IN THE DISTRICT COURT
AT WHANGANUI

I TE KŌTI-Ā-ROHE
KI WHANGANUI

CIV-2017-083-000188
[2018] NZDC 17275

BETWEEN	OLD TOWN PROPERTIES LIMITED Plaintiff
AND	RICHARD AUSTIN and GARY SPOONER (as Partners in the firm Treadwell Gordon) Defendants

Hearing	On the Papers
Appearances:	Mr J H Waugh for the Plaintiff Mr F Barton and Ms R Barton for the Defendants
Judgment:	24 August 2018

DECISION OF JUDGE C S BLACKIE AS TO COSTS

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[1] In this matter, the plaintiff filed proceedings against the defendants in the sum of $41,172, being losses arising out of the defendants' negligence in failing to draft an easement instrument in accordance with the plaintiff's instructions. The defendants, in turn, made an application to the Court to strike-out the proceedings on the basis that the claim was out of time under the Limitation Act 1950. The application was heard on 22 May 2018 in the District Court at Whanganui and my decision to grant the application was delivered on 30 May 2018.

[2] At the conclusion of my Judgment, I made some observations over costs and invited counsel to make submissions.

[3] Submissions by both parties are now to hand.

Principles

[4] The District Court Rules provide the Court with a general discretion in relation to costs as follows:

> **14.1 Costs at Discretion of Court**
>
> (1) All matters are at the discretion of the Court if they relate to costs –
>
> (a) of a proceeding; or
>
> (b) incidental to a proceeding; or
>
> (c) of a step in a proceeding.
>
> (2) Rules 14.2 and 14.10 are subject to Clause (1).
>
> (3) The provision of any Act overrides sub-clauses (1) and (2).

[5] This discretion must be exercised judicially, taking into account all relevant considerations, including guidance provided throughout Part 14 of the Rules. In *Manukau Golf Club Inc v Shoye Venture Limited*, [2013] NZSC 109 at [7] - [8] Chambers J observed:

> "[7] Although Rule 53 of the Court of Appeal (Civil) Rules, like Rule 14.1 of the High Court Rules, renders costs' decisions discretionary, a discretion has never been unfettered and must be exercised judicially. Particularly since detailed costs regimes were introduced in the High Court (in 2000) and the Court of Appeal (2008), the general discretion has been held to be qualified by this specific Rule. As the Court of Appeal said in *Mansfield Dry Cleaners Limited v Quinny's Dry Cleaning (Dintce Dry Cleaning Upper Hutt Ltd)*, the overall structure of the costs regime now means "there is a strong implication that a Court is to apply the regime in the absence of some reason to the contrary.
>
> [8] A fundamental principle applying to the determination of costs in all the general Courts in New Zealand is that costs follow the event. Because of dealing with a Court of Appeal costs' decision, we cite the principle as set out in Rule 53A(a) of the Court of Appeal (Civil) Rules but the same principle applies to costs in the District Court, the High Court and this Court …"

[6] Rule 14.2 contains seven factors which must be considered in a costs decision;

14.2 Principles apply 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 the costs of the party who succeeds:

(b) 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.

[7] Whilst there is a general principle under s 14.2(a) that costs are paid by the unsuccessful party, the Court may decline to award costs to a successful party under Rule 14.7 which provides as follows:

14.7 Refusal of or reduction in costs

Despite Rules 14.2 to 14.5, the Court may refuse to make an order for costs or reduce the costs otherwise payable under those Rules if –

(a) The nature of the proceeding or the step in a proceeding was such that the time required by the party claiming costs would have been substantially less than the time allocated under Band A; or

(b) The property or interests at stake in the proceeding were of exceptionally low value; or

(c) The issues at stake were of little significance; or

(d) Although the party claiming costs had succeeded overall, that party has failed in relation to a cause of action or issue that significantly increased the costs of the party opposing costs; or

(e) The party claiming costs has contributed unnecessarily to the time or expense of the proceeding or the step in the proceeding by –

(i) Failure to comply with these Rules or a direction of the Court; or

(ii) Taking or pursuing an unnecessary step or 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 proceedings; or

(f) Some other reason exists that justifies the Court for refusing costs or reducing costs despite the principle that the determination of costs should be predictable and expeditious.

Defendants' Submissions

[8] Counsel for the defendants submits that the defendants are entitled to costs of $5,429 on a Category 2B basis and disbursements of $325 in accordance with District Court Rule 14.12. In exercising its discretion to order costs, counsel has urged the Court to consider correspondence between both counsel negotiating settlement of the matter, including:

- A plaintiff offered to settle for $15,000 (letter dated 15 April 2016);
- Defendants counter-offered to settle for $10,000 (letter dated 7 April 2016);
- Plaintiff issued proceedings, defendants communicated to the plaintiff that the claim was statute-barred and reiterated the $10,000 counter-offer (letter dated 3 August 2017);
- Plaintiff failed to accept that the claim was statute-barred, declined the $10,000 counter-offer and suggested the parties meet to discuss (email dated 9 August 2017);
- Defendants declined to meet, reiterated confidence that the claim was statute-barred and extended its time for acceptance of the $10,000 in a final offer to settle (email dated 10 August 2017);
- The plaintiff did not accept the settlement offer at any stage.

[9] Counsel for the defendants submits that the plaintiff was not reasonably justified in failing to accept the settlement offer.

[10] Counsel acknowledges my statement "sometimes the law gets in the way of justice" (Judgment 30 May 2018) and submits the defendants' attempts to settle demonstrated recognition that there was an issue to be addressed. Counsel further submits that acceptance of that offer would have gone a long way to address the plaintiff's concerns and achieve a sense of justice. Notably, the defendants brought the Limitation Act 1950 provisions to the plaintiff, who chose to proceed in any event. Consequently, counsel submits that the defendants had been put to considerable expense in its defence of the proceeding.

[11] Finally, counsel underscores the Court's recognition of the importance of upholding the integrity of the costs regime and contends that the Court ought to signal its disapproval of the plaintiff's failure to accept the settlement offer.

The Plaintiff's Submissions

[12] Counsel for the plaintiff submits that the question of costs should be dealt with under Rule 14.7(f), that the defendants' application should be declined and costs should lie where they fall.

[13] In my Judgment of 30 May 2018, I made the observation that but for the provisions of the Limitation Act 1950, which has since been repealed, the Court would likely have found merit in the plaintiff's otherwise seemingly strong case. On that basis, it is now submitted by the plaintiff that the defendants have managed to avoid liability to what was clearly a negligent act, the avoidance facilitated by legislation that has since been appealed given, in the plaintiff's submission, the injustice that all too often resulted from the Act's application. The further submission is made that had the negligent act occurred just a couple of years later, the plaintiff may well have been able to recover the significant financial loss that resulted from the alleged negligence.

[14] In response to the defendants' submissions in relation to their negotiations to settle and the plaintiff's refusal of their offer, counsel for the plaintiff highlights that the defendant declined the plaintiff's suggestion to meet to discuss settlement off the record without prejudice and states that the $10,000 offer was not accepted as there was no admission of guilt, so the decision was ultimately made to proceed in the hope that justice would prevail.

Analysis and Case Law

[15] Two cases are similar in principle to the case in hand. Both were considered as to their facts in my Judgment of 30 May.

- *Thom v Davys Burton* [2008] NZSC 65 – the plaintiff received negligent advice in relation to an agreement under s 21 of the Matrimonial Property Act

resulting in the agreement being void and unenforceable. Notably, the breach of duty was not in contention, the issue before the Supreme Court was when the loss arose. The Supreme Court held that the proceedings were out of time under the Limitation Act 1950. The appellant was ordered to pay to the respondent $15,000 in costs, plus reasonable disbursements.

- *Potter v Blue Wallace Surveyors Ltd* [2012] DCR 410 – the plaintiff filed proceedings against the defendants for breach of duty of care in creating, preparing plans and easements for the subdivision of properties at McFarlane Street Hamilton. The easements were for the purposes of various proceedings being able to share a right-of-way and access to a public road. It later transpired that the easement was defective when the plaintiff endeavoured to sell one of the properties. The Court held that the claim was out of time and a strike-out application was successful. In a later decision in respect of costs, Judge Spiller found that the plaintiffs, as the party who failed, were required to pay the costs of the first and second defendants, as the parties who succeeded. Judge Spiller considered the proceedings were of average complexity and that and inordinate amount of time was required for the steps in the proceedings. He awarded costs on a 2B basis.

[16] Clearly, in the two cases which are referred to, where the unsuccessful parties failed due to being time-barred, costs were nevertheless awarded in the usual manner, that is to the successful party in the proceeding.

[17] Given the reliance placed on the merit of the plaintiff's claim, had the Limitation Act 1950 not applied:

- *Singh v Auckland Goldline Co-operative Taxi Society Ltd* [2018] NZHC 1673, 13. The plaintiffs brought an application for judicial review seeking to challenge various decisions made by the defendant, an incorporated taxi society. The defendant sought to strike-out the plaintiff's amended statement of claim. Shortly after the hearing commenced, the strike-out application resolved on the basis that it would be withdrawn following the filing of an amended statement of claim. The plaintiff sought costs and disbursements on

> the unsuccessful strike-out application. The Court held that whilst the plaintiffs were presumptively entitled to costs, on the strike-out application, amongst other reasons, had the agreement not been reached, the strike-out application may, nevertheless, have succeeded in part. The Court was, therefore, satisfied that costs should lie where they fall.

[18] The case demonstrates the Court's ability to assess the success, or otherwise, of a claim that was not actually determined by the Court when considering a costs application.

[19] It is inescapable that the general starting point applicable for the determination of costs is that the party who fails in respect of a proceedings should pay the costs of the party who succeeds. There needs to be a "good reason" for departing from this general principle. As said by Chambers J in *Manukau Golf*, discretion has never been unfettered and must be exercised judicially; fairness is not assessed according to private opinion.

[20] The grounds relied upon by the plaintiff do not fall within Rule 14.7(a to (e), so the Court must be able to find "some other reason" under sub-Rule (f) before the normal Rule that the party who failed should pay costs can be displaced. The main ground upon which the plaintiff seeks to rely is that the defendants are relying on legislation which has since been repealed and managed to avoid liability in what would otherwise have been a strong proceeding against them. While *Singh v Auckland Goldline Co-operative Taxi Society Ltd* shows that the potential success of a claim that was not determined can be assessed when considering costs, is just one of a broad range of facts that the Court must take into account. Furthermore, *Singh* can be distinguished on the basis that the failure of the strike-out in that case was due to a withdrawal of the application, not a statute bar. In the case currently before the Court, the provisions of the Limitation Act applied and the defendants were entitled to rely on them as so enacted.

[21] Further, I cannot ignore the background. Legal proceedings was not the only option available to the plaintiff; the defendant made a settlement offer, duly informed the plaintiff that their claim was statute-barred and would fail if taken to Court, but the

plaintiff nevertheless continued with the legal proceedings. Although I can express some judicial sympathy to the plaintiff, having considered the issue of costs in the light of submissions filed, I am of the view that costs should be imposed in the usual manner, that is the plaintiff, as a party who failed, should be ordered to pay the costs in respect of the defendants who succeeded.

[22] The costs sought by the defendants are not unreasonable. There will be an order accordingly, fixing costs as set out in paragraph [13] of the defendants' memorandum dated 14 June 2018.

C S Blackie
District Court Judge