IN THE DISTRICT COURT
AT HAMILTON

CIV-2015-019-001085
[2017] NZDC 24721

BETWEEN	ROSS PILKINGTON AND RPG TRUSTEES 2006 LIMITED Plaintiff
AND	ROBINDER SINGH AND KAMALDEEP SINGH Defendant

Judgment: 27 November 2017
(On the papers)

RESERVED JUDGMENT OF JUDGE D M WILSON QC
[Costs]

Introduction

[1] I found for the defendants on liability in a reserved decision of 21 September 2017 on all of the plaintiffs' causes of action and reserved costs. Memoranda on costs from counsel have been received.

Defendants application for costs

[2] The defendants submit that costs should follow the decision and that the defendants are entitled to recover:

(a) Scale costs on a 2B basis from the start of this proceeding (including preparation for a seven day hearing) until 11 September 2017, plus **indemnity costs** for the hearing itself; or

(b) Scale costs and disbursements on a 2B basis from the start of this proceeding until 29 August 2017, plus increased costs from 30 August 2017; or

(c) Scale costs on a 2B basis (including preparation for a 7 day hearing); or

(d) Scale costs on a 2B basis (including preparation for a 2 day hearing); and

(e) Disbursements, from the Plaintiffs.

[3] The Plaintiffs accept that the Defendants are entitled to scale costs on a 2B basis but submit that this should be strictly limited.

[4] The Plaintiffs made detailed objections to the application and submitted that the certain costs were relevant only to the liability hearing or otherwise objectionable:

[5] I turn to deal with the issues raised by the memoranda.

Indemnity costs: the Law

[6] 14.6(4) of the District Court Rules 2014 (DCR) sets out the grounds for indemnity costs. The leading case is *Bradbury v Westpac Banking Corporation*, where the Court of Appeal confirmed the following as grounds for indemnity costs awards:[1]

(a) The making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud;

(b) Particular misconduct that causes loss of time to the court and to other parties;

(c) Commencing or continuing proceedings for some ulterior motive;

[1] *Bradbury v Westpac Banking Corporation* [2009] NZCA 234.

(d) Doing so in wilful disregard of known facts or clearly established law;

(e) Making allegations which ought never to have been made or unduly prolonging a case by groundless contentions, summarised in French J's "hopeless case" test.

[7] These are reflected in the criteria set out in r 14.6(4) with the inclusion of a few extra grounds that are not relevant here.[2]

[8] This is a high threshold[3] and has been characterised in different ways, from "truly exceptional circumstances"[4] through to requiring "flagrant misconduct" by the paying party.[5] This includes where the proceeding was doomed to fail on the merits, or never had a realistic prospect of success.[6] Indemnity costs will likely be appropriate for the period of continuing the action after it becomes clear there is no substance to the case.[7]

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[9] The plaintiffs submit that their case continued to be arguable once the defendants' expert opinions shifted to align with theirs. There is merit in this submission. There has been no "flagrant" misconduct by the plaintiffs.[8] There are no "truly exceptional circumstances"[9]. There is no case for indemnity costs.

Increased costs

[10] An offer made under r 14.10 ('without prejudice except as to costs') that is more than the judgment obtained by that party entitles that party, in this case the defendants, to costs taken on steps in the proceeding after the offer was made, pursuant t r 14.11. However, this is at the discretion of the court under r 14.11(1).

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[2] Such as where there is an express contractual term to claim indemnity costs.
[3] *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] 3 NZLR 288 (CA).
[4] *Craig v Social Media Consultants Ltd* [2017] NZDC 2366 at [4].
[5] *Prebble v Huata* [2005] NZSC 18 at [6].
[6] *Hobbs v Gilbert* HC Nelson CIV-1999-442-2, 12 May 2005.
[7] *Baxter v RMC Group Plc* HC Auckland CP262/01, 9 September 2003.
[8] *Prebble v Huata* [2005] NZSC 18 at [6].
[9] *Craig v Social Media Consultants Ltd* [2017] NZDC 2366 at [4].

[11] Increased costs may be awarded where a settlement offer has been rejected "without reasonable justification".[10] The award of increased costs arises when a party fails to act reasonably; in this case, with regards to settlement outside of court.[11] The timing and content of the offer are important indicators as to whether refusal of the offer was reasonable.[12]

This Case

[12] Two offers to settle were made by the defendants. Both were advanced "without prejudice save as to costs."

[13] The plaintiffs submit that the first offer:[13]

(a) did not reflect the legal costs incurred up until the point of the offer, to get an admission of liability, and that

(b) the remedial work offered by the settlement offer was not to the extent contemplated by the experts' joint report. That is, the plaintiffs allege the offer had not fairly reflected the work required (as agreed by the experts) or the costs incurred to that date.

[14] These are highly relevant considerations which case law establishes ought to be covered.[14]

[15] The offer was made on 28 August 2017, for a hearing on 11 September. This is two weeks before the hearing date, and after it became known to the defendants that their experts had changed their opinion in favour of the plaintiff's experts' opinions. This is not an unreasonable time for an offer, and not an unreasonable basis for making such an offer.

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[10] District Court Rules 2014, r 14.6(3)(b)(v).
[11] *Bradbury v Westpac Banking Corporation* [2009] NZCA 234 at [27].
[12] *Clear v Sutton* [2017] NZHC 1484 at [98]; *New Zealand Carbon Farming Limited v Mighty River Power Limited* [2016] NZCA 624.
[13] Annexed to the defendants' cost submissions as item "A".
[14] *Health Waikato Ltd v Van der Sluis* [1997] ERNZ 236.

[16] The plaintiffs did not apparently address the second offer dated 30 August 2017[15].

[17] The defendants submit that the offers made were more onerous to the defendants than the judgment entered, and thus any rejection was without reasonable justification.

[18] The plaintiffs submit it was reasonable to reject the offer as it did not cover legal costs incurred to that point, nor did the remedial work go far enough (particularly about restoring the ground water). However, I accept the defendant's submission that a portion of their offer did in fact deal with the restoration of the ground water given the proposal for mediation by an independent farm advisor[16] and the references to maintenance of water level in paragraph 3 (b) of the offer of 30 August 2017.

[19] The defendants respond that it was unreasonable because the plaintiffs did not seek a contribution to their legal costs, instead repeating a previous offer. The High Court has held the following regarding *Calderbank* offers:[17]

> The fact that reasoning underpinning the Calderbank letter was accepted in my judgment does not require increased costs to be given.

[20] The fact that the defendants did not include the legal costs incurred to that point in the offer made is relevant to whether it was reasonable to reject the offer. Legal costs incurred were not in the offer made, and while they were not sought by way of counter-offer, the focus is on the offer and rejection not the counter offer.

[21] The reasonable expectations of the parties at the time of the offer are relevant to whether it was reasonable to reject the offer.[18] It is pertinent that the plaintiffs do not appear to have asked that legal costs be reflected in any settlement offer.

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[15] Annexure "B" to the defendants first memorandum.
[16] See paragraph 2(c) of the defendants letter of 28 August 2017.
17 *Messenger v Stanaway Real Estate* [2015] NZHC 3352 at [43].
18 *New Zealand Sports Merchandising Ltd v DSL Logistics Ltd* HC Auckland CIV-2009-404-5548, 19 August 2010 at [36]; *Samson v Mourant* [2016] NZHC 1119 at [44]; *Weaver v HML Nominees Ltd* [2106] NZHC 473 at [30].

Lack of an arguable case

[22] The defendants submit that there was no arguable case because the evidence of its principal witness, Mr Ross Pilkington was inconsistent with the plaintiffs' case. The reasonableness of the rejection of the offer must be assessed at the time of the offer was made. At that date Mr Pilkington had not been cross-examined. I accept that a principal purpose of cross-examination is to test consistency and reliability and its success cannot be fully assessed before the hearing.

[23] However, the plaintiffs' solicitors, in rejecting the first settlement offer. expressly stated that they were proceeding with the liability hearing when it was "clear that our clients did not expressly consent to the work on the drain and could not impliedly consent to that work"

[24] The issue at the liability hearing was consent whether express or implied. Given the direct conflict in the exchanged briefs on this vital issue, the plaintiffs should have prudently reviewed the evidence on this topic. Had Mr Ross Pilkington been rebriefed on this topic the gaps in his memory which were exposed at the hearing would have been revealed.

[25] Had they done so they would have realised that there were issues in recollection of the witness such that the settlement offer should not have been firmly rejected on that issue.

[26] I accept that the plaintiffs had a basis to believe they had an arguable case on the prepared briefs that is not decisive. Had they accepted either offer their position would have been far better than they achieved at the hearing where the issue of consent was decisive against the plaintiffs' claims. The case should have been settled.

[27] The defendants here seek 50 per cent increased costs. The Court of Appeal has held that "in only the most exceptional of circumstances would an increase of 50 percent above scale costs be warranted", for increased costs.[19] This is not such a case.

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[19] *Holdfast NZ Ltd v Selleys Pty Ltd* (2005) 17 PRNZ 897 (CA) at [46]–[48].

[28] Like all costs matters the decision on increased costs is one of discretion.

[29] In the exercise of my discretion I award a 40% increase over 2 B costs. This leaves open still the issue of what scheduled costs should be awarded.

The Test for Awarding Second Counsel Costs

[30] The defendants claim costs for second counsel.

[31] As the High Court, has put it:[20]

> … In *Nomoi Holdings Ltd*, Chambers J held that the key question in determining whether to certify costs for second counsel was:
>
> " … whether the nature of this proceeding, given the way the trial was conducted, was such as to justify requiring the losing party to contribute to the winning party's cost in having a junior counsel present."
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> [52] The approach to determining whether costs of second counsel should be granted is always objective, and "is focused on the nature of the proceeding, not the actual counsel involved and how he or she or they choose to conduct the litigation".

[32] The test is therefore that there will "usually need to be some unusual feature to the litigation" to justify an allowance for second counsel, or the applicant (the defendants, here) need not show that the case is beyond the capabilities of principal counsel, "so long as it is sufficiently complex to justify certification for second counsel."[21]

[33] Regarding second counsel, the defendants submit that the case was complex because of the prolonged nature and given the plaintiff's chief witness leading evidence in the middle of the trial that was crucial but not a part of their brief. The defendants submit that certification for second counsel should be made because "there were multiple witnesses" and "matters of a degree of complexity to be addressed".

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[20] *Tao v Strata Title Administration Limited* [2016] NZHC 1821 at [51]–[52].
[21] *Tao v Strata Title Administration Limited* [2016] NZHC 1821 at [52].

[34] With respect to the defendant's counsel, the number of witnesses is not enough. Second counsel certification is rare due to the context of how civil proceedings take place.[22] As Chambers J said (in the context of category 2 proceedings):[23]

> These changes to former trial practice, when taken together, have had the effect of forcing counsel to do a lot more work before trial … The corollary of these changes has been that in-trial work and stress have been reduced. That in turn has meant the need for second counsel is now considerably reduced.

This Case on second and auxiliary counsel

[35] The plaintiff submits that this is not a case where an allowance in costs for second counsel ought to be made. I agree. The High Court in *Nomai Holdings* made the following, perhaps quite relevant, observation:[24]

> I am conscious that appearing as second counsel is an important part of every barrister's training. This Court would certainly want to encourage such training. I do not think, however, that the costs rules are the appropriate way of fostering such training and education. There is no valid reason why the losing litigant should, as a general rule, subsidise opposing junior counsel's practical legal education.

[36] This was not a case for awarding costs for second counsel against the plaintiffs.

Counsel 'Appearing'

[37] The defendants have claimed hearing costs for the two day hearing at over $20,000. It is plainly unreasonable to claim costs of appearance at hearing for so many counsel, particularly those who did not actually appear for the defendants. Presence in court does not justify the expense being claimed as costs, particularly not from counsel sitting and watching the trial in the back.[25]

[38] Further, there appears to be elements of double counting for research, as those hearing costs are already claimed under scale costs for preparation for the hearing, according to the plaintiffs.[26] These costs cannot be awarded twice (in much the same

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[22] *Nomoi Holdings v Elders Pastoral Holdings Ltd* (2001) 15 PRNZ 155 (HC) at 159.
[23] *Nomoi Holdings v Elders Pastoral Holdings Ltd* (2001) 15 PRNZ 155 (HC) at 159.
[24] *Nomai Holdings Limited v Elders Pastoral Holdings Limited* (2001) 15 PRNZ 155 (HC) at [20].
[25] Submissions for the Plaintiffs on Costs at [32](a).
[26] Submissions for the Plaintiffs on Costs at [32](e).

way as disbursements cannot be charged where they would be subsumed already by compensation for professional time).[27]

Document Delivery

[39] As the plaintiffs aptly point out, this is not legal work and ought not to be recovered through costs.[28]

Preparatory time

[40] The Defendants claim costs of $7,120 under 16.3 (preparation of affidavits or written statements) and 16.4 (preparation of list of issues and common bundle. A party can only claim these costs if the hearing does not proceed,[29] which is obviously not the case here[30]. The defendants accept this submission in their reply memorandum and I find accordingly.

Costs for costs memorandum

[41] As the plaintiffs rightly point out, costs incurred preparing costs memoranda are not appropriately claimed in the costs claim, as the High Court has held:[31]

> While considerable effort was put into the applications for costs, I make no further award of costs. This process was a necessary incident of the primary hearing process and the submissions for both parties were fairly made.

[42] On that basis costs for costs memoranda should lie where they fall, pursuant to the principles in r 14.2.

Preparation for hearing which did not proceed

[43] The Court of Appeal in *Selleys* note that it may be reasonable to claim costs on preparation for a hearing that never occurred, where the hearing was to proceed but for the filing of an application of discontinuance by one of the parties:[32]

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[27] See *Russell v Taxation Review Authority* (2000) 14 PRNZ 515 (HC) at 522.
[28] Submissions for the Plaintiffs on Costs at [32](d).
[29] Schedule 4, District Court Rules, *"16 Preparation for hearing following setting down or direction for trial if trial does not eventuate:"*
[30] Plaintiffs memorandum at [8]
[31] *Gauld v Waimakariri District Council* [2014] NZHC 956 at [30].
[32] *Holdfast NZ Ltd v Selleys Pty Ltd* (2005) 17 PRNZ 897 (CA) at [51].

> Mr Marriott argued, however, that Selleys' scale claim of $15,940 had been miscalculated and was too high by some $6,000. There were three items of alleged over-claim. The major deduction he sought ($2,900) was in respect of item 7.4 in Schedule 3 to the High Court Rules. That item related to Selleys' "preparation for hearing" in circumstances where "trial does not eventuate" and covered its "preparation of lists of issues and authorities, selecting documents for common bundle of documents, and all other preparation". That challenge is clearly wrong: Selleys quite rightly got itself ready for a trial set down for 26 July 2004. Further, Selleys did not claim (perhaps through inadvertence) under item 7.3: "Preparation of affidavits or written or oral statements of evidence to be used at hearing". On band B, a claim of two days ($2,900) would have been justified under that head. Mr Gault, for Selleys, advised us that Selleys had commenced (but not completed) trial preparation as at the date of discontinuance.

This Case – Claim for the seven day hearing

[44] However, in that case, there was no trial due to Holdfast filing of notice of discontinuance; not because the Court determined the case on liability. The discontinuance in *Selleys* was caused by counsel's concern they might have sued the wrong company within the corporate group; after applying to join the corporate group, and being advised the Judge was considering indemnity costs if that application failed, Holdfast considered it prudent to drop the case and file it against new defendants (instead of joinder to the existing action). This is a vastly different situation from the present case.

[45] The defendants claim for preparation for a seven day hearing on the basis of a minute of the Court dated 15 August 2017 that indicated an expectation that the experts would deal with matters regarding remedy. The defendants claim in their costs submissions that it only "became certain" to them there would be no further questions determined by the Court after I reserved judgment on 12 September 2017.[33].

[46] The plaintiffs submit that this was never the position, and that the defendants could have sought clarification from the Court at any time.[34] The defendants could have raised the issue when the minute dated 15 August was issued. I accept that some preparation for the estimated 7 day hearing would have been prudent and that some allowance should be made for this.

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[33] Submissions for the Defendants on Costs at [7]–[8].
[34] Submissions for the Plaintiffs on Costs at [10].

[47] However as reflected in *Selleys* it could not be said that the defendants "quite rightly" prepared for seven days as well as the two days, when the defendants knew or ought to have known not later than 15 August that seven days would not be required.

[48] The plaintiffs submit that when the liability only hearing was agreed, it was never contemplated that a full seven day hearing would then be conducted after the liability hearing was completed.[35] I accept that submission.

[49] Some allowance must however be made for preparation up to 15 August. I allow full preparation costs to that date. I leave it to counsel to settle quantum in line with this judgment. I grant leave to refer the issue back to me initially by teleconference if required.

Limitation of costs to defence actually advanced at hearing.

[50] The plaintiffs submit that the defendants' costs should be limited to the defence actually advanced: that is the sole defence of consent.

[51] The plaintiffs also submit that the defendants' costs for any steps prior to their dropping of their other defences should not be included in the award because a change in position of the experts altered how the case proceeded.

[52] Costs ought to be reasonable pursuant to rule 14.2. I find that the recovery of costs in preparation of defences that were abandoned (I infer because of a change of position by the defence's own experts) and not advanced at hearing is not reasonable and is not allowed.

Disbursements

[53] Disbursements may be claimed to the extent they are approved of by the court for the purposes of the proceeding, or are of a class specified in r 14.12(1)(b), specific to and necessary for the conduct of the proceeding, and are reasonable in amount.[36]

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[35] Submissions for the Plaintiffs on Costs at [10].
[36] District Court Rules 2014, r 14.12(2).

Necessary for the conduct of the proceedings means "…in the sense that failure to incur the expense would have prejudiced the proper conduct of the proceedings…"[37]

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[54] The defendants have claimed costs on a variety of disbursements – including the full cost of all experts – some of which the plaintiffs submit are not claimable.

[55] The defendants are entitled to the full costs of experts required as disbursements. The same applies to witness fees and expenses, regardless of whether they were called at the hearing subject to concepts of reasonableness.

[56] A large number of disbursements claimed by the defendants do not meet the test in r 14.12(2) to the extent that they are "approved by the court for the purposes of the proceeding"; these are things such as Costs for Witness Fees, retrieval costs for decisions not used,[38] and photocopying costs for an unneeded bundle.[39]

[57] The plaintiffs' complaint that they have not been paid yet is irrelevant: the expense can be *incurred* under r 14.12 and still be a disbursement. Witness fees are recoverable in their actual expenses, provided they are reasonable.[40]

[58] However, to the extent disbursements for witnesses' fees are claimed for days above the actual hearing time (that is, the defendants claim for three days, the plaintiffs allege one day was all that was necessary) they are not claimable for costs.

[59] I leave it to counsel to settle quantum in line with this judgment. I grant leave to refer the issue back to me initially by teleconference if required.

The Boundary Survey

[60] The plaintiffs contend that this is not claimable because it resulted in a third agreed joint survey to remedy difficulties with this earlier survey. It looks like the

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[37] *Russell v Taxation Review Authority* (2000) 14 PRNZ 515 (HC) at 522.
[38] Submissions for the Plaintiffs on Costs at [18](c).
[39] Submissions for the Plaintiffs on Costs at [19].
[40] *Air New Zealand Ltd v Commerce Commission* [2007] 2 NZLR 494 (CA); See also *Tindall v Far North District Council* HC Auckland CIV-2003-488-135, 25 May 2007 at [28].

plaintiffs are alleging that this disbursement was either not "necessary for the conduct of the proceeding" or "reasonable in amount".

[61] Whatever the plaintiffs' stance, it might well be that the boundary survey is a disbursement claimable in costs if it was required to comply with a direction of the court. If that is not the case, then it would need to be approved by the court for the specific purposes of the proceeding.

[62] However, the fact that it might have been poorly conducted and caused an agreed follow up survey goes to the exercise of the court's overriding discretion on how to award costs under r 14.1. I do not think it appropriate to award full costs on a survey that caused problems that were remedied by another survey (which was likely then used as a part of the conduct of proceedings). I award 50 percent under this head.

The Experts' Fees

[63] The defendants claim for all expert's fees. The plaintiffs submit this should be limited to only those who appeared at hearing, and only to the extent they were preparing for the hearing. In part, this submission is correct.

[64] Expert witness fees are recoverable in full as disbursements.[41] However, only if they are either:

(a) Approved by the court for the purposes of the proceedings; or

(b) Specific to or necessary for the conduct of the proceeding and reasonable in amount.

[65] The plaintiffs' submissions cover in detail the Opus invoices and fees. They allege these are not reasonably charged. I agree that as the invoices provide no basis for these charged fees for periods where work was not known to be done, the plaintiffs are correct in their submissions on this point.

[41] *Air New Zealand Ltd v Commerce Commission* [2007] 2 NZLR 494 (CA) at [64].

[66] I invite counsel to confer on the calculation of a 'reasonable' period of time for Mr Read's call out fee.

Scale costs

[67] Both parties accept that scale 2B should apply to this proceeding. The issue is as to which of the claimed headings of costs should be allowed. The defendants dispute that scale costs ought to be limited to the preparation and attendance of the confined issue hearing and opposing summary judgment application.

[68] As the defendants put it, pursuant to 14.2(a) they are entitled to the costs of the proceeding as the plaintiffs lost. This includes judicial conferences and drafting memoranda prior to what the plaintiffs call "giving away all of their other defences".

[69] A limitation of that sort fails to recognise the fact that those steps were incurred as a part of the proceeding and the defendants are entitled to costs on those steps.

Appearances at hearing

[70] The defendants submit that the work done across multiple lawyers for the hearing is a cost saving measure, as the two counsel that appeared have the highest hourly rates of all involved on the defendant's team.

[71] Keeping costs down is obviously a priority and this management of time ought not to be discouraged by refusing to award costs because of this spreading of the work load.

[72] It is not clear to me why it was charged as "appearing" rather than "preparation" though. But that will likely be an internal firm matter.

Research during hearing

[73] The defendants claim it on the basis that it was for closing submissions, and could only be done after witnesses had given all of their evidence. I accept this proposition.

[74] The concessions made by the defendants regarding Ms Hills time spent observing and Mr Hunts delivering documents are properly made.

Amended briefs

[75] The defendants are entitled to the costs of preparing those briefs. This is a standard step in the proceedings and per r 14.2 the defendants are entitled to recovery of that. The suggestion that they merely certified what the plaintiffs drafted is likely not accurate given what the defendants have shown in their submissions at [9].

Costs for costs memorandum

[76] As the plaintiffs rightly point out, costs incurred preparing costs memoranda are not appropriately claimed in the costs claim, as the High Court have held:[42]

> While considerable effort was put into the applications for costs, I make no further award of costs. This process was a necessary incident of the primary hearing process and the submissions for both parties were fairly made.

[77] On that basis costs for costs memoranda should lie where they fall, pursuant to the principles in r 14.2.

Leave granted

[78] I leave it to counsel to settle quantum in line with this judgment. I grant leave to refer matters back to me initially by teleconference if required.

DM Wilson QC
District Court Judge

[42] *Gauld v Waimakariri District Council* [2014] NZHC 956 at [30].