IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2008-404-002469

BETWEEN	SOPHEA CHEA Appellant
AND	DARA CHAN Respondent

Hearing: 19 February 2009

Counsel: F C Deliu for Appellant
R C Knight and Eva Ho for Respondent

Judgment: 3 April 2009 at 11:00am

RESERVED JUDGMENT OF HUGH WILLIAMS J

This judgment was delivered by
The Hon. Justice Hugh Williams
on

3 April 2009 at 11:00am

pursuant to Rule 11.5 of the High Court Rules

……………………………………………..
Registrar/Deputy Registrar

The respondent's application for increased or indemnity costs against the appellant and her counsel will be further considered on compliance with the timetable set out in paras [110]-[112].

Solicitors:
Equity Law, P O Box 8333 Symonds Street, Auckland 1150, for intending appellant

Counsel:
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Case Officer: SusanJane.Parker@justice.govt.nz

Introduction

[1] On 16 July 2008 Harrison J, in an oral judgment, dismissed the appeal by the appellant, Ms Chea, against a Family Court dismissal of her application for interim maintenance from Mr Chan, her former husband and the respondent.

[2] On 12 November 2008 Ms Chea's application for leave to appeal to the Court of Appeal against Harrison J's judgment was dismissed and Mr Chan's application to stay what Potter J, in a Minute issued on 18 August 2008, described as an "omnibus" interlocutory application was granted. In a single application, that sought Harrison J's recusal, leave to appeal against the 16 July 2008 judgment and an order permitting cross-examination in relation to any application for costs.

[3] This judgment deals with an application by Mr Chan for indemnity costs against Ms Chea and her legal advisers.

[4] Though Ms Chea, through Mr Deliu as counsel, raised a number of procedural matters which it will be necessary to discuss, it is helpful to set the background by referring to the various judgments.

Judgment of Judge Ryan

[5] In the Family Court, Judge Ryan dismissed Ms Chea's application for interim maintenance on 10 April 2008.

[6] On 19 November 2008 reasons for the 12 November 2008 judgment were given. The reasons discussed Judge Ryan's judgment in the Family Court in the following passage:

> [6] It began with a brief recital of the basic facts underpinning the interim maintenance application:
>
> > [1] The parties met on 2 January 2004 and commenced living together and were married on 17 May of the same year. They were both born in Cambodia. They lived together until 3 December 2006.

> When they ceased living together the Respondent notified the Immigration authorities that they had ceased living together and as a result his sponsorship, which was required for the purposes of the Applicant's application for permanent residency, was withdrawn.
>
> [2] There are no children of the marriage. The Applicant says that she is now not a legal resident in New Zealand and therefore not entitled to any assistance from the Government by way of a benefit or such like. As she has no work permit she is unable to secure employment. She says she is destitute and requires maintenance from her husband.

[7] After dealing with certain procedural matters, the Judge noted that during the parties' short marriage they both worked in their café business, taking weekly drawings. He noted that company accounts were not produced, "nor any other documentary evidence to substantiate the income earned by the parties" (at p 2, para [5]). The Judge then reviewed certain other factual matters disclosed on the affidavits before noting Ms Chea sought interim maintenance of "somewhere between $300 and $1,000 per week".

[8] Turning to legal issues, he then observed:

> [9] Section 82 provides the Court with an unfettered discretion as to whether or not to make an interim spousal maintenance order and it is not necessary to have regard to the specific grounds for spousal maintenance set out in the other sections of the Act. Langridge [(1987) 3 FRNZ 272] is authority for the proposition that it is not wrong for the Court to have regard to the principles of spousal maintenance when considering whether or not to exercise the discretion.
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> [10] The purpose behind s 82 is to allow easy and quick access to a Court to avoid serious hardship or injustice arising to a claimant for spousal maintenance due to the length of time it takes for a substantive application for spousal maintenance to be dealt with in the Family Court. As a result hearings for interim spousal maintenance orders are, in the normal course of events, dealt with on the affidavit evidence with submissions from Counsel. This was the process adopted in this proceeding. As a consequence, where there is a conflict between the evidence of each party that conflict cannot be resolved without a substantive hearing. There are serious challenges made by each party against the other as to matters of credibility. There is insufficient evidence for me to establish in any safe way what either party is earning and what either party's financial obligations are on a weekly basis.
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> [11] On top of that, twelve months elapsed between the date of the separation and the application for interim spousal maintenance. However she did it, the Applicant was clearly able to support herself. If I accept the Respondent's evidence it is because she has worked and received "money under the table". If I accept the Applicant's evidence she has supported herself by relying on the goodwill of friends. I do not know where the truth of the matter lies.

> [12] As I have said, there is a dearth of evidence of a supporting nature such as company accounts, income tax particulars and the like, upon which I can base any interim findings of fact.
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> [13] When I couple these unsatisfactory aspects of the evidence with the unsatisfactory nature of the evidence relating to the Applicant's current status in New Zealand and her ability or not to gain a work permit, I conclude that it would be unsafe to make any interim spousal maintenance order pending hearing of the substantive application. The application for interim spousal maintenance is refused.

> [9] The Judge then made timetabling directions which should have led to a hearing of the substantive application for spousal maintenance within a relatively brief period following delivery of his decision.

Harrison J's judgment

[7] The 19 November 2008 reasons discussed Harrison J's judgment in the following passage:

> [12] He first said he was unable to understand why leave to appeal had been granted, when the appeal raised no important issue of principle or law (p 2, para [2]). He noted Ms Chea's application for interim maintenance on which Judge Ryan ruled was in fact her second such application, the first having been dismissed in February 2008 for procedural deficiencies (p 2 para [6]), and then turned to consider Judge Ryan's judgment.
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> [13] After citing paras [10]–[12] – also cited above – the Judge noted that, since 10 April 2008, Ms Chea's immigration status had been clarified, that she was in New Zealand lawfully, and had a work permit. As an aside, counsel advised on 12 November that Ms Chea now has paid employment.
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> [14] Harrison J summarised the grounds of appeal as being, first, that Judge Ryan failed to make a principled discretionary decision on the evidence or adjourn the hearing for additional evidence, and, secondly, that the Judge wrongly took Ms Chea's immigration status into account.
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> [15] He disposed of the latter because of the updated information given him and observed that, in any case, Judge Ryan did not give the topic undue adverse weight.
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> [16] After citing the terms of s 82, Harrison J held Judge Ryan had exercised the discretion confirmed by s 82 on a principled basis, particularly given the dearth of evidence before the Family Court and the Judge's inability to resolve disputed factual issues on the affidavits (at p 4, para [11]). Harrison J took the same view.
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> [17] The Judge noted information given him by Mr Knight, counsel for Mr Chan, that counsel for Ms Chea had asked the Family Court to defer allocating a fixture for their client's substantive application, presumably pending determination of her appeal.

> [18] The Judge then observed – in a passage on which Mr Orlov, leading counsel for Ms Chea, particularly relied in his oral submissions on the leave application (Mr Deliu having filed written submissions for her) - that the appeal had resulted in "wastage of public resources and funds" (at p 4, para [13]) and continued:
>
> > [14] This appeal was hopeless and I dismiss it. Counsel confirm that Ms Chea is in receipt of a grant of legal aid. I direct the registry to send a copy of this decision to the Legal Service Agency. It should not be meeting the costs of an appeal which never had any merit in circumstances where Ms Chea was provided an opportunity to have her substantive application for final maintenance orders determined by now.
> >
> > [15] Mr Knight seeks leave to apply for an award of costs even though Ms Chea is legally aided. He will rely on the exceptional circumstances provision in the Legal Services Act: s 43. Leave is granted. He is to file and serve a written synopsis of submissions by 25 July 2008 and Mr Deliu is to file and serve a written synopsis of submissions in answer by 1 August 2008.

Judgment and Reasons of 12 and 19 November 2008

[8] The reasons given on 19 November 2008 summarized the respective submissions on the application for leave to appeal in the following way:

> [19] Accepting that Ms Chea needed to demonstrate there was a point of law of such public or general importance as to justify the cost and the delay of a second appeal in order for leave for such an appeal to be granted (Judicature Act 1908, s 67, r 718E), the numerous grounds listed in the "omnibus" form of application were reduced in Mr Deliu's written, and Mr Orlov's oral, submissions to:
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> > a) the refusal of interim maintenance was based primarily on Ms Chea's lack of immigration status and failure to adduce evidence. These contravened procedural justice and fairness as taking the immigration status into account would breach s 21(1)(g) of the Human Rights Act 1993 prohibiting discrimination on the basis of ethnic or national origins;
> >
> > b) Judge Ryan's decision was such that he effectively failed to exercise his discretion that being a matter of public interest as potentially amounting to discrimination of a sector of the public based on their immigration status;
> >
> > c) Harrison J gave an opinion to the Legal Services Agency that the appeal was baseless. That affected Ms Chea's legal status. That was of public importance, as the Judge should not have done what he did. The judgment, he submitted, was "completely unprincipled".

> d) That instead of dismissing the appeal, Harrison J should have directed the Family Court to set a hearing date for Ms Chea's substantive maintenance application.
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> [20] Whilst admitting the Family Court Judge had an unfettered discretion under s 82, Mr Orlov submitted the nature of the decision effectively amounted to a failure to exercise that discretion. He relied on s 27 of the New Zealand Bill of Rights Act 1990 and what he submitted were relevant provisions of the International Covenant on Civil and Political Rights and the United Nations Declaration on the Elimination of Violence against Women. In Ms Chea's case, he submitted that the "New Zealand Government via the Judiciary, has failed to comply with its international obligations" in enacting s 82, and in the Courts' approach to exercising the jurisdiction under that section. He submitted it was wrong for the Judge to direct the Registry to send a copy of his judgment to the Legal Services Agency as that "denied access to justice" to Ms Chea. He made fairly extensive submissions on the facts of the matter, though accepting they were, at most, marginally relevant to the test for granting leave for a second appeal. He particularly stressed in his submission that it would be in the public interest to grant leave to Ms Chea to appeal in an area where the law in international domestic relations is in an "emergent state", particularly as regards the international instruments mentioned.
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> [21] Mr Knight relied on the submissions he had earlier made to refute the submissions made on Ms Chea's behalf. In particular, he submitted the international instruments were irrelevant to the exercise of a statutory discretion such as that conferred by s 82; that a number of the submission made on Ms Chea's behalf were both factually irrelevant and incorrect; and that Harrison J was fully entitled to take the view he did concerning communication by the Registry with the Legal Services Agency. Of note, Mr Knight advised Ms Chea her legal advisers never sought discovery, gave notice of a wish to cross-examine, or invoked any other interlocutory step which might have advanced Ms Chea's position.

[9] After citing s 82 of the Family Proceedings Act 1980, the 19 November reasons continued:

> [23] As both Judge Ryan and Harrison J observed, that section plainly confers an unfettered discretion as to whether an order should be made and the amount of an order with the decision turning on all the circumstances of the case (Webb et al *Family Law Service*, para 5.30, p 5, 602, 401 and cases there cited).
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> [24] In reaching his decision, Judge Ryan plainly acted in accordance with the discretion conferred by s 62, though holding that, because of the paucity of evidence put before him by the parties and the conflicts between them on factual issues, the appropriate result of the exercise of his discretion was to dismiss Ms Chea's application. In doing so, he clearly – as he said – was unable to determine "where the truth of the matter lies", having regard to the parties' clash of views of the facts. As explained to Mr Orlov during the 12 November hearing, it is by no means an uncommon experiences for judges dealing with applications on affidavit evidence alone, to find themselves unable to determine factual matters because of differing versions of the facts

> put forward by deponents, even applying a "robust and realistic judicial attitude" to such matters (*Bilbie Dymock Corporation Ltd v Patel* (1987) 1 PRNZ 84, 86).
>
> [25] However, it is impossible to equate a judge's inability to resolve factual disputes on affidavits and thus arrive at a discretionary decision with a failure to exercise the discretion itself. That is the point taken, first by Judge Ryan, then by Harrison J, and that is a commonplace outcome unable to be elevated into a point of law of public or general importance sufficient to justify a second appeal in this matter.
>
> [26] Further, where the Government of New Zealand has provided a statutory mechanism for spouses to apply for interim maintenance and for their cases to be judicially evaluated, it is not possible to argue that such a mechanism in some way engages the terms of the International Instruments on which Messrs Deliu and Orlov rely or the provisions of s 27 of the NZ Bill of Rights Act 1990. It followed that no point of law of general or public importance arose from that submission.
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> [27] Turning to Harrison J's direction concerning the Legal Services Agency – and the other evidential matters concerning legal aid which Mr Orlov mentioned – the short answer must be that, whether counsel for Ms Chea are being remunerated or not, the fact is she has been legally represented in the Family Court, before Harrison J and at the 12 November hearing, copious oral and written submissions being advanced on her behalf at every level.
>
> [28] In those circumstances, there is no basis for Mr Orlov's submissions that what has occurred in this case amounts to a denial of access to justice for Ms Chea. Thus no point of law or of general or public importance sufficient to justify a second appeal arose in that regard.

[10] The reasons judgment concluded:

> [33] Standing back and looking at this aspect of the matter overall, the conclusion is inescapable that Ms Chea's second application for interim maintenance application to the Family Court for interim maintenance could, and should, have been capable of being dealt with in a straightforward fashion as could, by now, her application for final maintenance. But that process has become needlessly complicated and attenuated by the procedural steps taken by her or on her behalf, steps which have attempted to invoke expressions of high principle which, on examination, are unconnected to the exercise of discretion for which s 82 provides.
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> [34] In relation to all of the above, it is noted that, when asked, Mr Orlov was firm that every step taken on her behalf has been specifically discussed with Ms Chea and taken on her express instructions. In light of the firm terms of the various Court directions and judgments, it may be a possibility that she has not fully grasped all the nuances of the instructions she was giving.

[11] The reasons judgment included a timetable for the hearing of the respondent's costs application, the judgment noting:

> [42] On 15 September 2008, Mr Knight, on Mr Chan's behalf, applied for an order requiring Ms Chea to pay Mr Chan's costs on a solicitor/client basis (and amended that application on 26 September 2008).

Submissions

[12] As mentioned, Mr Deliu raised a number of jurisdictional and other objections before the hearing, during Mr Knight's submissions on behalf of Mr Chan, and elaborated on the same in his own submissions. It is considered the better approach to summarize both counsel's submissions – to the extent possible - in their entirety and then deal with the points of objection and jurisdiction in the Discussion section of this judgment. It is pertinent, however, to note that, at the commencement of the hearing, Mr Deliu asked for permission to record the hearing.

[13] The evidence showed that between October 2007-November 2008 Mr Chan has been charged about $44,000 by his solicitors and about $98,000 by counsel. A proportion was incurred up to and including the Family Court hearing but a significant proportion was charged as a result of the matters dealt with in this Court. It is the latter portion Mr Chan sought to recover from Ms Chea or her advisers in this hearing.

[14] In an affidavit sworn on 26 November 2008 Ms Chea complained of Mr Knight writing to the Legal Services Agency to suspend her legal aid, something about which she said she was complaining to the New Zealand Law Society. Legal aid, it seems, may have been granted to Ms Chea on 13 June 2008, following time taken by the LSA to consider her application. She said her legal aid was suspended for about five months from about 11 January 2008. She said that at the date of her affidavit she was earning $300 per week but was pregnant and would have to cease work in the not too distant future. As the Court understood it, she had ceased work due to the imminence of her confinement at some stage relatively shortly before this hearing.

[15] She did, however, provide a further affidavit sworn on 16 February 2009. Of note as far as the present application is concerned, she said:

2. I firstly wish to say that my lawyers have always acted on my instructions. At every step along the way they discussed matters with me, advised me of the options and it was me who ultimately decided how to proceed. ... They advised me that even if aid was wrongfully withdrawn that they would do my case for free to help me. I feel that they genuinely care about my cases.

3. For an example of them advising me and me instructing them, in terms of my maintenance appeal to this Court, and related leave to appeal application, they advised me that there were difficulties but also that there were delays in the Family Court in getting a hearing for my final maintenance order application heard which, as it turns out was true, as many months later I still have not been given a hearing date. ... I was able to get my appeal, and leave to appeal, heard in (relatively) much faster time in the High court.

4. I regularly consulted with Messrs Orlov and Deliu, as well as Ms Kuo, but they ultimately told me that they would have to act on my instructions as long as the instructions were not illegal or unethical. I have proceeded on that basis as I needed maintenance and was willing to take the risk of litigation.

[16] Mr Knight pointed to the effective identity between the costs rules in the former High Court Rules and those which came into force in 2009. He particularly relied on r 14.6(3) setting out the circumstances in which a party may be ordered to pay increased costs, and r 14.6(4)(a) permitting the ordering of indemnity costs if a party has acted "vexatiously, frivolously, improperly or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding" and the power to order indemnity costs following disobedience of a direction of the Court. He also relied on the decision of this Court in *Bradbury v Westpac Banking Corporation* (2008) 18 PRNZ 859, 862-863 paras [9]-[12] that:

> [9] The decision in *Glaister v Amalgamated Dairies Ltd* [2004] 2 NZLR 606 (CA) gives guidance on the approach to be applied. The starting point in any assessment is objective, not subjective, and is to be applied by reference to rules and not to actual costs. The integrity of the scale, with its associated value of predictability and certainty, is not to be lightly discarded. Nevertheless, Judges of this Court retain an overriding discretion to depart from the scale and 'if satisfied that it is appropriate to do so they ought not to hesitate to resort [to it]': at [28]. That exercise must, of course, like the exercise of all discretionary powers, be considered and particularised.
>
> [10] The current costs scheme is underpinned by the premise that a successful party should receive a reasonable contribution towards its costs: *Glaister* at [14]; see also Elias CJ in *Prebble v Awatere Huata* [2005] NZSC 18 (SC), endorsing this statement by Cooke P in *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1991] 3 NZLR 457 at 460:

> [The costs scheme] reflects a philosophy that litigation is often an uncertain process in which the unsuccessful party has not acted unreasonably and should not be penalised by having to bear the full party and party costs of his adversary as well as his own solicitor and client costs. If a party has acted unreasonably - for instance by pursuing a wholly unmeritorious and hopeless claim or defence - a more liberal award may well be made in the discretion of the Judge, but there is no invariable practice.

> [11] The philosophy underlying the ... passage from Cooke P's judgment is now recognised by r 48C. The practical test for determining a claim for indemnity costs remains whether the losing party has pursued a wholly unmeritorious or hopeless case. In *Lewis v Cotton* [2001] 2 NZLR 21 (CA) at [65]-[72] the Court of Appeal upheld an award of indemnity costs in this Court where it was satisfied a claim '… border[ing] on the hopeless …' (at [67]) and '… indicating a lack of focus on the essential ingredients of [a] claim' (at [68]) fell within the realm of vexatious, querulous, improper or unnecessary conduct in commencing or continuing a proceeding.

> [12] It has been said that costs have not been awarded in New Zealand to indemnify successful litigants for actual solicitor and client costs 'except in rare cases generally entailing breach of confidence or flagrant misconduct': Prebble at [6]. This Court has required proof of exceptional circumstances such as where allegations of fraud are made without foundation; or where proceedings are commenced for an ulterior motive or in wilful disregard of known facts or clearly established law; or where allegations are made that ought never have been made: *Hedley v Kiwi Co-operative Dairies Ltd* (2002) 16 PRNZ 694, applying *Colgate Palmolive Co v Cussons Pty Ltd* (1993) 118 ALR 248; *Paper Reclaim Ltd v Aotearoa International Ltd* HC AK CIV 2004-404-4728 22 April 2005.

[17] Mr Knight drew on various judgments in this Court in support of his submission that Ms Chea's appeal was hopeless; the applications filed on her behalf did not conform with the applicable Rules; she ignored or disobeyed a direction in her counsel not filing separate applications for the various components of the "omnibus" application despite being directed so to do; and submitted the proceeding has accordingly wasted time and cost Mr Chan much more than should have been the case in a straightforward matter such as this.

[18] He pointed out that while Ms Chea was legally aided in relation to the Family Court appeal, she may not have been legally aided in relation to the other matters which occupied time in this Court and, in the exceptional circumstances listed in his submissions, she should be ordered to pay indemnity costs notwithstanding any legal aid grant.

[19] He submitted that under r 14.1 and inherent jurisdiction, it was now established that costs could be awarded against a party's solicitors and counsel on

the basis that legal advisers owe dual duties to the Court as well as to their client to manage litigation competently and not in a way which abuses the Court's process. In *Harley v McDonald* [2002] 1 NZLR 1, 22-23 paras [44] and [49], the Privy Council said:

> [45] The undoubted inherent jurisdiction of the Courts in New Zealand to make a costs order against a client's solicitor rests upon the principle that, as officers of the Court, solicitors owe a duty to the Court, while the Court for its part has a duty to ensure that its officers achieve and maintain an appropriate level of competence and do not abuse the Court's process. The Court's duty is founded in the public interest that the procedures of the Court to which litigants and others are subjected are conducted by its officers as economically and efficiently as possible. In New Zealand barristers are also officers of the High Court. This being so, there would seem to be no reason in principle why the Court should not exercise the same jurisdiction over them as it does over solicitors.
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> ...
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> [49] A costs order against one of its officers is a sanction imposed by the Court. The inherent jurisdiction enables the Court to design its sanction for breach of duty in a way that will enable it to provide compensation for the disadvantaged litigant. But a costs order is also punitive. Although it may be expressed in terms which are compensatory, its purpose is to punish the offending practitioner for a failure to fulfil his duty to the Court. In *Myers v Elman* [1940] AC 282 Lord Wright of Richmond described the Court's inherent jurisdiction as to costs in this way at p 319:
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>> "The underlying principle is that the Court has a right and a duty to supervise the conduct of its solicitors, and visit with penalties any conduct of a solicitor which is of such a nature as to tend to defeat justice in the very cause in which he is engaged professionally . . .. The jurisdiction is not merely punitive but compensatory. The order is for payment of costs thrown away or lost because of the conduct complained of. It is frequently, as in this case, exercised in order to compensate the opposite party in the action."
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> The jurisdiction is compensatory in that the Court directs its attention to costs that would not have been incurred but for the failure in duty. It is punitive in that the order is directed against the practitioner personally, not the party to the litigation who would otherwise have had to pay the costs.

[20] Mr Knight also pointed to other cases where costs have been awarded against legal advisers. That led to a submission that in this case Ms Chea's legal advisers pursued a hopeless appeal and acted in ways within r 14.6 and criticized in the authorities. Accordingly it was appropriate to order solicitor-and-client costs against Ms Chea's solicitors and counsel by contrast with the relatively modest allowance

were scale costs alone to be ordered. He elaborated on what has occurred during the progress of this claim to provide, as he put it, "context as how mad this process" has been.

[21] Over Mr Deliu's objection, Mr Knight also read documents relating to the Family Court and Ms Chea's legal aid application where Mr Knight's removal from the case was sought and objection taken to his correspondence with the Agency, but accepted such matters were not presently for this Court's consideration.

[22] He also detailed the chronology of events and the failure of Ms Chea's advisers to comply with the Court's directions.

[23] Mr Deliu commenced his very full submissions by challenging the Court's jurisdiction to hear Mr Chan's application. On 18 February 2009 he and Mr Orlov filed what was called a Notice of Appearance under Protest to Jurisdiction grounded on assertions they had always acted ethically on instructions but Mr Chan and his lawyers had acted improperly. It asserted the application was not properly served or brought with affidavit evidence in support, lacked particulars and, at the date the document was filed, submissions. In particular there were no identified breaches of duty to the Court, no basis for costs against the lawyers personally, no wasted costs and the application was "frivolous, vexatious and/or an abuse of process". It said that "costs on the cost hearing and preparation are/will be sought on an indemnity basis against Mr Knight and Ms Ho and/or Mr Chan".

[24] The assertions in relation to the application arose from the fact that the formal interlocutory application filed on Mr Chan's behalf on 15 September 2008 (later amended) sought an order "requiring the appellant to pay the respondent's costs of and incidental to this application on a solicitor/client basis" but it was only in a memorandum filed on 12 December 2008 that Mr Knight advised that in the alternative to seeking costs against Ms Chea, Mr Chan would "seek costs against Ms Chea's solicitors/counsel".

[25] Mr Deliu was critical of the lack of affidavit evidence in support of the costs application, a refusal to provide time-sheets, invoices and other material bearing on

the reasonableness of the costs incurred, and questioned whether they had in fact been incurred. He submitted the application failed to specify what actions on the part of counsel were such as allegedly supported any application for personal costs, there was no specificity as to which actions were said to have wasted costs and Mr Chan and his advisers had attempted to block Ms Chea's legal aid. After detailed reference to a number of documents filed in the case – or in one case, perhaps, according to Mr Deliu, not filed – Mr Deliu submitted:

> The application is therefore malicious, vexatious, frivolous, unsustainable in law and an abuse of this Court's processes rising to the level in which costs should in fact be ordered against Mr Knight an/or Ms Ho for what in my submission was [*sic*.] their gross breaches in handling this costs "application" against me/us as even if I am wrong as to *mala fides*, gross negligence can suffice and their failures to file an application, with particulars, with grounds, with named lawyers, with evidence, with submissions, with some indication for me/us to prepare for 1 day of oral arguments is so far out of what would be expected from such experienced counsel and solicitor that it must be grossly negligent, though I submit in the first instance that it was in bad faith due to the failure to respond to my and Mr Orlov's queries. For a further example of arguable negligence, please see my memorandum of 17 September 2008 which to an extent Mr Knight conceded by re-filing less than a week later.

Accordingly, Mr Deliu submitted, the striking-out application he had filed was justified.

[26] As mentioned, he challenged jurisdiction on the basis no formal application had been filed on Mr Chan's behalf seeking costs against counsel, challenging service and challenging the fact that counsel were not named and the application was unparticularized. Mr Deliu said the application was served on a Mr Gates but he was not counsel's address for service.

[27] In all the circumstances, Mr Deliu submitted that, were the Court to hold it had jurisdiction to deal with the application - including Mr Knight's 12 December variation - a miscarriage of justice would arise, Ms Chea may need separate representation, and a further fixture may be required. In such an event, he said, Messrs Orlov and Deliu would seek leave to file an application for costs against Mr Chan and his lawyers but, such was unnecessary for the 19 February hearing as the present application was a nullity and void *ab initio*. At that stage he also said he was not acting for Mr Orlov.

[28] In an interchange between counsel, Mr Knight challenged Messrs Orlov and Deliu's standing were they personally to seek an order for costs against him and Mr Chan and his solicitors.

[29] At the conclusion of that interchange, Mr Deliu said he had instructions to appear on 19 February for Ms Chea, Mr Orlov and himself but later said he had no instructions from Mr Orlov and that he wished to withdraw his memorandum in full and would refuse to respond to Mr Knight because of lack of jurisdiction.

[30] Mr Knight then responded (at 12:47pm) with an oral application under r 1.7 in relation to his memorandum. He accepted Messrs Orlov and Deliu had a right to be heard on that application. He clarified that what Mr Chan was seeking were increased costs from a 2B scale across the board since and including the "omnibus" application to and including the hearing on 19 February, and an order that the costs awarded be apportioned by the Court between Ms Chea on the one hand and costs against Messrs Orlov and Deliu on the other with the preponderance of costs being awarded against counsel.

[31] He justified the service of the proceedings on Mr Gates as the solicitor on the record and in default of any document evidencing a change of legal representation. He asserted Messrs Orlov and Deliu were employed by Mr Gates until recently. He pointed to the manner in which memoranda and other documents filed on Ms Chea's behalf had been signed by counsel.

[32] Mr Deliu countered by submitting Mr Knight had no right to make an oral application and said he, Mr Deliu, was unable to be served within the confines of the courtroom.

[33] After the luncheon adjournment, Mr Deliu said he had spoken briefly to Ms Chea and applied to strike out Mr Knight's application for failure to file submissions as required by r 7.39. He said Ms Chea had given instructions to Mr Deliu to present submissions associated with the Protest to Jurisdiction though she was prejudiced by the consequent necessity for Mr Deliu to research over the luncheon adjournment the matters raised by Mr Knight. He said Mr Orlov had

withdrawn all instruction to Mr Deliu over the luncheon adjournment and maintained the protest to jurisdiction on the basis he had never been served. Mr Deliu took the same position and sought a second hearing for himself and Ms Chea.

[34] Mr Knight responded by saying the application against Ms Chea was clear on its face, the filing of submissions and a chronology was helpful but not vital and submitted any failure to comply with the Rules had not prejudiced the appellant or her advisers. He submitted that, in any case, no formal application was required, relying on *L v Chief Executive of the Ministry of Social Development* (HC AK CIV 2007-404-7031, 13 October 2008), though the principle for which he contended does not appear clearly from that judgment.

[35] Mr Knight submitted the claims for costs against Ms Chea had been covered by the interlocutory application and were clearly signalled by him in his memorandum as far as counsel were concerned. He seemed to suggest, towards the end of this aspect of his submissions, that the 19 February 2009 hearing could proceed against counsel but not against Ms Chea.

[36] Taking up his submissions again, Mr Deliu submitted Ms Chea's affidavit had been prepared by his instructing solicitor and emphasised what he contended were the relevant passages it contained. He submitted the Court was unable to go behind Ms Chea's evidence and should accordingly conclude counsel throughout acted correctly on her instructions. He drew attention to memoranda which he submitted were not on this file, some mention of a *Calderbank* offer which was without prejudice and should not have been mentioned and in any event was not in evidence, and repeated that the Court had no jurisdiction against Mr Deliu on the issue of costs. He contended the "omnibus" application did not disclose any breach of duty to the Court, pointing to Mr Knight's lack of citation of authority in support. He again relied on the lack of any formal application extending the costs application to counsel and a number of other suggested failures which he detailed. Despite all that, he submitted there was no evidence of wasted costs and repeated his submissions about the lack of affidavit evidence and the lack of service.

[37] He said Ms Chea's affidavit showed that she was not legally aided for the "omnibus" application and was critical of the correspondence between Mr Knight and his instructing solicitor and the Legal Services Agency. He submitted the application for recusal was not improper nor was the application for leave to appeal, and submitted that were Ms Chea to be awarded costs and were she not legally aided in this proceeding because of the efforts of Mr Chan and his advisers, that would be unconscionable. They, he submitted, did not have "clean hands".

[38] He submitted this Court did not have an unfettered discretion concerning costs, pointing to authority that awards against counsel should only be made in clear-cut cases. He suggested the submission that the proceedings in this Court were unmeritorious was misplaced and instigated by animosity. He suggested that, while Ms Chea's option to appeal and then seek leave for a further appeal may not, as it turned out, have been the best option, for the reasons she explained it was a reasonable option for her to instruct counsel to pursue.

[39] He submitted *pro bono* work by lawyers should not be visited by costs or society would become "degraded". It was wrong to suggest counsel were "hiding behind" Ms Chea's instructions. Any such suggestion showed they were acting in accordance with her instructions.

[40] Of Mr Knight's oral application, Mr Deliu submitted it was trite that he could not make two striking-out applications, particularly when the latter was oral in a courtroom when service could not be effected and when jurisdiction was being protested. He submitted Mr Chan and his advisers were estopped from proceeding with the application. He said a formal application was required by the Rules. *L* was distinguishable and was, in any case, under appeal.

[41] As to the application for increased costs, Mr Deliu pointed to the lack of any apportionment in Mr Knight's submissions, the lack of particulars, the lack of grounds and the failure to serve. He then turned to his written submissions dealing with wasted costs orders in the United Kingdom, citing texts on the making of costs orders against lawyers and recited at some length from *Harley*. He submitted counsel's actions did not result in any wasted costs, there was no basis for any

punitive order as there was no evidence counsel acted intentionally or recklessly concerning the "omnibus" application and the case was inappropriate for a personal order against counsel as there were disputed issues as to fact.

[42] Mr Deliu then dealt with *Medcalf v Mardell* [2003] 1 AC 120, and what he submitted were counsel's rights at international law as set out in the document "Basic Principles on the Role of Lawyers", adopted by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders (7 September 1990). He cited from an issue of the New South Wales Bar Association *Newsletter*, a statement from the president of the Singapore Law Society and a number of other overseas opinions, Bar Association statements and the like. He also referred to *Ridehalgh v Horsefield* [1994] 3 All ER 848 at 855.

[43] Mr Deliu then moved to a review of counsel's work on the file, from which he moved to discuss what he submitted was relevant Australian and Canadian authority.

[44] Following reference to *Rondel v Worsley* ([1969] 1 AC 191) and *Ridehalgh*, he submitted there was no basis for awarding costs for lawyers' breach of their duties to the Court or for bringing a hopeless case without authority. He submitted the jurisdiction to order costs against a legal practitioner personally was to be exercised sparingly because, amongst other things, the Court could never know details of practitioners' instructions (dal Pont: *Lawyers Professional Responsibility in Australia and New Zealand* 2nd ed 374-375).

[45] He sought a stay of execution if judgment were entered against counsel to enable them to consider their position and exercise their further rights.

[46] In reply, Mr Knight again rehearsed the course of the matter in this Court and submitted his own actions were in accordance with directions, Minutes and the Rules.

[47] He countered the submission Mr Deliu had never appeared in the matter by referring to appearances in the Duty Judge's List when Mr Deliu asked for the issues

to be dealt with immediately, and submitted Mr Chan's stance was that "costs on an unexceptional matter had ballooned because of needless procedural steps, failure by Ms Chea to assess the situation properly and incorrect advice as to the quickest means of Ms Chea getting her rights properly adjudicated upon".

[48] Mr Knight again submitted there was no need for formal application on notice because of the Court's inherent jurisdiction and that the order for costs against counsel was a matter of justice in adjudicating where liability for costs should lie.

[49] He pointed to Mr Deliu fully and exhaustively presenting the case on 19 February in an extensive submission which said little concerning Ms Chea – a comment Mr Deliu said arose because of the lateness of Mr Knight's submissions – and again referred to other authority on the topic. He made the point that Messrs Deliu and Orlov both knew since at least from Mr Knight's 12 December 2008 memo that costs were being sought against them in relation to their actions. He submitted that, having regard to Mr Deliu's response, any tardiness in his filing his submissions had not prejudiced them. He again pointed to the comments in the two judgments in this Court and suggested there was no basis for a "tit for tat" application for costs against Mr Chan and his advisers. If the forecast application were to be brought, it should have been brought well before 19 February. He suggested the reputation of Mr Chan and his advisers had been "sullied" at the hearing. He posed the rhetorical question as to what this Court could do to debar further litigation in this case (bar an appeal) and labelled as "extraordinary" the submission that there needed to be evidence before the Court as to the genuineness of the accounts rendered to Mr Chan when they were signed and exhibited to an affidavit.

[50] He submitted the case had got out of hand and counsel had "lost their objectivity".

[51] Mr Deliu then insisted on responding by saying that he had not submitted the accounts to Mr Chan were not real, and he was not alleging fraud. His cross-application was not "retributive" but was seeking costs on costs for spending a day at

a hearing with procedural deficiencies. He again dealt with other authority put before the Court by Mr Knight.

Discussion and Decision

(1) Jurisdiction and Service

[52] Logically, the first matter which requires to be addressed is what Messrs Deliu and Orlov call their Protest to Jurisdiction. It largely stems from the service point earlier outlined – though other aspects will require discussion.

[53] In the Family Court, at least up to 18 February 2008, documents filed on Ms Chea's behalf showed Mr Gates' firm as the solicitors acting for Ms Chea with Mr Orlov as instructing solicitor, though by 7 April 2008 Mr Deliu had, on the documents, taken over Mr Orlov's role. The physical address given was Level 4, Newcall Tower, 44 Khyber Pass Road, Newton, Auckland.

[54] When the appeal was filed in this Court it showed a firm called "Equity Law" as solicitors for the appellant with Mr Orlov as instructing solicitor but by 26 June 2008 the frontispiece of documents filed showed Equity Law "a Division of the Provo Group and D J Gates Law" – whatever that might mean – as the solicitors involved. The physical address remained as previously.

[55] That formulation appears to have been maintained until submissions filed on 11 November 2008. They again showed Mr Gates' firm – now in Whangaparaoa instead of Khyber Pass Road – as the solicitor involved, with Mr Orlov as counsel.

[56] However, by the date the Protest to Jurisdiction and supporting affidavit were filed, the frontispiece showed a Mr McClymont "via Frank Deliu" as the solicitor involved with Mr Orlov as counsel, though Mr Deliu signed the Protest to Jurisdiction. The notice gave the same Khyber Pass Road address and said "documents for service on Mr Evgeny Orlov" may be served at that address amongst other means.

[57] All of that took place with no formal notification of any change of representation or address for service. That is required by (now) r 5.40 in this Court and is also required by the service rules r 115ff of the Family Courts Rules 2002. Not only is formal notification of such changes required by the Rules, but there are good policy reasons for requiring formal notification, namely to avoid the type of service objections raised by Mr Deliu at this hearing.

[58] It is well-settled that failure to provide an address for service means documents served on previous solicitors still constitutes good service (*Re Salaman (An Infant)* [1923] NZLR 50, *McGechan on Procedure* para HR5.40.01 p 1-546).

[59] In those circumstances while, as a counsel of perfection, Mr Knight and his instructing solicitors should perhaps have noted the change in the solicitors seeming to be acting for Ms Chea between the firm acting in the Family Court and the firm which filed the notice of appeal, since the physical address was identical and Equity Law later proclaimed itself a division of Mr Gates' office, service of the various documents by Mr Chan and his advisers on the physical address in Khyber Pass Road complies with the Rules' requirement and is unexceptionable. That is particularly the case when, even in the October 2008 ADLS Directory of Barristers and Solicitors, Equity Law is still describing itself as a "branch office" of Mr Gates and is at the Khyber Pass Road address. The address and requirements for service given in the Protest to Jurisdiction is also strongly against the point raised by Mr Deliu.

[60] In strict terms, the address for service of Ms Chea was and remains Level 4, Newcall Tower, 44 Khyber Pass Road, Newton, Auckland, irrespective of which firm occupies that address.

[61] Since it is understood documents filed on Mr Chan's behalf were served at that address (or by fax or electronically as the documents filed on Ms Chea's behalf require), it must follow those documents were properly served on Ms Chea and her advisers.

(2) General

[62] As the summary of the welter of submissions and counter-submissions, applications and counter-applications, and the manner in which the submissions were presented has shown, this matter has developed into a proceeding which has gone well beyond the ambit of the original appeal.

[63] Several things are, however, clear.

[64] The first is that, as Harrison J made plain, the appeal was unmeritorious and stood little, if any, chance of success. Reduced to its essence, it was an appeal against a refusal by a Family Court Judge to exercise a statutory discretion in favour of Ms Chea in relation to an application for maintenance for a limited period.

[65] As Harrison J said, it is difficult to understand why leave to appeal was given once the true parameters of the issue under appeal are distilled – it appears never to have been argued and occurred as a result of a Minute by Judge Ryan - not least when it is clear Judge Ryan dismissed the application because it lacked sufficient evidence and because he was unable to resolve affidavit conflicts.

[66] From the evidence and submissions filed in relation to this hearing, it has now emerged that Ms Chea appealed because she was advised that, were she to be successful, she may have received interim maintenance more quickly than by continuing her Family Court application. Assuming she was advised in that way, it is nonetheless the case that it was a risky strategy which, had the basis of Judge Ryan's decision and the merits of the matter been properly assessed, was most unlikely to achieve the result she desired.

[67] Therefore, apart from Mr Chan taking up the leave reserved by Harrison J to permit him to apply for costs notwithstanding that his former wife was thought to be legally aided, all matters in this Court should have concluded when Harrison J delivered his judgment.

[68] That they did not do so is one of the matters most weighing on the costs application.

[69] Jumping forward to the application for leave to appeal, it must immediately be said that a dispassionate and professional assessment of Ms Chea's position would have made clear there was essentially no chance leave would be granted. It is unnecessary to repeat why that view was taken on 12 and 19 November as the salient parts of the judgment have already been recounted. From the material advanced by Mr Orlov it was simply impossible to discern any possible point of law of general or public importance sufficient to justify a second appeal. It may be notable that, so far as is known, no attempt has been made to challenge that view in the Court of Appeal.

[70] It follows the application for leave to appeal should never have been filed nor pursued.

[71] Flowing on from that, the application for leave to appeal was initially included in the "omnibus" application, but when Potter J, properly, directed the filing of separate applications for the separate matters raised in the "omnibus" application, rather than comply Mr Deliu essentially queried the reasons for Potter J taking the view she did.

[72] Those reasons should have been apparent to competent counsel. The directions should have been complied with.

[73] Counsel's failure to comply with the directions led to the striking-out/stay application which was also dealt with on 12 and 19 November 2007. That application would have been unnecessary had counsel complied with Potter J's directions.

[74] In addition, apart from possible involvement in determining any costs application, Harrison J's participation in the matters in issue on this file was at an end. Accordingly, the recusal application was superfluous and, had there been genuine concerns about Harrison J determining the question of costs, that matter could have been dealt with in the usual way, not by a recusal application.

[75] The application to cross-examine persons as part of the determination of the costs application was also highly unlikely to be granted. It was not advanced in the way required by the Rules and accepted practice.

[76] The final matter which needs to be discussed in the period after Harrison J's judgment relates to Mr Knight's costs application on behalf of Mr Chan.

[77] It is correct, as Mr Deliu pointed out, that the application dated 15 September 2008 was, in its terms, directed only at seeking indemnity costs against Ms Chea and it was only in Mr Knight's 12 December memorandum that notification was given of Mr Chan's intention to broaden the scope of his application and seek costs against Ms Chea's legal advisers.

[78] In the fraught circumstances of this contest, it would plainly have been preferable had Mr Knight filed a formal amended interlocutory application for costs in terms of his memorandum. However, given that Ms Chea's legal advisers had been aware of the broadening of the application for at least two months prior to the hearing, the Court is of the view that the circumstances fall within r 7.41(1)(c) (and the former r 254(1)(c)), namely that an oral application at an interlocutory hearing will be permitted where the -

> "order sought has been outlined in a memorandum filed for a case management conference and no party will be unduly prejudiced by the absence of a formal notice of the application"

[79] In those circumstances, there is no basis for a conclusion other than that Ms Chea and her legal advisers were aware for at least two months prior to this hearing that Mr Chan's indemnity costs application would seek those costs both from the appellant and from her legal advisers.

[80] That is not to overlook Mr Deliu's submission that Mr Orlov had never been served with the application and he had no instructions from Mr Orlov in relation to the matter.

[81] That point is met by reference back to the circumstances relating to the address for service, the frontispiece of the various documents filed on Ms Chea's

behalf and the solicitor said to be acting and by recording that Messrs Orlov and Deliu's names and signatures have appeared interchangeably during the course of this proceeding. Even their Protest to Jurisdiction bears both their names as "counsel acting".

[82] The approach of counsel to their dealings with one another – both generally and, more, in relation to the costs application in this case – appropriately starts with some general remarks.

[83] Much of the practice of law often involves actual or potential conflict or confrontation.

[84] Where more than one person is involved, clients of lawyers commonly endeavour to gain an advantage or avoid disadvantage at the hands of clients of other lawyers. That observation applies as equally to criminal prosecutions and major civil litigation as it applies to negotiations over the terms of a contract of no interest other than to the parties.

[85] One of the reasons society has lawyers is so they, with an intimate knowledge of clients' circumstances married to their legal skills, can best assist clients to achieve advantage or avoid disadvantage. They are obliged to advance their client's interests resolutely, often in the face of the best efforts of other lawyers' clients efforts to achieve mastery over their own.

[86] But, crucially, it is of the essence of professionalism that, in fulfilling their obligations to their clients, lawyers do not – unless the circumstances leave them with no choice – identify their interests with those of their clients and the interests of other lawyers' clients with the lawyers themselves. It is for this reason that, amongst lawyers' other duties, the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 ch. 10.1 requires lawyers to treat other lawyers with "respect and courtesy" and ch 13.2 requires lawyers not to act in a way that "undermines the processes of the Court or the dignity of the judiciary" and obliges lawyers to "treat others involved in Court processes with respect". In those respects

(and others) the 2008 Rules do no more than codify previous rules and practices concerning lawyers' proper conduct.

[87] This approach is essential for lawyers to retain the necessary dispassionate objectivity which enables them to fulfil their duties to their clients, their profession and the Courts.

[88] However, over time, it appears the lines have become blurred in relation to the matters just outlined and it is now not uncommon for evidence to disclose a tendency on the part of lawyers and others involved in Court processes – to put it colloquially - to "play the man and not the ball". While that approach as between clients may be understandable – though not acceptable unless the circumstances demand it – it is not difficult to find examples where that approach results in intemperate correspondence, emails and soured relationships between parties' lawyers.

[89] A facet of that approach is shown by such matters as extravagant and unrealistic pleadings, evidence patently drafted by lawyers - not witnesses - which attacks opposite parties and their advisers, and correspondence (including emails) which fails to put clients' viewpoints in a manner that differentiates between lawyers and their clients. Such an approach not infrequently results in responses in similar mode and in disproportionate or inflammatory assertions of professional misconduct, unethical behaviour and the like.

[90] A particular facet of the approach to litigation under discussion arises through correspondence and emails directly between counsel instead of through their instructing solicitors. For whatever reason – instructing solicitors who do not wish to be involved in the intricacies of litigation once counsel have been instructed or ready availability of email – correspondence directly between counsel seems to be increasing and is no longer confined to uncontentious issues. It is not difficult to find examples – including in this case - where correspondence has been conducted in the ways discussed.

[91] One result is that – as must always have been seen to be likely – correspondence on contentious issues, often couched in intemperate terms, appears before Courts either as exhibits to parties' affidavits or attached to submissions. Counsel thereby become witnesses – sometimes unwittingly – despite long-standing proscription on their continuing to act in such circumstances (*Hutchinson v Davis* [1940] NZLR 490, 506, 516; *Beggs v Attorney-General* [2006] 2 NZLR 129).

[92] In this general review, it remains to add that the attitudes of litigants under discussion and - though to a significantly lesser degree - their lawyers can infect their attitudes to the Court and its officers. Litigants – especially unrepresented litigants – under the protection of absolute privilege for Court proceedings, attack not just each other but the Court, its staff and even its Judges. Judicial restraint to achieve dispassionate, even-handed judgment can, in such circumstances, be strained.

[93] The attitudes and approaches under discussion have repeatedly manifested themselves in this case. As examples, a request on Mr Chan's behalf for a timetable extension was opposed by Mr Deliu on the basis that Mr Chan's advisers had contacted LSA and that it was "not only unethical but also unlawful contractual interference and a breach of privacy rights". A direction was sought that nobody on Mr Chan's part should communicate with LSA "lest they will be held in contempt of Court". Ms Chea's lawyers had her put in evidence Law Society complaints, correspondence between counsel and solicitors repeating assertions of unethical conduct and exhibiting mutually recriminatory email correspondence with both counsel describing each other's actions as "silly" and as insulting their intelligence by "trying to defend the indefensible". In addition, the pleadings in this Court included Mr Deliu's recusal application on Ms Chea's behalf.

[94] It may be natural for humans, once attacked, to retaliate – but it does nothing to assist orderly disposal of litigation which focuses on issues properly raised in it.

[95] A further aspect of that relates to the way in which submissions were prepared and presented. Some of the flavour can be gleaned from the summary earlier appearing but, additionally, there appears to be an habitual disproportionality in the approach of Messrs Deliu and Orlov to this and other proceedings.

[96] Reduced to its essentials, however important to Ms Chea, this was a commonplace application to the Family Court for the exercise of a discretion in her favour to award her interim maintenance for a period. The application failed because the evidence was insufficient to support it. That arose either because Ms Chea did not have the requisite evidence, or those responsible for drafting her papers failed to put it before the Court.

[97] As earlier mentioned, an appeal against that decision – even if brought for the underlying reason now suggested – always had low probability of achieving the result Ms Chea sought. Dispassionate professional evaluation of the Family Court judgment would have shown that.

[98] Further, as also mentioned, Ms Chea's application for leave to appeal was misguided and had no realistic chance of success, again something that disinterested professional assessment and advice would have shown.

[99] It appears that pleadings and submissions filed by Messrs Orlov and Deliu commonly seek to invoke International Conventions on human rights, the rights of children and women and civil and political rights. They frequently put before the Court elevated declarations from international conferences on such matters as counsel's rights and obligations and *ex cathedra* speeches by Judges and others in high places. Frequent recourse is made to the New Zealand Bill of Rights Act 1990, especially s 27. The pleadings and submissions filed in this case reflect that approach.

[100] This is not, as they claim – and claimed in this case - fearless advocacy in support of their clients' position. It is more a tribute to counsel's search engines than to their professional judgment. Here, it is simply a failure to recognise that what was at issue – a discretionary decision that inadequate evidence had been adduced to justify the making of an interim maintenance order under a domestic statute. This came nowhere near engaging the elevated declarations of principles emanating from the sources summarized.

[101] But, once invoked, they needed to be dealt with by Mr Knight – and the necessity so to do affected the temper of his submissions. Then they needed to be dealt with by the Court.

[102] Such a disproportionate approach to this litigation was unhelpful, to put it at its mildest, in delineating the issues, focusing on them and achieving a result.

[103] All of that brings the Court back to the application brought on Mr Chan's behalf for indemnity costs against Ms Chea and her legal advisers, particularly Messrs Orlov and Deliu.

[104] Though the capacity for a court to order solicitor-and-client costs and to order them against a party's lawyer is described as grounded in this Court's inherent jurisdiction, perhaps confirmatory of the changes in attitudes in litigation earlier discussed, most texts found the power in *Myers v Elman* [1940] AC 282 and it is difficult to find cases earlier than about 1990 in which the topic is even raised (*Law of Costs* 2nd ed, dal Pont, 2009 para 23.1 p 788, para 23.15 p 798; *McGechan on Procedure* para HR Pt14.12(3) p 1-1607).

[105] In this country, it is clear the leading decision is *Harley*. The cases it discusses make clear some of the criteria to be considered are whether the aim of a costs order against lawyers is compensatory (though it may have punitive effect); a sparing attitude should be adopted by Courts to the making of such orders, not least because the Court cannot know the client's instructions; the seriousness of the dereliction or negligence asserted; recognition of the time and other pressures under which lawyers are placed; and recognition that something significantly more than a mere error is required to be demonstrated before such an order is justified. Procedurally, making unsupported allegations, commencing or continuing proceedings without authority or merit, failure to comply with procedural directions and the hopelessness of the case - coupled with the taking of tactical advantage - are also all seen as relevant.

[106] As far as Ms Chea is concerned, she has now confirmed that all the actions taken by her legal advisers resulted from her instructions. She must therefore be

taken to have knowingly exposed herself to an order for costs against her resulting from the failure of her appeal and her application for leave to appeal. Her exposure is that of a normal unsuccessful litigant for the period during the progress of her proceeding in this Court when she may not have been legally aided. Even now, it is difficult to calculate whether that applies to any of the periods since 5 May 2008, the date on which her appeal was lodged.

[107] Any order for costs during any part of the period since that date when she has been legally aided is limited by the requirement that any order against her must be reasonable in all the circumstances "including the means of all the parties and their conduct in connection with the dispute" and orders for costs against a legally aided person are debarred in a civil proceeding unless the Court is satisfied there are "exceptional" circumstances, in the determination of which the statutory criteria must be considered (Legal Services Act 2000 s 40).

[108] In this case, application of those principles to the circumstances is relatively straightforward since the court has already taken a view that, even if the bringing of the appeal to hearing might – just – have been merited, no action in this Court following dismissal of the appeal on 16 July 2008 could have been justified (apart from any argument on Mr Chan's costs application against his former wife pursuant to the leave reserved).

[109] The Court therefore holds that, in this case, the cut-off date is 16 July 2008. Subject to the costs question later detailed, all costs reasonably incurred by Mr Chan after that date are potentially recoverable from Ms Chea or from counsel. (Despite their names appearing on the various documents filed, Ms Chea's solicitors do not appear to have had any involvement of any substance in the carriage of these proceedings and accordingly the application for costs against them is dismissed).

Result

[110] Beyond that, the application needs to be dealt with piecemeal in the following way:

a) Within 7 days of delivery of this judgment, Messrs Deliu or Orlov are to advise the Court and Mr Chan's solicitors and counsel of the precise period or periods since 5 May 2008 during which Ms Chea has been or is legally aided and the amount of aid granted.

b) Within 21 days of delivery of this judgment Mr Chan's solicitors and counsel are to advise the Court and Ms Chea's legal advisers of:

   i) The amount of costs and disbursements incurred by Mr Chan or his solicitors and counsel (separately) both prior to, and since, 16 July 2008 (including for this hearing) and the charge-out rates incurred.

   ii) It will be sufficient if this direction is able to be complied with by reference to fee notes already before the Court.

c) The file is then to be referred back to Hugh Williams J for further consideration as to whether scale costs, increased costs or indemnity costs (presumably GST exclusive: *Burrows v Rental Space Ltd* (2001) 15 PRNZ 298, 301 para [14]) should be ordered and, if so, for what period and against whom.

[111] As far as Ms Chea is concerned, in relation to any period or periods during the history of this proceeding in this Court for which she has been legally aided, a further consideration will then be undertaken having regard to the criteria appearing in s 40 of the Legal Services Act 2000. For any period or periods during which she is not or has not been legally aided, that further consideration will be undertaken having regard to the principles affecting costs, particularly the fact Ms Chea is an unsuccessful litigant. The principles affecting whether increased or indemnity costs should be ordered will be considered, as will whether any order made should be apportioned between Ms Chea and counsel.

[112] As far as Messrs Deliu and Orlov are concerned, once that further material is received consideration will be given, in accordance with the authorities discussed in

this judgment, as to whether a costs order should be made against either of them and whether any such order should be on increased or indemnity basis and whether any liability should be apportioned or be on a joint and several basis.

[113] Two further matters should be made clear:

a) Those directions are not made with any pre-determination in mind; the result may be that no orders are made or, at the other end of the spectrum, that full indemnity costs are apportioned and ordered between those held to be liable.

b) The hearing being concluded, no further evidence is to be adduced other than by leave which will only be granted in highly exceptional circumstances. No further memoranda should require to be filed.

....

HUGH WILLIAMS J.