EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT MASTERTON

CIV-2014-035-000113
[2016] NZDC 17707

BETWEEN	RICHARD ALEXANDER VROLIJK Plaintiff
AND	DOMINIC STEWART, GRAEME BAYLISS AND CRAIG CLOUSTON (TRADING AS SELLAR AND SELLAR) Defendants

Hearing: On the papers

Appearances: J H C Waugh for the Plaintiff
N S P Laing for the Defendants

Judgment: 21 September 2016

JUDGMENT ON COSTS OF JUDGE K G SMITH

Introduction

[1] On 7 July 2016, judgment was granted to the plaintiff against the defendants arising from the way in which they operated a bank account in his name at the Wairarapa Building Society. The purpose of that bank account was to ensure that the plaintiff set aside money sufficient to meet his tax obligations, which were assessed by the defendants and paid on his behalf to the Inland Revenue Department.

[2] The cause of the litigation was unauthorised withdrawals from that bank account by the plaintiff's now former wife.

[3] The trial was conducted over two days and the Court heard from Mr Vrolijk (the plaintiff), Mr Clouston, who is now regrettably deceased, a staff member of the defendant, and from Ms Rimene–Vrolijk.

[4] The plaintiff now seeks costs. His first application is for indemnity costs and if they are not granted he is seeking increased costs or costs on a category 2 band B basis.

[5] In a schedule to the plaintiff's submissions the amount sought for indemnity costs is stated as $44,527.88. In the same schedule, costs have been calculated as if they might be awarded on a 2B basis or on that basis with a 50 percent uplift. On a 2B scale basis, costs for the attendances listed by counsel would be $26,255. On the same 2B basis, but with a 50 percent uplift, those costs are calculated as being $39,382.50.

[6] The defendants acknowledge that costs should follow the event and that an award ought to be made in the plaintiff's favour against them. But they dispute his claim for indemnity costs or for increased costs. Instead, the defendants argue that costs should be either on the basis of category 2A, or possibly category 2B, although an invitation is extended not to allow for three of five judicial conferences claimed by the plaintiff.

Legal principles

[7] Costs are provided for in Part 14 District Court Rules 2014. Rule 14.1 provides that costs are always at the discretion of the Court. The principles to be applied are stated in r 14.2 as follows:

> **14.2 Principles applying to determination of costs**
>
> The following general principles apply to the determination of costs:
>
> (a) the party who fails with respect to a proceeding or an interlocutory application should pay costs to the party who succeeds:
>
> (b) an award of costs should reflect the complexity and significance of the proceeding:
>
> (c) costs should be assessed by applying the appropriate daily recovery rate to the time considered reasonable for each step reasonably required in relation to the proceeding or interlocutory application:
>
> (d) an appropriate daily recovery rate should normally be two-thirds of the daily rate considered reasonable in relation to the proceeding or interlocutory application:

(e) what is an appropriate daily recovery rate and what is a reasonable time should not depend on the skill or experience of the solicitor or counsel involved or on the time actually spent by the solicitor or counsel involved or on the costs actually incurred by the party claiming costs:

(f) an award of costs should not exceed the costs incurred by the party claiming costs:

(g) so far as possible the determination of costs should be predictable and expeditious.

[8] As to the categorisation of proceedings, found in r 14.3, category 1 is for those proceedings of a straight–forward nature able to be conducted by counsel considered junior. The same rule provides that category 2 proceedings are those that are considered to be of average complexity requiring counsel of skill and experience considered average. The final category provided in the Rules is category 3, for proceedings that because of their complexity or significance require counsel to have special skill and experience.

[9] The time specified for compliance with r 14.2(c) is in Schedule 4. The determination of what is a reasonable time to assess the steps referred to in that Schedule is addressed by r 14.5(2) which provides:

14.5 Determination of reasonable time

…

(2) A determination of what is a reasonable time for a step in a proceeding under subclause (1) must be made by reference—

(a) to band A, if a comparatively small amount of time for the particular step is considered reasonable; or

(b) to band B, if a normal amount of time for the particular step is considered reasonable; or

(c) to band C, if a comparatively large amount of time is considered reasonable.

[10] Increased costs and indemnity costs are also addressed in r 14.6(1)(a) and (b). Those Rules allow the Court to consider ordering increased costs over and above those that would otherwise be payable under the Rules or for the costs payable to be actual costs, disbursements, and witness expenses reasonably incurred. In r 14.6(1)(b) the actual costs are described as indemnity costs.

[11] Under r 14.6(4)(a) – (f) inclusive, the Court may order the payment of indemnity costs in certain circumstances. Under 14.6(4)(a), exposure to indemnity costs arises where the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing or defending a proceeding or a step in a proceeding.

[12] Rules 14(4)(b) – (e) inclusive do not apply. The remaining rule to consider is r 14.4(4)(f) which is a provision allowing the Court to take into account any other reason that might exist to justify the making of an order for indemnity costs.

[13] Rule 14.6(3) deals with increased costs. There are two circumstances where costs might be increased above the scale that might otherwise apply. The first does not apply here; that is, whether the nature of the proceeding, or a step taken in a proceeding, required time to be taken by the party claiming those costs substantially exceeding what is allocated under band C. However, the alternative that is relied on by the plaintiff for seeking an increase in costs is in r 14.6(3)(b); that the defendant has contributed unnecessarily to the time or expense of the proceeding, or a step of the proceeding.

[14] Rule 14.6(3)(b)(i) – (v) provides:

> **14.6 Increased costs and indemnity costs**
>
> **…**
>
> (3) The court may order a party to pay increased costs if—
>
> (a) the nature of the proceeding or the step in the proceeding is such that the time required by the party claiming costs would substantially exceed the time allocated under band C; or
>
> (b) the party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in the proceeding by—
>
> (i) failing to comply with these rules or a direction of the court; or
>
> (ii) taking or pursuing an unnecessary step or an argument that lacks merit; or

(iii) failing, without reasonable justification, to admit facts, evidence, or documents or accept a legal argument; or

(iv) failing, without reasonable justification, to comply with an order for discovery, a notice for further particulars, a notice for interrogatories, or any other similar requirement under these rules; or

(v) failing, without reasonable justification, to accept an offer of settlement, whether in the form of an offer under rule 14.10 or some other offer to settle or dispose of the proceeding; or

…

Claim for indemnity costs

[15] The plaintiff drew on the principles from *Bradbury v Westpac Banking Corp*[1] to support the claim for indemnity costs. From that case, the plaintiff's submissions were that the relevant circumstances justifying such an award were:

(a) …

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

(c) Commencing or continuing a proceeding for some ulterior motive;

(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 – essentially the "hopeless case" situation.

[16] Most of the plaintiff's submissions focussed on what was referred to as the "hopeless case" situation. The plaintiff characterised the defendant's case as hopeless as follows:

(a) Asserting they could lawfully take instruction from the plaintiff's then wife based on the form of authority that had been signed by him;

[1] *Bradbury v Westpac Banking Corp* [2009] NZCA 234, [2009] NZLR 400.

(b) Raising affirmative defences of acquiescence and estoppel, each bearing a reverse onus without evidential support; and

(c) Arguing that the plaintiff had suffered no loss because the funds in the Wairarapa Building Society may have been matrimonial property.

[17] There is also an argument that the defendants made an application for security of costs that was likewise hopeless because it was contrary to what were asserted by the plaintiff to be "known facts".

[18] The defendants accept that the District Court Rules allow for the possibility of indemnity costs, in the exercise of a discretion, provided appropriate justification exists to award them. However, they argue that the circumstances contemplated by the Court of Appeal in *Bradbury* require much more than can be gleaned from this case, even on a generous reading of the facts from the plaintiff's perspective. The defendants expressed this view by saying that the threshold to be reached as a result of the *Bradbury* decision is a very high one, saying that their behaviour in defending the proceedings does not approach that threshold.

[19] In *Bradbury,* the Court of Appeal said in relation to indemnity costs:[2]

> Indemnity costs, which depart from the predictability of the Rules Committee's regime, are exceptional and require exceptionally bad behaviour. That is why to justify an order for such costs the misconduct must be "flagrant".

[20] In *Bradbury,* the flagrant behaviour was pursuing a hopeless case and then abandoning causes of action at trial, using veiled threats to reveal confidential information gained through the solicitor/client relationship for the improper purpose of forcing the bank into settlement, and by extracting a financial windfall which would have been an abuse of the processes of the Court.

[21] Based on that analysis of *Bradbury*, the defendants argue that their decision to defend the plaintiff's claim should not be characterised as flagrant or in any other way justifying an indemnity award against them.

---

[2] At [28].

[22] In support of that submission they drew on a comment by Cooke P in *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* as follows:[3]

> [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.

[23] In response to the plaintiff's submissions that their claim was hopeless, the defendants also point out that r 14.6(4)(a) refers to the party having acted vexatiously, frivolously, improperly, or unnecessarily in defending a proceeding. They submit their behaviour in defending the proceeding could not be characterised as vexatious, frivolous, improper or unnecessary especially when the outcome relied on factual findings made about the evidence given by Mr Vrolijk and Ms Rimene-Vrolijk. In other words the defences they raised were tenable until such time as some of the evidence they relied on to raise them fell away because of adverse findings about Ms Rimene–Vrolijk's evidence.

[24] I do not agree with the plaintiff that it is possible to characterise the defendants' case as hopeless and therefore to have been pursued in a way exposing them to indemnity costs. While the arguments they advanced about the form of authority providing a mandate to accept instructions from Ms Rimene–Vrolijk was always fraught with difficulty, and unlikely to succeed, the same cannot be said about the defences of acquiescence and estoppel. From the defendants' perspective they had sent Mr Vrolijk a substantial number of statements explaining the operation of his Wairarapa Building Society account over time from which it ought to have been apparent to him that withdrawals were being made for reasons other than paying his tax or Sellar and Sellar professional fees. In those circumstances, even if there had been an initial breach of duty in allowing the withdrawals to be made, the defendants were entitled to explore with the plaintiff that at all relevant times for this litigation he knew, and understood, how the account was being operated and either expressly or impliedly agreed. The defences based on acquiescence and estoppel

---

[3] *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1991] 3 NZLR 457 (CA) at 460.

were plausible and were responsibly pursued. It only fell away when Ms Rimene-Vrolijk's evidence was tested and found wanting.

[25] The defendants' unsuccessful arguments about the Wairarapa Building Society account being matrimonial property, and the equally unsuccessful application for security for costs, does not change this assessment. The information available to the defendants was sufficient to consider an application appropriate; Mr Vrolijk spent a considerable amount of time overseas working and the extent of his assets in New Zealand was unknown to them.

[26] The fact that a party to proceedings may have a number of issues to press, some of which have a greater chance of success than others, is not sufficient to justify indemnity costs. Similarly, the argument that the application for security for costs was unsuccessful is insufficient to tip the scales in favour of indemnity.

[27] For completeness, I am not satisfied that there was any evidence suggesting the defendants had an ulterior motive for choosing to defend the proceedings or adopted as tactics in doing so any behaviour that was egregious or otherwise merits a response by way of indemnity costs. The plaintiff refers to delaying tactics and to several attempts to adjourn the proceeding. What lies behind these submissions is either an assertion that an insurer was deliberately attempting to exhaust his capacity to litigate, or at least to hope that the litigation would otherwise falter. That allegation is rejected by the defendants. There is no support for it, and the information available to me just suggests robust litigation in which both the plaintiff and defendants were attempting to get the best position possible for themselves in the lead up to trial.

[28] I am satisfied there are no circumstances justifying the award of indemnity costs to the plaintiff.

Increased costs

[29] The defendant relies on the same information advanced in support of indemnity costs to seek increased costs. In this category, one matter that has been

given substantial weight in submissions is whether it was appropriate for the defendants to reject settlement proposals made by the plaintiff.

[30] In support of the claim for increased costs, the plaintiff refers also to remarks from *Bradbury* (supra). What is said to support increased costs is an assertion that the defendants have failed to act reasonably. That is, pursuing a "hopeless" case, including an unreasonable refusal to settle. Copies of correspondence proposing settlement by the plaintiff were provided with the memoranda.

[31] The plaintiff submits that rejecting his settlement proposals was unreasonable on the part of the defendants causing him to be put to the costs of litigation. I do not agree.

[32] Each of the settlement offers made by the plaintiff required the defendants to accept that they were indebted to him for the whole of the amount removed from his Building Society account during the claim period plus costs. The plaintiff was prepared to forego interest. That position never altered. The plaintiff never offered to settle in a way that took account of the litigation risk faced by both parties.

[33] By way of contrast, the defendants did make a settlement proposal although for less than the plaintiff's claim. Implicit in the defendants' settlement proposal was an acceptance of litigation risk and an attempt to apportion that between them in some way or other. The plaintiff was entitled to reject that offer and was ultimately vindicated in doing so, but it does not follow that the costs he is to receive should be increased.

[34] The plaintiff has argued that increased costs might be ordered where there has been a failure by the defendant to act reasonably (relying on *Paper Reclaim Ltd v Aotearoa International Ltd*).[4] In that situation, the issue would become the extent to which any failure to act reasonably contributed to the time or expense of the proceeding.

[4] *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] 3 NZLR 188.

[35] The submission is that the defendants demonstrated a consistent and determined failure to act reasonably and therefore increased the time and expense of the proceeding.

[36] I do not accept that submission. Essentially, it is a submission only available to the plaintiff with the benefit of hindsight; put another way, the plaintiff is only able to say that the outcome was inevitable because he has been successful. Immediately before the start of the trial, the plaintiff could not have been so confident of his prospects of success, especially given the number of statements posted to his home disclosing the way in which the account had operated.

[37] While it is regrettable that a number of efforts were made by the defendants to adjourn the proceeding, I am not persuaded that such a factor in and of itself justifies an uplift in costs.

[38] There is no basis for an increase above scale.

Scale costs

[39] Calculated on a 2B scale, the plaintiff has calculated each of the steps in the proceeding. The amount calculated totals $26,255. The defendants say that it is not appropriate to allow for five judicial conferences in that assessment because they relate to the plaintiff's refusal to produce additional relevant documents such as emails between him and Ms Rimene–Vrolijk.

[40] I do not agree that it is appropriate to set aside attendances at all of those judicial conferences. The defendants argue that recourse to the Court should not have been required but I think that assessment is also one made with the benefit of hindsight.

[41] The final issue to address is whether the categorisation should be based on 2A or 2B. The nature of the issues addressed over the entire proceeding, particularly the difficult areas of law relating to acquiescence and estoppel, I think justify a category 2B assessment.

[42] Finally, there is no disagreement between the parties as to the amount for disbursement.

Outcome

[43] The defendants are ordered to pay to the plaintiff the sum of $26,255 calculated on a category 2B basis for the costs of, and incidental to, this proceeding. They are further ordered to pay disbursements to the plaintiff of $3692.88.

K G Smith
District Court Judge