practice effectively the grounds for divorce” (see United Kingdom, Law Commission, *Facing the Future: A Discussion Paper on the Ground for Divorce* (Law Com No 170, 1988) at para 4.4).

17 I note that the petitioners in *Shi Fang* and *Bernadette* succeeded in obtaining a divorce based on the respondents’ blameworthy behaviour and were awarded costs. In *Shi Fang*, the Court of Appeal noted (at [56]):

It should be borne in mind that the hearing of the ancillary matters was part of the divorce proceedings initiated by the wife. The wife obtained a *decree nisi* on the ground that the marriage had irretrievably broken down owing to desertion on the part of the husband. Implicit in the grant of such decree to the wife was the finding of the fault on the part of the husband as a cause for the divorce. In granting the *decree nisi* the court ordered, *inter alia*, that costs be adjourned for further hearing. We can find no reason why the wife should not be allowed the full costs of the hearing of the petition. ...

How significant was the “character” of the fact relied on in the award of costs? Would the discretion have been exercised differently if the fact relied on was of a fault-free character, such as that the parties have lived apart (ss 95(3)(d) and (e) of the Women’s Charter)?

18 The “no-fault” divorce regime recognises that the breakdown of a marriage is a complicated matter and may be attributed to far more reasons than what can be set out in court documents. It is also undesirable to attribute fault to a party, as it can increase acrimony and resentment in the post-divorce family which requires cooperative parenting for the children of the marriage. The process of proving fault in itself encourages parties to make hurtful allegations of the other party’s conduct and character. To highlight the fault of one party as a significant consideration in the award of costs does not sit well with the “no-fault” divorce regime. Lai Siu Chiu J in *AQT v AQU* [2011] SGHC 138 (“AQT”) remarked that the court “in ordering costs must be sensitive that the cost order does not run contrary to the no-fault basis that underlies our jurisprudence on divorce” (at [57]). Could *Bernadette* be better understood as a case where costs were awarded to the petitioner because she had been

put through the costs, time and effort in initial contested divorce proceedings before the respondent agreed not to contest her petition at the hearing itself?

Costs in proceedings for ancillary matters

19 In *AQT*, Lai J pointed out some difficulties with the approach in *Shi Fang* and *Bernadette*. In that case, the husband was ordered to pay the wife costs for the hearing of the divorce petition, and the wife argued, in the light of *Bernadette*, that she should also be awarded costs for the hearing of the ancillary matters. Lai J explained that (at [57]):

I am of the view that this is an appropriate case with “good reasons” to differ from the norm in *Bernadette*. *Bernadette* cited *Shi Fang v Koh Pee Huat* [1996] 1 SLR(R) 906 at [56] (“*Shi Fang*”) for the proposition that the hearing of the ancillary matters was a continuation of the hearing of the petition. However, I note that the Court in *Shi Fang* at [56] held that “[i]mplicit in the grant of such decree to the wife was the finding of the fault on the part of the husband as a cause for the divorce”. *The Court in ordering costs must be sensitive that the cost order does not run contrary to the no-fault basis that underlies our jurisprudence on divorce. In this case, the Husband actually filed the divorce petition first but he submitted that he consented to interim judgment based on the wife’s counterclaim to avoid unnecessarily protracting legal proceedings.* I also note that the Husband made several offers of maintenance to the Wife but the Wife rather unreasonably repeatedly failed to give the Husband any figure. The Husband also attempted unsuccessfully to discuss the Wife’s allegations of non-disclosure and resolve the ancillary issues through discussions with the Wife but she refused to negotiate. Therefore in the light of the facts of this case, I order that each party bear his or her own costs for the ancillary matters. [emphasis added]

20 In *Chen Siew Hwee v Low Kee Guan (Wong Yong Yee, co-respondent)* [2006] 4 SLR(R) 605 (“*Chen Siew Hwee*”), Andrew Phang Boon Leong J (as he then was) opined (at [16]):

... I note that the present law is embodied in the Singapore Court of Appeal decision of *Tham Khai Meng v Nam Wen Jet Bernadette* [1997] 2 SLR 27 at [49] and [50], which holds that as the hearing of the ancillary matters is a continuation or a part of the hearing of the divorce petition, the party who is awarded the costs of the petition (the wife in the present proceedings) is also entitled to the costs of the hearing of the ancillary matters. It seems to me, with respect, however, that although it is true that the hearing of the ancillary matters is, in a sense, a continuation of the hearing of the divorce petition, *in reality, the hearing of the ancillary matters is a discrete set of proceedings which may not always result in a decision in favour of the party who has been awarded the costs of the petition.* Indeed, the present proceedings, at least in so far as the issue relating to the division of matrimonial assets is concerned, constitute a good illustration. It is hoped that the Court of Appeal might be able to clarify the situation in this regard, bearing in mind the fact that the award of costs is also a discretionary exercise. ... [emphasis added]

21 I agree with these observations of Phang J (as he then was) in *Chen Siew Hwee*. A party who has obtained a judgment of divorce and costs for the divorce proceedings should not automatically expect that she or he would also be awarded costs for the ancillary matters. I note that Chan Sek Keong J (as he then was) in *Sujatha v Prabhakaran Nair* [1988] 1 SLR(R) 631 had held that the court could not make an order for the costs incurred in subsequent proceedings, and any costs incurred in the subsequent hearing for ancillary matters should be “awarded separately upon the merits of that application” (at [14]). This was explained on the basis that “costs are in the discretion of the court” and that “it is not competent for a court to fetter its discretion as to costs of future applications in

the cause, the circumstances of which cannot possibly be known to it at the date of the decree *nisi*" (at [14]).

Costs in matrimonial appeals

22 The observations that I have made above relate to the costs of divorce proceedings and the hearings on ancillary matters. A slightly different perspective may be taken with respect to costs awarded for appeals. In awarding costs for an appeal that has been dismissed or allowed, there is a clearer position on who had been successful in the proceedings, for the court below had already adjudicated the matter once. But this is not to say that costs ought always to be awarded to the successful party in appeals, for this can cause further animosity and bitterness between the parties. In *BNS v BNT* [2015] 3 SLR 973 ("*BNS*"), where the Court of Appeal dismissed the wife's appeal against the High Court's refusal of her application to have the children relocate to Canada with her, Phang JA explained the reason for making no order as to costs (at [36]):

We did, however, observe during the hearing and now reiterate in the present judgment that it is imperative that both the Husband and the Wife should focus on setting aside their differences as well as their legal claims against each other and focus, instead, on continuing to develop as well as maintain a good and strong relationship with their children and ensure that their best interests are the paramount consideration. It was for this reason that – despite the Husband's strong protestations to the contrary – we made no order as to costs.

23 Thus, even where there is a clear "winner" in the case of an appeal, the court can exercise its discretion to depart from the general principle that costs should follow the event. One good reason for such a departure is the attempt to reduce and not further increase hostility between the parties who must continue to cooperate in jointly parenting their children long after the divorce is concluded.

Common costs orders in matrimonial proceedings

24 There are a number of cases where it has been held that the courts would generally not order costs in matrimonial proceedings. In *Lum Cheng Yee (M W) v Lai Choon Seng* [1996] SGHC 206, Judith Prakash J observed that (at [31]):

The usual attitude which the court takes when it comes to ancillary matters especially where the division of property is concerned is that each party should bear his/her own costs as the issues involved in such matters are very seldom black or white but call for the court to exercise its discretion and make fine distinctions and value judgments. It is only where one party has unnecessarily prolonged or complicated the process by, for example, refusing to make discovery or by concealing facts from the court or by airing unnecessary and irrelevant facts and issues, that it is appropriate to make that party bear the costs.

She repeated her views in *Cheung Kam Yi Betty v Liu Tsun Kie* [2012] SGHC 213 where she said that "[i]n general, costs are not ordered in matrimonial matters" (at [79]). Tay Yong Kwang J in *AHJ v AHK* [2010] SGHC 148 expressed a similar view, stating that he ordered parties to bear their own costs "[a]s is usual in proceedings of this nature" (at [31]).

25 Indeed, there have been a significant number of recent cases (both in the High Court and the Court of Appeal) where no order as to costs was made for matrimonial proceedings (see, for example, *ALJ v ALK* [2010] SGHC 255 at [50]; *Tan Hwee Lee v Tan Cheng Guan and another appeal and another matter* [2012] 4 SLR 785 at [116]; *AYQ v AYR and another matter* [2013] 1 SLR 476 at [29]; *BCB v BCC* [2013] 2 SLR 324 at [41]; *BJS v BJT* [2013] 4 SLR 41 at [56]; *Kwee Lee Fung Ivon v Lim*

Gordon [2013] SGHC 228 at [89]; *ANH v ANI* [2014] SGHC 184 at [12]; *Guo Ningqun Anthony v Chan Wing Sun* [2014] SGHC 56 at [126]; *AYM v AYL and another appeal* [2014] 4 SLR 559 at [49]).

26 A relevant consideration and reason for ordering that parties bear their own costs is the courts' desire to minimise acrimony and discontent between parties. In *BNH v BNI* [2013] SGHC 283, George Wei JC (as he then was) made no order as to costs for the hearing for ancillary matters "[i]n the interest of helping the parties move on and not to prolong this unhappy litigation" (at [50]). Choo J had said in *BMG* (at [10]):

The defendant cited a few recent decisions of the High Court and the Court of Appeal in which the courts made no order as to costs for hearings on ancillary matters. Although I hesitate to draw a trend from these decisions, *I can appreciate that – especially in matters relating to divorce – the court will hope to minimise further acrimony and antagonism between parties.* After judgment, it may not always be the case that both parties are pleased with the outcome of the ancillary matters. *An adverse cost order may aggravate the situation further, making one party out to be the "loser".* [emphasis added]

Some guidance on costs in matrimonial proceedings

27 As I have mentioned earlier, the award of costs lies in the discretion of the court. The overriding concern of the court is to "achieve the fairest allocation of costs" (see *Auroi* at [103]–[104]). While costs should generally follow the event, the court is free to depart from this guiding principle whenever the court considers that the circumstances of the case warrant some other costs order. I have also indicated earlier that the guiding principle that costs should follow the event is more easily departed from in the context of matrimonial proceedings.

28 The guiding principle is premised on a number of considerations which, in my view, do not necessarily apply with equal force in the context of matrimonial proceedings. For a start, it presupposes that there is a "winner" and a "loser" in the litigation. While this may be generally true in civil proceedings, it is less so in matrimonial proceedings.

29 In divorce proceedings, an implication of following the principle that costs follow the event is that costs are awarded to the successful party who had filed for the divorce even though both parties might be equally entitled to do so, either for the same or different reasons. For example, where parties have lived apart for three years and both agree that a divorce ought to be obtained in reliance of the "neutral", "fault-free" fact in s 95(3)(d) of the Women's Charter, either party is able to file for the divorce. Either party could be the "winner" or the "loser" depending on who had commenced the divorce proceedings.

30 Even in cases where a fault-based fact in s 95(3) has been relied on, it may still be unclear if the defendant ought *in principle* to have costs ordered against him. Let us say, for instance, that a wife has committed adultery and her husband would like to seek a divorce relying on her adultery under s 95(3)(a). Let us further suppose that the wife agrees that the marriage has irretrievably broken down and that divorce is inevitable in the circumstances. The only way to obtain a divorce is by a court judgment. There is no divorce by consent in Singapore and no option to obtain a divorce in an administrative tribunal outside the courts. Unlike commercial cases, for instance, where one party's refusal to pay a debt or damages has made it necessary for the successful and deserving party to institute proceedings, court proceedings for divorce cannot be considered "unmeritorious litigation" in the same way that commercial litigation might be (to use the words of Coomaraswamy J in *Then Khek Koon* at [155]). To obtain a divorce, court proceedings are necessary, even if they are uncontested proceedings.

31 I also have concerns that drawing a distinction between “winners” and “losers” in matrimonial proceedings might unnecessarily aggravate the bitterness and acrimony between parties. This is highly undesirable as parties must continue to cooperate with each other to co-parent their children (if any), even after matrimonial proceedings have concluded. Furthermore, the idea of costs recovery as a “cost-shifting rule” whereby the “loser” pays for the costs of the “winner” does not sit well in cases where both parties may have to pay costs out of the same pool of matrimonial assets to be divided between the parties. After the court has determined the just and equitable division of the assets between the parties, an order of costs may have the practical effect of further shifting the proportions awarded, particularly when the asset pool is of modest value. This unique aspect of matrimonial proceedings is absent in commercial disputes.

32 For these reasons, I am of the view that even though the guiding principle is that costs should follow the event (and this is also provided for in the FJR, see [10] above), there are usually good reasons in the context of matrimonial proceedings to depart from it (see [10] for the considerations to be taken into account). In matrimonial proceedings (apart from appeals), the “event” would be the grant of a judgment of divorce. It follows that the party who obtains the divorce judgment may generally be awarded the costs of the divorce proceedings. This will be particularly true in cases where one party has contested the divorce and a divorce judgment is ultimately granted. Conversely, costs may be ordered against the party who sought the divorce but failed to obtain the grant of a divorce judgment. The courts may depart from the guiding principle that costs should follow the event where they find it appropriate to do so (see r 852(2) of the FJR). This would be appropriate, for example, in cases where the judgment of divorce was obtained based on a “neutral” fact such as “living apart” or upon compromise by the parties to proceed on an uncontested basis whatever the fact relied on, or where the court is of the view that an order of costs would aggravate the acrimony between the parties and it is important in the circumstances to reduce the risk of increasing hostility. Ultimately, the determination of costs is in the discretion of the courts. Ormrod J (as he then was) in *Povey v Povey* [1971] 2 WLR 381 remarked (at 396):

... While “costs follow the event” represents what is generally thought to be just in cases in other divisions, it does not necessarily represent what is just in many cases which have to be dealt with in a family division... The work in this division is more often an essay in shades of grey than in black and white. Moreover, in this division the parties remain bound to one another by ties which are not severed on divorce. They continue to be parents, and in many cases the wife remains dependent on the husband. These are all matters to be taken into account in exercising the discretion as to costs in each individual case... The “event” in my judgment is not a sufficiently sensitive indicator in the family division. ...

I share the same sentiments.

33 The hearing of ancillary matters may be considered to be discrete from the divorce proceedings. It is also difficult to determine clearly the successful party in ancillary matters. For example, in the determination of the division of assets, it is hard to say which party has won if both parties had, say, sought 70% of the assets but an order of equal division was eventually ordered by the court. It is the conduct of the parties in the proceedings which will have greater relevance in the court’s exercise of discretion in determining costs (see also rr 854, 856 and 857 of the FJR). For example, where one party has been uncooperative in disclosing his or her assets and means, that party would be unlikely to receive a favourable costs order.

34 In cases of appeals, the party who has succeeded in the appeal may generally be awarded costs of the appeal. But even in such situations, the court may determine that it is just to make a different costs order, such as that in *BNS* (see [22] above).

Application to the present case

35 In the present case, there were two sets of costs in question. The Wife's counsel asked for costs of the appeal *and* the proceedings below.

36 As mentioned earlier, in the proceedings below, the District Judge had ordered that parties should bear their own costs. The Wife's counsel submitted that even though the Wife could not appeal against this costs order, I was nevertheless entitled to make costs orders for the proceedings below since the Husband had appealed and the entire matter was thus before this court. I am not persuaded that the Wife is entitled to seek such an order at this appeal. Section 137(2) of the Women's Charter provides that "there shall be no appeal on the subject of costs only".

37 As for the costs of this appeal, I awarded costs fixed at \$2,000, inclusive of disbursements, to be paid by the Husband to the Wife.

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