

**IN THE DISTRICT COURT
AT WAITAKERE**

**CIV-2014-090-001378
[2017] NZDC 4473**

BETWEEN	G A NIGHTINGALE AND L M NIGHTINGALE Plaintiffs
AND	B P JAMES AND W R JAMES Defendants
AND	LOYAL REALTY LIMITED First Third Party
AND	LYNDSAY KERR Second Third Party

Costs	14 December 2016 (Plaintiff)
Submissions:	19 December 2016 (First and Second Third Party) No submission from or on behalf of the Defendants
Judgment:	6 March 2017

COSTS DECISION OF JUDGE B A GIBSON

[1] On 23 November 2016 I gave judgment in this claim in favour of the plaintiffs and the first and second third parties. I invited the plaintiffs and third parties to submit memoranda concerning costs and disbursements within 21 days of the date of the decision.

[2] The plaintiffs' memorandum was filed on 14 December 2016 and seeks an increased costs award in the sum of \$31,372.50 representing a 50% uplift from scale costs under 2B of the District Courts Rules 2014, amounting to \$20,915 together with disbursements of \$4,186.82.

[3] The first and second third parties seek indemnity costs of \$54,604 or in the alternative increased costs with a 50% uplift, leading to an award of \$48,327.

[4] On the day following release of the judgment on 23 November 2016 the defendant, Mrs James, advised the Court that her solicitors were no longer instructed. No change of address for service or of representation has been filed and, although the substantive matter was resolved by the judgment of 23 November 2016, a withdrawal of solicitor under Rule 5.4(4) of the District Courts Rules 2014 has not been filed notwithstanding that the proceedings are only finally concluded on resolution of the costs issue.

[5] On 23 January 2017 a Minute was issued by me inviting the defendants to file a memorandum in reply to the costs memoranda of the successful parties and to do so within 14 days of the date of that Minute. A reply from the defendants to the plaintiffs and third parties' memoranda has not been received.

[6] I am satisfied that the plaintiffs' claim for increased costs by an uplift of 50% from scale costs and in terms of the schedule attached to counsel's memorandum of 14 December 2016 is justified. Rule 14.6(1) allows the Court to make an order increasing costs otherwise payable under the Rules, and Rule 14(3)(b) enables the order to be made where the time or expense of the proceeding has been unnecessarily contributed to by the taking or pursuing of an unnecessary step or an argument that lacks merit.

[7] The defendant's argument that a concluded agreement for the sale of the plaintiffs' property was rejected by me as was the proposition that a set of the defendant's initials evidencing the concluded agreement was not theirs. In correspondence produced at trial the defendants alleged the second third party had placed their initials on a copy of the agreement, a proposition I rejected, and it appears they had obtained a number of reports from expert handwriting analyses in the course of the proceedings, although none were produced by them at trial. The underlying proposition of their defence was one of fraud although by the time of trial the amended statement of defence did not assert that against the second third party, merely that someone else had placed the defendants' initials on the agreement. The only logical conclusion from that argument was that it must have been the second third party, a conclusion which I had little hesitation in rejecting on the evidence available to me.

[8] Consequently I am satisfied that the defendants pursued an unnecessary argument that wholly lacked merit. Therefore the plaintiffs' claim for increased costs is appropriate and meets the criteria set out in the Rules and also on the approach in *Holdfast NZ Limited v Selleys Pty Limited*¹ and accordingly the plaintiffs are awarded costs of \$31,372.50 against the defendants together with disbursements of \$4,186.82 as set out in the schedule attached to counsel's submission of 14 December 2016.

[9] The first and second third parties seek firstly indemnity costs of \$54,604. A schedule of the invoices reflecting that claim is set out in counsel's submission of 19 December 2016 but copies of the actual invoices and underlying timesheets have not been supplied. It is well settled that the Court is entitled to see these before determining any application for indemnity cost as it has an obligation to ensure that the costs claimed are fair and reasonable.

[10] In the alternative the first and second third parties seek increased costs of 50% over scale. The appropriate scale is 2B of the District Courts Rules 2014.

[11] I am satisfied the first and second third party are entitled to an increased costs award by an uplift of 50% from scale costs for the reason given earlier in this decision in relation to the plaintiffs' claim for increased costs. There is, however, a difficulty in quantifying the award as the first and second third parties claim \$48,327 as representing a 50% uplift from scale arrive at a total of \$48,327, whereas the plaintiffs' 50% uplift from scale leads to a total of \$31,372.

[12] The difference appears to be brought about because the plaintiffs have not claimed under 17.1 of Schedule 4 of the District Courts Rules 2014. Accordingly, should the plaintiffs wish to do so, their claim for costs can be amended to include a claim for this step with an uplift of 50%.

¹ (2005) 17 PRNZ 897

[13] Consequently, for the foregoing reasons, the first and second third parties' claim for increased costs in the sum of \$48,327 is allowed.

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B A Gibson, DCJ