IN THE DISTRICT COURT
AT ROTORUA

CIV-2013-063-000478
[2017] NZDC 19595

BETWEEN	MACDOUGALL BUILDERS LIMITED Plaintiff
AND	DAVID BARRY SWINBURNE Defendant

Hearing:	On the papers
Counsel	F Wood for the Plaintiff G McArthur for the Defendant
Judgment:	1 September 2017 at 12.00 noon

JUDGMENT OF JUDGE R L B SPEAR
[As to Costs]

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[1] In a reserved decision issued on 29 April 2016, judgment was entered for the plaintiff against the defendant in the sum of $34,115.45 together with interest of $5,342.48, calculated pursuant to s 62B District Courts Act 1947 from the date the proceeding was commenced. Costs were reserved for further submissions from counsel. The complicating feature in respect of costs was primarily that the defendant received a grant of legal aid in respect of the proceeding on the second day of the hearing.

[2] Agreement was reached with counsel that, for the period for which legal aid does not apply, scale 2B costs are applicable.[1]

[3] The liability of the defendant for the period when he was legally aided is to be determined having regard to s 45 of the Legal Services Act 2011.

[1] Minute of 16 November 2016.

45 Liability of aided person for costs

(1) If an aided person receives legal aid for civil proceedings, that person's liability under an order for costs made against him or her with respect to the proceedings must not exceed an amount (if any) that is reasonable for the aided person to pay having regard to all the circumstances, including the means of all the parties and their conduct in connection with the dispute.

(2) No order for costs may be made against an aided person in a civil proceeding unless the court is satisfied that there are exceptional circumstances.

(3) In determining whether there are exceptional circumstances under subsection (2), the court may take account of, but is not limited to, the following conduct by the aided person:

(a) any conduct that causes the other party to incur unnecessary cost:

(b) any failure to comply with the procedural rules and orders of the court:

(c) any misleading or deceitful conduct:

(d) any unreasonable pursuit of 1 or more issues on which the aided person fails:

(e) any unreasonable refusal to negotiate a settlement or participate in alternative dispute resolution:

(f) any other conduct that abuses the processes of the court.

(4) Any order for costs made against the aided person must specify the amount that the person would have been ordered to pay if this section had not affected that person's liability.

(5) If, because of this section, no order for costs is made against the aided person, an order may be made specifying what order for costs would have been made against that person with respect to the proceedings if this section had not affected that person's liability.

(6) If an order for costs is made against a next friend or guardian ad litem of an aided person who is a minor or is mentally disordered, then—

(a) that next friend or guardian ad litem has the benefit of this section; and

(b) the means of the next friend or guardian ad litem are taken as being the means of the aided person.

[4] One of the issues that arises in this case is whether this "immunity" against costs for the defendant should apply for the entire proceedings or whether it should be from the time of application for legal aid, the time that the plaintiff was informed that

legal aid had been applied for, or the time of the grant of legal aid which, as mentioned, was on the second day of the hearing on the substantive claim. Whatever the outcome in respect of that consideration, it is accepted by the plaintiff that s 45(2) requires the Court to be satisfied that there are exceptional circumstances of the type set out in s 45(3) before an award of costs is made against a legally aided person and that award of costs must not exceed an amount that is reasonable for the defendant to pay having regard to all the circumstances including his means and his conduct per s 45(1).

[5] In the event that an order for costs is made against the defendant, the Court is required to specify the amount that the person would have been ordered to pay if this section had not affected that person's liability – s 45(4).

[6] Certain relevant dates for considering this issue of costs are as follows:

(a) 2 September 2013 – commencement of the claim;

(b) 1 October 2013 – filing of counterclaim;

(c) 26 March 2014 – filing of defence to claim;

(d) 30 October 2014 – defence to counterclaim.

[7] For convenience I have used the traditional description of the pleadings, rather than those applied by the District Courts Rules 2009. Over 2014 and 2015, the initial "pleadings" under the 2009 Rules were replaced with amended claims and counterclaims.

[8] While Mr Wood has acted for the plaintiff since the commencement of the proceeding, Mr McArthur was not engaged until 20 March 2015. The defendant was initially represented by the Rotorua law firm of Lance Lawson but that firm ceased to act for him from 25 July 2014 when the defendant elected to represent himself. That self-representation continued through until 20 March 2015 when Mr McArthur was engaged.

[9] Further relevant dates following Mr McArthur's entry as counsel for the defendant:

(a) 10 November 2015 – Mr McArthur applies on behalf of the defendant for legal aid;

(b) 13 November 2015 – Legal Services seeks further information about the defendant's financial circumstances;

(c) 11 to 13 November 2015 – the first trial (aborted);

(d) 13 November 2015 to 4 April 2016 – various dealings between Mr McArthur on behalf of the defendant and Legal Services regarding the provision of information as to the defendant's financial circumstances and the substance of the dispute between the parties;

(e) 4 to 7 April 2016 – second trial

(f) 4 April 2016 – legal aid granted;

(g) 5 April 2016 – the Court and the plaintiff first informed of the grant of legal aid.

(h) 29 April 2016 – decision on substantive claim.

[10] The case first went to trial before Judge Cooper at Rotorua on 11 November 2015 and continued until it was abandoned on Friday 13 November 2015. Judge Cooper that day recused himself from acting further in this case as he had become aware that he had presided over cases involving the defendant on previous occasions and they were of such a nature that the Judge did not consider it was appropriate for him to continue to preside over this case. Judge Cooper only became aware that there was this prior involvement with the defendant, or the extent of it, when it was raised by the defendant during the course

of the second day of that first trial. It appears that the defendant did not appreciate initially that Judge Cooper had dealt with him previously although Mr Wood for the plaintiff has indicated some scepticism about that assertion.

[11] The rationale behind (what is described often as) the legal aid immunity now by s 45 of the Legal Services Act 2011 is explained by McGrath J for the Court of Appeal in the leading decision of *Laverty v Para Franchising*[2] under the equivalent provision found in s 40 of the Legal Services Act 2000:

> [19] Section 40, reflecting s 3(a), facilitates access to legal services by restricting the amount of costs orders that the Courts may make against a legally aided person. Its effect is to reduce, although not to remove, the risk such a person otherwise faces that, despite having legal aid, if unsuccessful in the litigation, the person may be required to pay substantial costs despite having limited means. Without such protection the potential for such a costs order would deter persons of limited means from exercising their right of access to the courts, even with the support of legal aid. To counter that disincentive, s 40 limits the circumstances in which a substantial order for costs can be made on normal cost principles against a litigant who has legal aid.

[12] The second trial commenced before me at Rotorua on 4 April 2016 and lasted four days until 7 April 2016. My reserved judgment was issued on 29 April 2016 upholding the claim in the sum of $34,115.45.

[13] On the first day of the second trial, the counterclaim was discontinued without prejudice to the ability of the defendant to bring a new claim that dealt with all of his allegations of various building work defects he attributed to the plaintiff. The reasons for this discontinuance are covered primarily in Ruling 2 dated 4 April 2016 and a minute dated 27 April 2016. In short, the defendant alleged that further defects in the building works had become apparent in recent times and required further evaluation by way of intrusive examination of the building. That all had to happen before the defendant's counterclaim could be finalised. The basis upon which the counterclaim was discontinued is set out more exactly in paragraph [10] of my Ruling 2 of 4 April 2016:

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[2] *Laverty v Para Franchising Ltd* [2006] 1 NZLR 650.

> [10] After returning from the early lunch break [on 4 April 2016], Mr McArthur informed me that Mr Swinburne wished to discontinue his counterclaim without prejudice to bringing a further claim against the plaintiff for all known breaches of the building contract. This must be, of course, on the basis that the Court would proceed to deal with the plaintiff's claim relating to what were the contractual works, what was the price for those works, what has been paid and thus how much is outstanding. With those issues being determined, it would be for Mr Swinburne to obtain a stay of execution of any judgment for the plaintiff and, absent consent, that would need to be considered at a formal hearing set up for that purpose and with evidence to support the need for such a stay.
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> [11] If there was not a stay ordered because of insufficient evidence to warrant it in the interests of justice, then matters would then proceed with the plaintiff being able to execute on any judgment obtained.

[14] Following delivery of the reserved decision on 29 April 2016, directions were given towards a hearing for the application for a stay with a timetable for the filing of certain documents in support.

[15] At the hearing of the application for stay of execution of the judgment obtained by the plaintiff, Mr Swinburne had still not commenced a fresh claim alleging what defects he asserted arose from the building work undertaken by the plaintiff. In a decision given on 16 November 2016 I said this:

> [8] It is abundantly clear that Mr Swinburne has still not, as at 16 November 2016, commenced this fresh claim alleging defects in the building work undertaken by McDougall Builders and yet he still attempts to have a stay entered so that McDougall Builders is unable to pursue execution on its judgment. I am not impressed at all with the steps that have been taken (or perhaps not taken) by Mr Swinburne in this respect. They are completely at odds with the obligation that was placed fairly and squarely on him when I agreed to allow him to discontinue his counterclaim and reshape it within a new proceeding.

[16] In the event, I refused to stay execution on the judgment. The defendant had failed to comply with the timetable directions. I said this at paragraph [17]:

> [17] In all the circumstances I do not consider that a case has been made out for a stay of execution on the judgment. This is primarily because the claim for building defects has not been pursued with anywhere near the vigour that I had indicated was required. Secondly, I am far from satisfied that the Court has a full explanation about Mr Swinburne's financial position and in particular how the $160,000 received from ACC was applied.

[17] The first issue is the period over which the defendant is to be regarded as legally aided for the purposes of s 45 of the Act. The definition of an "aided person" in s 3 simply states that it, "*means a person who is granted legal aid under this Act or the former Act*".

[18] Mr Wood, in his helpful submissions on costs, acknowledges that as early as 20 March 2015, Mr McArthur advised Mr Wood and the Court that the defendant was applying for legal aid. Indeed, the defendant duly applied for legal aid on 10 November 2015. Mr Wood asserts that notwithstanding numerous enquiries made by him of Mr McArthur at regular intervals about the status of the defendant's legal aid application, it was not until the second day of the second trial (5 April 2016), that Mr McArthur advised that legal aid had been granted. Of course, it had been granted only the previous day.

[19] Much has been made by counsel of the period that the legal aid grant has covered and some of that is retrospective to the date of the grant. However, I do not consider that that is necessarily determinative or indeed helpful in determining the issue as to the period over which the immunity under s 45 applies. They are two quite different considerations.

[20] What I consider to be of particular importance is the requirement under s 24 of the Legal Services Act 2011 requiring a party to civil proceedings who is granted legal aid to give notice to the other party or parties to the proceedings and to the Registrar of the relevant Court.

> **24 Provider in civil proceedings to notify other parties**
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> (1) When a party to civil proceedings is granted legal aid, the provider under the grant must at once give notice of that fact to every other party to the proceedings, and to the Registrar of the relevant court.
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> (2) If any other person subsequently becomes a party to the proceedings, the provider must give an equivalent notice to the new party.
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> (3) If the grant of legal aid is withdrawn, the provider under the grant must notify all other parties to the proceedings of that fact.

[21] Mr Wood quite rightly emphasises that various decisions made by a party to civil proceedings are based on whether the opposing party is legally aided or not. That of course is why Mr Wood regularly enquired as to the status of the defendant's legal aid application. As Mr Wood argued this at para 18 of his submissions:

> …The reason for (the s 24 obligation of advice) is that the other party is entitled to know whether and when a person is in receipt of legal aid because of the impact the change of status has on the opposing party's ability to get costs from a legally aided person. The fact the person may be on legal aid will invariably have an impact upon the litigation strategy for the opposing party.

[22] I agree entirely with that observation. It is also of importance to appreciate that the notice requirement under s 24 is for the time that the grant is made rather than the time the application is made. I consider that this must determinative of period for which the costs' immunity applies. If that were not so, a party might conceivable spend considerable resources pursuing a claim against a person believed not to be legally aided only to find at some later stage in the proceedings that the other party has protection from costs by s 45. Of course, that is what has essentially happened here.

[23] If the intention of the legislature in respect of s 45 was for that immunity to apply retrospectively and either from commencement of the proceedings or the time of application for a grant of legal aid, it would have been a simple matter to have specified that to be so. To construe s 45 to have such retrospective effect would create injustice as it would invariable cause harm to the other party.

[24] I accordingly find that the defendant does not enjoy the immunity under s 45 in respect of the period leading up to the date of the grant of legal aid, being 4 April 2016.

[25] While the plaintiff is entitled to costs on the agreed scale 2B basis up to 4 April 2016 when the hearing of the second trial commenced, a complication arises in respect of the costs incidental to the first trial.

[26] Mr Wood seeks costs of and incidental to that first trial contending that the defendant should have appreciated at a much earlier stage that Judge Cooper might have had a difficulty hearing this case. However, that might have asked just a little

too much of the defendant as neither he nor apparently Judge Cooper appreciated that there was this past history until the trial had commenced and run for at least into the second day. I consider that this is just unfortunate for the plaintiff but one of those situations where no-one is really to blame or responsible in the sense that there should be accountability by way of a costs order. Accordingly, while I find that the plaintiff is entitled to costs on the scale 2B basis up to 4 April 2016, that necessarily excludes the attendance at the first trial.

[27] The question then arises as to whether there are exceptional circumstances under s 45(2) such that the Court should order costs against him for the period from the time of the grant of legal aid on 4 April 2016. Irrespective, however, as to whether exceptional circumstances apply, an order for costs made against the defendant for the period from and inclusive of 4 April 2016 must not exceed an amount that it is reasonable for the defendant to pay, having regard to all the circumstances including the defendant's means and his conduct in connection with the dispute.[3] The difficulty here is that the defendant's financial position has not been fully disclosed notwithstanding the affidavit that he has submitted in respect of costs and the clear directions that required full disclosure. In the decision delivered on 16 November 2016 in respect of the stay of execution, I said this at paragraph [14]:

> I have a great deal of difficulty accepting that the detail given by Mr Swinburne provides an accurate picture of his financial position and, in particular, an accounting of the money that he received from the ACC for renovations to his home as against the money that has been apparently applied to the home. A brief explanation is given that the extra funds from what is identified in the judgment on the substantive claim has been applied in, "rectifying defects," or "swallowed up in repairs" as Mr McArthur put it. In that respect he has obviously relied upon what Mr Swinburne has said.

[28] And further, at para [17]:

> …Secondly, I am far from satisfied that the Court has a full explanation about Mr Swinburne's financial position and in particular how the $160,000 received from ACC was applied.

[29] The defendant filed a further affidavit sworn on 14 December 2016. It is still silent as to how the $160,000 received from ACC was applied and it really adds nothing to the information provided at an earlier time. It may be that this is the

[3] Section 45(1).

affidavit received earlier in draft by Mr Wood and on which he has commented. Mr Wood also attacks the accuracy of the affidavit as to the asserted values of various properties as against the secured debts and generally in respect of the defendant's financial position.

[30] The defendant has not been forthcoming or fulsome in respect of the required information as to his full and complete financial position such that the Court can make an accurate assessment of his ability to pay costs.

[31] Returning to the exceptional circumstances consideration, I find that exceptional circumstances do apply in this case. At every turn, Mr Swinburne has proved difficult and generally non-compliant with Court timetable orders adding significantly to the costs that the plaintiff has incurred. Furthermore, his defence has changed repeatedly throughout the course of the pleadings. Additionally, he refused to pay the plaintiff even such amounts that he accepted were owing for work that was done.

[32] Another example of the defendant's unreasonableness in respect of this building dispute was his refusal to allow the plaintiff access to the property to carry out minor remediation work or engage in meaningful settlement discussions.

[33] Of significance, Mr McArthur in his thoughtful submissions clearly did not feel able to respond to that criticism of the defendant and the defendant's conduct in relation to this proceeding.

[34] I accordingly find that exceptional circumstances apply here. I am far from satisfied that the defendant has made a full disclosure into his financial circumstances and so that makes it difficult for me to conclude that the defendant does not have the means to meet a full order of costs. Indeed, the apparent refusal by the defendant to provide a full accounting of the ACC payments of $160,000 leaves me with the clear impression that he has the means to pay a reasonable amount for the costs of the plaintiff particularly as they will relate only to the second trial.

[35] Indeed, I note from the grant of legal aid received by the defendant that he was required to pay Legal Services the lesser of $52,898.11 or his actual legal costs as the defendant's contribution to Legal Services' support by the grant of aid. At the very least, that suggests that he has assets that have been disclosed to Legal Services that were convincing of his ability to meet such a payment.

[36] It seems appropriate that costs are awarded on a two-fold basis and in line with the breakdown set out by Mr Wood in Annexure A to his memorandum as to costs:

(a) Costs against the defendant on the basis that he was not legally aided up to the time of the first trial but excluding that first trial:

2009 Rules 4.3 x $1500 per day =	$6,450
2014 Rules 18.85 x $1780 per day =	$33,553
Total Scale 2B Costs prior to grant of Legal Aid	$40,003

(b) Scale 2B costs following grant of legal aid:

3 days x $1780 per day =	$5,340

[37] Pursuant to s 45(4), in respect of the costs ordered for the period when he was legally aided (para 35 (b)), I confirm that the defendant has not had the costs award reduced pursuant to s 45(1) through straitened financial circumstances or other personal circumstances for the reasons earlier explained. I consider that the Scale 2B costs are reasonable in all the circumstances.

[38] Disbursements are also claimed in the total specified sum of $2,000 and they are awarded and to be attached to the costs for recovery relating to the period leading up to the grant of legal aid.