

**IN THE DISTRICT COURT
AT AUCKLAND**

**CIV-2016-004-001121
[2018] NZDC 5405**

BETWEEN	JAMES STEWART KIRKPATRICK AND WAREHOUSE WORLD LIMITED (AS TRUSTEES OF THE JAMES TRUST) Plaintiffs
AND	BEACHAM LIMITED First Defendant
AND	ALEXANDER GREGORY BEACHAM Second Defendant
AND	GREGORY MARK BEACHAM Third Defendant

Hearing: On the papers

Judgment: 28 March 2018

DECISION OF JUDGE G M HARRISON AS TO COSTS

[1] The plaintiffs (the trustees) seek an award of indemnity costs against all defendants jointly and severally in respect of proceedings in this court seeking recovery of rental for premises at [address deleted], Penrose, Auckland, for the sum of \$30,195.53, plus interest and costs.

[2] The claim was settled just prior to the commencement of the substantive hearing, which had been set for 7 March 2018.

[3] As relevant, cl 6.1 of the lease provides:

The tenant shall pay ... the landlord's legal costs (as between solicitor and client) of and incidental to the enforcement or attempted enforcement of the landlord's rights and remedies and powers under this lease.

[4] The defendants (the Beachams) submit that this clause does not entitle the trustees to recover solicitor/client costs in respect of all steps required to recover the unpaid rental, but in my view the clause just quoted clearly covers the right to receive those costs. Judge M-E Sharp ordered the Beachams to pay indemnity costs of \$10,167.50 on 26 April 2017. I note that order was made by consent and was ordered in respect of the waste of time and expense for the trustees in having to bring an application to strike out a defence filed by the Beachams in person, which was overtaken after counsel had been instructed by the filing of an amended statement of defence.

[5] The total amount claimed by the trustees is \$39,937.50 plus disbursements of \$563.01 and costs on the memorandum seeking a costs order of \$2,950.

[6] The trustees have submitted their solicitor's invoices for the period over which the proceedings were pursued, and their solicitor's time in attendance records for that period.

[7] The Beachams' major concern is at the quantum of costs sought. There is no challenge to the claim for disbursements, but the claim for costs on the memorandum seeking costs is also challenged.

[8] As far as the claim for solicitor/client costs is concerned, the relevant decision is that of the Court of Appeal in *Black v ASB* [2012] NZCA 384.

[9] The court said:

[77] As this court held in *Frater Williams & Co Limited v Australian Guarantee Corporation (NZ) Limited*, where there is a contractual right to indemnity costs the question for the court asked to make an order is: for the necessary steps, are the costs claimed reasonable in amount? That is because r 14.6(1)(b) permits the court to order payment of costs "reasonably incurred". It follows from the wording of r 14.6(1)(b) that indemnity costs are determined with reference to actual costs, but may be less than the actual costs if the court considers the actual costs were not reasonably incurred.

[78] In *Frater Williams* this court emphasised that the word "reasonable" does not import a discretion in the usual sense. The principle that one party may contractually bind itself to pay the other party's full

solicitor/client costs is established: *ANZ Banking Group (NZ) Limited v Gibson ...*

[10] Rule 14.6(4) provides:

The court may order a party to pay indemnity costs if –

- (e) the party claiming costs is entitled to indemnity costs under a contract or deed.

[11] The approach to be adopted is different where the conduct of the defendant is in question. That involves assessing whether a party has acted vexatiously, frivolously or otherwise as provided for in 4(a) of the rule, or has ignored or disobeyed an order or a direction of the court or breached an undertaking given to the court or another party to the proceeding as provided for in 4(b).

[12] At [80] the Court of Appeal in *Black* said:

Assessing whether the indemnity costs claimed under a contract are reasonable involves the court making an objective assessment of these matters:

- (a) What tasks attract a costs indemnity on a proper construction of the contract?
- (b) Whether the tasks undertaken were those contemplated in the contract;
- (c) Whether the steps undertaken were reasonably necessary in pursuance of those tasks;
- (d) Whether the rate at which the steps were charged was reasonable having regard to the principles normally applicable to solicitor/client costs; and
- (e) Whether any other principles drawn from the general law of contract would in whole or in part deny the claimant its prima facie right to judgment.

[13] I have already indicated that in my view cl 6.1 permits (a) and (b).

[14] As to (c) I have considered the invoices and time records of the plaintiffs' solicitors. It seems to me that care has been taken to remove from the amounts claimed fees for unrelated work such as for related proceedings taken in the High Court. Furthermore, the amount claimed has been discounted from the total cost of time expended. The charge-out rates are mostly at \$325 per hour, being the hourly rate of a qualified solicitor, with occasional involvement of a partner at rates between \$450

and \$500 per hour. Those rates appear normal to me and I can discern no anomaly in the steps undertaken in pursuing the trustees' claim. That also covers (d). There are no other principles of law relevant to this case which would deprive the trustees of their prima facie right to the amount claimed.

[15] The Court of Appeal noted that a liable party may request the court to order costs to be taxed, or to be referred to a suitably qualified legal practitioner to vet the reasonableness of the amount claimed. I see no need to adopt either of those possible courses of action. The third, and as yet unsure, position is whether someone in the position of the Beachams can refer the fee notes to the New Zealand Law Society on a complaint pursuant to the Lawyers and Conveyancers Act 2006. The issue is whether or not the Beachams would fall within the meaning of "a person who is chargeable with a bill of costs ..." as referred to in s 132 of the Act. There is conflicting authority on the point and the Court of Appeal reserved the issue for resolution at a later time. In any event I am of the view that that course need not be followed in this case.

[16] The court went on to refer to a number of decisions in which indemnity costs claimed of between \$45,000 and \$153,000 had been approved, and determined that the discounted amount claimed by the bank was appropriate.

[17] The court also said the following:

[78] These two points were well made in the course of the following observations by this court in *Beecher v Mills*:

In the case of a contract [giving an indemnity for costs] it must in the end be a matter of determining what recovery is expressly or impliedly intended. In principle, anything less than a full indemnity for costs properly incurred must leave the indemnitee with part of the liability for which the indemnifier is prima facie responsible ... in the absence of a contrary indication it is not to be assumed that the parties intended such a result nor can there ordinarily be any room for the exercise of a judicial discretion to order less costs and thereby erode the contractual protection the indemnity was intended to provide. ...

[18] I, similarly, can see no reason to deprive the trustees as indemnitee in this case from the full indemnity for costs provided for by the lease.

[19] As to the claim for the costs on the memorandum the trustees refer to the decision of *Body Corporate Administration v Metha* (High Court, Auckland, CIV-6656/09, 15 February 2013). Allen J said:

[83] It is now well established that costs may be awarded in respect of an application for costs. An application for costs is to be treated no differently for cost purposes from an ordinary interlocutory application, so costs may be awarded according to scale or on an increased or indemnity basis as appropriate.

[20] To similar effect is the decision of Rodney Hansen J in *McDonald v FAI (NZ) General Insurance Co Limited* (High Court Auckland, CP 507/96, 4 July 2002). As the plaintiff has succeeded in all respects in its application for costs, I am of the view that it is appropriate also to allow the sum of \$2,950 for the application for costs.

[21] There will therefore be judgment in favour of the trustees against the Beachams for \$39,937.50 plus disbursements of \$563.01 plus further costs on the application for costs of \$2,950.

G M Harrison
District Court Judge