EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT CHRISTCHURCH

CIV-2015–009–000459
[2016] NZDC 12738

BETWEEN	MT ROSKILL CASH 'N CARRY LIMITED TRADING AS GILMOURS MT ROSKILL Plaintiff
AND	CASINO BAR (NO.4) LIMITED TRADING AS CALENDAR GIRLS WHISKEY LOUNGE First Defendant
AND	JACQUI PATRICIA LE PROU Second Defendant

Counsel: S Eglinton for the Plaintiff
No appearance by or for the First Defendant
Second Defendant appears in Person

Judgment: 9 September 2016

JUDGMENT OF JUDGE K G SMITH
[AS TO COSTS]

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[1] On 15 April 2016, judgment was given for the plaintiff against each of the defendants for $27,628.37. Costs were reserved. Agreement on costs has not been reached and the plaintiff and the second defendant have filed memoranda. The first defendant did not participate in the hearing and has not filed a memorandum about the costs that have been claimed.

[2] The plaintiff originally claimed costs of $31,837.19 incurred in bringing this proceeding, plus a further $801, which it has assessed on a category 2 basis, for the preparation of the plaintiff's memorandum containing its claim for costs. The total amount sought against the defendants for costs was $32,638.19. Separately, the

plaintiff claimed disbursements of $4022.72. The amount claimed by the plaintiff was altered in response to my minute to the parties of 3 August 2016, by adjusting the costs to remove GST, following the recent decision by the Court of Appeal in *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC.*[1] The amount now claimed is $28,381.03 on the basis that GST has been excluded from that calculation. The amount claimed for disbursements has also been reduced by taking off the GST so that this claim is now $3498.02.

[3] In my minute, the plaintiff was also asked about whether the tax invoices supporting the claim for costs had actually been paid by it, because they were rendered by the plaintiff's solicitor to a company called Credit Consultants Group Limited. The matter is dealt with below.

[4] What supports the plaintiff's claim for costs is its contract with the first defendant, guaranteed by the second defendant, containing an obligation to pay the costs incurred by the plaintiff in recovery action. That contract was referred to as a trading account in my judgment. Clause 2 of that account reads:

> 2. **Time for payment of invoices**
>
> In the event that any invoice has not been paid in full by the due date, Gilmours may at its option:
>
> 2.1 Charge interest compounding monthly on the unpaid overdue balance at the default rate which Gilmours may be charged by its lenders from time to time;
>
> 2.2 Charge you costs it incurs (including collection costs and legal costs); and
>
> 2.3 Suspend sale or delivery of further goods until the account is paid in full.

[5] The plaintiff relies on clause 2.2 to recover its actual costs, referred to in the statement of claim as indemnity costs. Ms Le Prou does not accept it is appropriate for the Court to order costs on this basis. She points out that my judgment referred to the principal debt plus commission and collection costs, interest and costs at the "prescribed rate". Ms Le Prou relied on this reference to the prescribed rate. In

[1] [2016] NZCA 282.

addition, she submitted that there is no comparison between the circumstances in this case and in the *ANZ Banking Group (NZ) Ltd v Gibson*[2] relied on by the plaintiff.

[6] Ms Le Prou also pointed out that the first defendant did not get the goods that were the subject of the invoices the plaintiff was pursuing which she sees as part of the reason why this case should be looked at differently from the *ANZ* case.

[7] As to the disbursements claimed, Ms Le Prou submitted that they were unreasonably incurred. The bulk of those disbursements relate to expenses for travel and accommodation for the plaintiff's counsel and witnesses incurred in travelling from Wellington and Auckland respectively for a hearing in Christchurch. Ms Le Prou said that the hearing did not need to take place in Christchurch and, in any event, could have been handled by a Christchurch–based lawyer avoiding the additional expense of counsel and witnesses travelling.

Discussion

[8] The ability of the plaintiff to recover costs on a contractual basis has been addressed in a number of cases but most notably in *Black v ASB Bank Ltd*.[3] In *ASB* the Court held as follows:

> [77] As this Court held in *Frater Williams & Co Ltd v Australian Guarantee Corporation (NZ) Ltd*, where there is a contractual right to indemnity costs the question for the Court asked to make an order is: for the necessary steps, are the costs claimed reasonable in amount? That is because r 14.6(1)(b) permits the Court to order payment of costs "reasonably incurred". It follows from the wording of r 14.6(1)(b) that indemnity costs are determined with reference to actual costs, but may be less than the actual costs if the Court considers the actual costs were not reasonably incurred.

[9] While ordinarily costs are at the discretion of the Court under r 14.1 District Courts Rules 2014, r 14.6(4)(e) recognises that the Court may order a party to pay actual costs if the party claiming those costs is entitled to them under a contract.

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[2] [1986] 1 NZLR 556 (CA).
[3] [2012] NZCA 384 at [77].

[10] While *Black v ASB* was referring to the High Court Rules, the principle remains the same under the District Court Rules. In *Black v ASB* the Court of Appeal said:[4]

> [80] Assessing whether the indemnity costs claimed under a contract are reasonable involves the Court making an objective assessment of these matters:
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> (a) what tasks attract a costs indemnity on a proper construction of the contract;
>
> (b) whether the tasks undertaken were those contemplated in the contract;
>
> (c) whether the steps undertaken were reasonably necessary in pursuance of those tasks;
>
> (d) whether the rate at which the steps were charged was reasonable having regard to the principles normally applicable to solicitor/client costs; and
>
> (e) Whether any other principles drawn from the general law of contract would in whole or in part deny the claimant its prima facie right to judgment.

[11] However, there is still room for a robust judgment about whether the actual costs are considered reasonable in all the circumstances.[5]

[12] Clause 2.2 is very broad, allowing the plaintiff to pass on the costs it incurs to the defendants, including collection costs and legal costs. That clause allows the plaintiff to make a claim against the defendants for the actual costs incurred in issuing proceedings against them for the debts represented by the invoices and the ability to do so is not fettered by any other clause in the contract.

[13] Next, it is necessary to assess whether the tasks undertaken were those contemplated by the contract. They were. All of the invoices provided by, or on behalf of, the plaintiff covered steps necessary to ensure this proceeding was prepared, filed and brought to a hearing. That work included interlocutory steps and participation in the trial. There is nothing on the face of the invoices suggesting the steps undertaken were not necessary or, in some other way, ought not to be

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[4] [2012] NZCA 384 at [80].
[5] *Frater Williams & Co Ltd v Australian Guarantee Corporation (NZ) Ltd at 191,887*.

recoverable under this contract. Although Ms Le Prou made submissions opposing the award of costs, she did not dispute the amount claimed by arguing that unnecessary steps were taken, although she did argue that it might have been appropriate to conduct the proceedings somewhere other than Christchurch. That submission is addressed below.

[14] There is nothing in the attendances apparent from those fee notes to suggest that work undertaken on behalf of the plaintiff was not properly connected with the recovery action being taken. I conclude the tasks undertaken were those contemplated by the contract.

[15] No submissions were made about the rate at which counsel's fees were charged. The hourly rate for plaintiff's counsel was $295 (presumably plus GST). There is no reason to think that such a rate is inappropriate for this work even though the amount sought to be recovered was reasonably modest. There is no basis on which I could say that the amount charged per hour was unreasonable.

[16] That leaves for consideration whether there is any principle of general law or contract to deny the whole, or any part, of costs claimed. There is no principle that would apply to either extinguish or reduce the costs claimed.

[17] Finally, I have considered more widely whether the claim is reasonable.

[18] Earlier, I mentioned my minute of 3 August 2016 in which several matters were raised. The issues were the appropriateness of GST being claimed, why the tax invoices were addressed to Credit Consultants Group NZ Limited and whether the plaintiff had, in fact, paid those invoices; why a discount on one of the fee notes had been provided, and whether a change in representation may have led to an unnecessary duplication of costs. The plaintiff responded to that minute in a memorandum of 9 August 2016. Neither of the defendants have done so. The plaintiff's memorandum advised that, if actual costs were to be awarded no GST ought to be included. That is because the plaintiff has been able to claim the GST content of each of those invoices as a registered GST tax payer. As to the identity of the party invoiced for those services, I have been advised, and accept, that Credit

Consultants Group NZ Limited was the plaintiff's agent for the purposes of initiating the debt recovery proceeding and in that capacity was able to instruct counsel. The plaintiff's memorandum informed me that the plaintiff has paid for those services and, as a result, in terms of clause 2.2 of the trading account, is entitled to seek costs on that basis.

[19] As to the discount that was allowed I was advised that a judgement call was made in fixing the appropriate fee to reduce the amount to reach what the plaintiff's counsel considered to be an appropriate fee. Obviously, counsel was entitled to assess what was considered to be a fair and reasonable fee in the circumstances and to provide a discount on what might otherwise have been charged as a result. That discount does not raise any concern about the appropriateness of the amount now claimed. In any event, that credit is being passed on to the defendants. The explanation provided is understandable.

[20] In response to my question about whether there had been a duplication of expenses, when counsel changed, I have been advised that no additional cost was imposed on the plaintiff as a result.

[21] Ms Le Prou made submissions about whether my decision had already addressed the question of costs by referring to a prescribed rate and whether those costs were reasonable because Christchurch–based counsel could have been retained. I do not agree with Ms Le Prou that costs were addressed in my judgment in a way precluding the present application. While my use of the phrase prescribed rate was unfortunate, the judgment provided for costs to be reserved and no amount was fixed or made payable at that time.

[22] I have some sympathy for Ms Le Prou's submission that the case could have been conducted by Christchurch–based counsel or, alternatively, the proceeding might have been transferred to another more convenient centre such as Auckland where she lives. However, neither of these points assist Ms Le Prou in resisting a claim for costs arising under the contract she signed or in showing that the actual costs incurred were unreasonable and ought to be reduced as a result.

[23] None of the parties applied to transfer the proceeding to Auckland or elsewhere. The plaintiff would have incurred costs in briefing Christchurch-based counsel and whether or not that would have led to a material saving is speculation. Once the decision was made to continue in Christchurch, and Ms Le Prou chose to exercise her right to cross–examine the plaintiff's witnesses, it was inevitable that the plaintiff's counsel and the witnesses needed to be present.

[24] The amount claimed for costs are reasonable and falls within clause 2.2 above. There is no basis to either decline that award or to reduce it.

[25] I am satisfied that the plaintiff has established a contractual right to actual costs, described in the statement of claim as indemnity costs, pursuant to clause 2.2. There is nothing in the fee notes to suggest that the actual costs are unreasonable or, in the exercise of a robust judgement, should be adjusted downwards. There is no public policy reason to deprive the plaintiff of its contractual entitlement to costs.

[26] The plaintiff is entitled to an award of costs against the first and second defendants of $28,381.03, together with costs for the preparation of the memorandum of costs and sealing judgment of $1157, and disbursements of $3498.02.

K G Smith
District Court Judge