EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS]

IN THE DISTRICT COURT
AT CHRISTCHURCH

CIV-2018-009-001104
[2018] NZDC 16240

BETWEEN	ROBYNE NAYLOR Applicant
AND	GLYN W JONES BUILDERS LIMITED Respondent

Hearing: On the Papers

Judgment: 9 August 2018

RESERVED JUDGMENT OF JUDGE P R KELLAR
IN RESPECT OF COSTS

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[1] The respondent seeks indemnity costs on the applicant's discontinuance of the proceeding and on the respondent's application for a stay of the proceedings.

[2] On 4 May 2018, the applicant filed an originating application "that the court determine, and order, what ancillary rights are reasonably necessary to impose to ensure the effective and reasonable exercise and enjoyment of the rights of the expressly granted under Easement Certificate of Title [title number deleted] created by Easement Certificate [certificate number deleted]." The respondent contends that the applicant brought the proceedings improperly, unnecessarily and in wilful disregard of known facts and law.

[3] The applicant sought relief in respect of a dispute over an easement on the respondent's property. Clause 2(i) of the Easement Certificate provides that the parties must refer any dispute to arbitration. The parties had previously arbitrated what appears to be the same dispute. This was subject to an arbitral ruling on 13 October 2015 in favour of the respondent.

[4] The applicant, through her counsel, made demand on the respondent, including on 31 October 2017 and 11 December 2017 relating to issues arising out of the easement. The applicant signalled an intent to commence court proceedings if matters were not resolved.

[5] The respondent raised the issue of the earlier arbitration and asserted that the respondent had been fulfilling its obligations under the easement. The respondent referred to those matters in emails of 3 and 7 November 2017, 19 December 2017 and 15 January 2018.

[6] The application and supporting affidavit were served on 16 May 2018. The respondent, through its solicitors, sent an email to counsel for the applicant at 4:19pm on 25 May 2018. The respondent sought confirmation by 5:00pm on Monday 28 May 2018 that the applicant would discontinue the proceeding. There was no response. The applicant has explained that there was no response because she lives rurally, she has health issues; she was the sole caregiver for her elderly father and counsel for the applicant was unwell.

[7] On 30 May 2018, the respondent sent an interlocutory application for a stay of proceedings (and as an alternate, an extension of time to file a notice of opposition) and supporting affidavit by email to counsel for the applicant. The notice of opposition to the originating application needed to be filed and served by the end of 30 May 2018. On 30 May 2018 at 1:17pm, counsel for the applicant advised that she had only recently received the earlier emails. Counsel for the respondent replied to the effect that the respondent had to apply for a stay of proceedings and, as an alternate, request an extension of time to file a notice of opposition, given that day was the last day to file and serve those papers. The respondent was willing not to file the interlocutory application for a stay of proceedings if the applicant confirmed that she would discontinue the proceedings by 4:00pm on 30 May 2018. No response was received. The engrossed interlocutory application for a stay of proceedings was provided to the applicant on 1 June 2018. The applicant discontinued the proceeding on 13 July 2018.

[8] Rule 15.20 of the District Courts Rules 2014 provides:

15.20 Costs

> Unless the defendant otherwise agrees or the court otherwise orders, a plaintiff who discontinues a proceeding against a defendant must pay costs to the defendant of and incidental to the proceeding up to and including the discontinuance.

[9] Rule 14.2 sets out the principles applying to the determination of costs in general. The rule provides:

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:
>
> …

[10] This is an application for an award of indemnity costs. Rule 14.6(4) provides:

> …
>
> The court may order a party to pay indemnity costs if –
>
> (a) the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding; or
>
> …

(f) some other reason exists that justifies the court making an order for indemnity costs despite the principle that the determination of costs should be predictable and expeditious.

[11] The respondent submits that indemnity costs ought to be awarded because the applicant acted improperly or unnecessarily in commencing the proceedings, in that she had full knowledge of the requirement to refer disputes regarding the easement to arbitration; she was aware that the Court lacked jurisdiction to consider arbitral disputes given the mandatory arbitration clause in the easement; and that jurisdiction would be protested if proceedings were filed. The respondent submits that nonetheless the applicant filed the proceedings. The respondent seeks indemnity costs of $7,667.50 as shown in invoices annexed to the Memorandum of Counsel for the Respondent.

[12] In *Bradbury v Westpac Banking Corporation* the Court said that the discretion to award indemnity costs could be exercised in the following circumstances:[1]

(a) The making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud;

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

(c) Commencing or continuing proceedings for some ulterior motive;

(d) Doing so in wilful disregard of known facts or clearly established law; or

(e) Making allegations which ought never to have been made or unduly prolonging a case by groundless contentions …

[13] Although the categories which must be present for the exercise of the jurisdiction are not closed, it is clear that indemnity costs will only be awarded where one of these exceptional circumstances is present. In the present case, the respondent submits that the applicant commenced the proceeding in wilful disregard of known facts, namely that the Easement Certificate required the parties to refer any dispute to arbitration. The applicant's response is that she put the respondent on notice of her intention to have the matter arbitrated or, if arbitration was not agreed, to refer the

[1] *Bradbury v Westpac Banking Corporation* [2009] 3 NZLR 400.

matter to the District Court for determination at least five months before the application was filed.

[14] The applicant, through her counsel, wrote to the respondent on 31 October 2017 in which the applicant advised that her "next course of action will be to file an application to resolve all outstanding matters in the District Court by way of an application under s 313 Property Law Act 2007." The respondent sent emails to counsel for the applicant on 3 and 7 November 2017, in the latter of which her referred to the previous arbitrator's decision stating that "only the High Court can change this decision and you are disregarding this." Counsel for the applicant sent another email to the respondent, on 11 December 2017, in which she stated that "the easement provides that disputes should go to Arbitration in the first instance." Counsel for the applicant proposed an arbitrator and sought confirmation that an arbitration could commence by 15 January 2017. Counsel for the applicant also stated that "if Arbitration is not agreed, or no response is provided by the timeframe outlined my client will file an application to resolve all outstanding matters in the District Court by way of an application under s 313 Property Law Act 2007." The respondent sent emails to counsel for the applicant on 19 December 2017 and 15 January 2018, to the effect that he had been fulfilling his obligations under the easement.

[15] There does not appear to have been any further communication between the applicant and respondent, or any steps taken to require the respondent to submit to arbitration before these proceedings were filed on 4 May 2018.

[16] The proceedings were unnecessary. The applicant was aware that the Easement Certificate required disputes to be referred to arbitration. The applicant could have taken steps to compel the respondent to submit to arbitration. The respondent had little option but to file an application for a Stay of Proceedings, giving that the time for filing a Notice of Opposition was fast approaching. Although the applicant filed these proceedings knowing the easement required disputes to be referred to arbitration, the applicant's conduct is not so grave as to require an award of indemnity costs. An award of increased costs is however appropriate. It was unnecessary for the applicant to file proceedings in Court when the Easement

Certificate stipulated that arbitration was the place for resolution of disputes regarding it.

[17] All things being equal, the applicant would be ordered to pay costs of a 2B basis which would have resulted in an award of costs of $3,382.00. In all the circumstances, an uplift of fifty percent ($1,691.00) is appropriate. The applicant is therefore ordered to pay to the respondent, costs of $5,073.00 together with such disbursements as the Registrar allows.

Judge PR Kellar
District Court Judge