

**IN THE DISTRICT COURT
AT ALEXANDRA**

**I TE KŌTI-Ā-ROHE
KI MANUHEREKIA**

**CIV-2017-002-000030
[2018] NZDC 22479**

BETWEEN	RUSSELL WARREN IBBOTSON Plaintiff
AND	ICL LIMITED First Defendant
AND	SIMON WEARING Second Defendant

Counsel: Plaintiff – self represented
Juliet Eckford for First and Second Defendants

Judgment: 31 October 2018

**CHAMBERS DECISION OF JUDGE M B T TURNER
AS TO COSTS**

Introduction

[1] On 14 August 2018¹ I struck out the plaintiff's claims for \$47,000 against the first and second defendants on the basis they were statute barred and consequently amounted to an abuse of the process of the Court.²

[2] Costs were awarded in favour of the defendants. As the parties have been unable to resolve the matter between themselves the Court is required to determine the issue. The plaintiff has chosen to dispense with the services of counsel and has filed submissions on his own account in response to the submissions filed on behalf of the

¹ *Ibbotson v ICL Limited* [2018] NZDC 16380.

² In respect of the claim based on breach of fiduciary duty I also found the pleading did not disclose a reasonably arguable cause of action.

defendants. As a preliminary point, I grant Mr Paine leave to withdraw, he having appeared as counsel for the plaintiff to date.

Cases

Defendants

[3] The defendants' first position is to seek indemnity costs, in this case amounting to \$60,102.16 (inclusive of GST). They submit that the plaintiff's case was "hopeless from inception", included unfounded allegations of fraud and they allege the proceedings were brought as part of what they describe as a "concerted vendetta" against them.

[4] Their second position is to seek increased costs, alleging that the plaintiff's approach to the proceedings was unnecessary and unmeritorious. Further, it is claimed that the plaintiff unreasonably refused to settle despite a number of attempts to achieve resolution. An uplift on scale costs of 100% is sought on the following grounds:

- (a) The time involved in the litigation;
- (b) The Court's finding that the pleadings were inadequate and failed to meet requirements; and
- (c) That the proceedings should not have been issued in the first place.

[5] A schedule attached to the defendants' memorandum itemises scale costs totalling \$28,700 and disbursements of \$1,381.68. On this basis, a 100% increase on costs and disbursements totals \$58,781.68.

Plaintiff

[6] The plaintiff's memorandum on costs contains extraneous and irrelevant matters which I put to one side. In summary, he submits that the defendants' costs claim is "grossly excessive, unfair and unreasonable" and emphasises:

- (a) The costs claimed are almost three times those he has paid to his own legal advisers;
- (b) There is no basis for indemnity costs because the action was not vexatious, frivolous or improperly brought or continued. Contrary to the defendants' view, his case was not "hopeless" as he had taken advice of "two independent experienced senior barristers" who both held the view there was a definite case to answer under the "fraudulent misrepresentation provisions of the statute of limitations". In the circumstances, he submits his claim was legitimate, and there was a proper basis to argue that the limitation period should not have applied; and
- (c) There is no basis for increased costs because he did not raise numerous unmeritorious points and/or persist in them despite a lack of merit. Rather, it was the defendants who made the progression of the case unnecessarily complicated. This involved what he describes as "excessive and unnecessary duplication in repeatedly raising matters in an endeavour to frustrate and confuse the proceedings".

[7] The plaintiff submits that costs should be calculated on a 2B basis, or even reduced below that to recognise the defendants' approach to the proceedings. He notes that Judge Phillips had categorised this case on a Schedule 2B basis and points out that the defendants' calculation of costs is a mixture of Schedule 2B and 2C amounts.

The law

[8] Rule 14.2 of the District Court Rules 2014 sets out the general principles applying to the determination of costs. It provides:

14.2 Principles applying to determination of costs

- (1) 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:
- (g) so far as possible the determination of costs should be predictable and expeditious.

[9] The four steps to determining costs pursuant to r 14.2(1)(c) are as follows:

- Categorising the proceedings by assessing their skill and complexity (r 14.3);
- Determining the appropriate daily recovery rate for the proceeding (r 14.4 and Schedule 5);
- Determining what is a “reasonable time” for each step in the proceeding (r 14.5 and Schedule 4); and
- Determining costs by applying the daily recovery rate to the total reasonable time.

[10] Scale costs are, however, able to be departed from in certain circumstances. Rule 14.6 provides:

14.6 Increased costs and indemnity costs

- (1) Despite rules 14.2 to 14.5, the court may make an order—

- (a) increasing costs otherwise payable under those rules (increased costs); or
 - (b) that the costs payable are the actual costs, disbursements, and witness expenses reasonably incurred by a party (indemnity costs).
- (2) The court may make the order at any stage of a proceeding in relation to any step in the proceeding.
- (3) The court may order a party to pay increased costs if—
 - (a) the nature of the proceeding or the step in the proceeding is such that the time required by the party claiming costs would substantially exceed the time allocated under band C; or
 - (b) the party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in the proceeding by—
 - (i) failing to comply with these rules or a direction of the court; or
 - (ii) taking or pursuing an unnecessary step or an 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 proceeding; or
 - (c) the proceeding is of general importance to persons other than just the parties and it was reasonably necessary for the party claiming costs to bring the proceeding or participate in the proceeding in the interests of those affected; or
 - (d) some other reason exists that justifies the court making an order for increased costs despite the principle that the determination of costs should be predictable and expeditious.
- (4) 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

- (b) the party 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; or
- (c) costs are payable from a fund, the party claiming costs is a necessary party to the proceeding affecting the fund, and the party claiming costs has acted reasonably in the proceeding; or
- (d) the person in whose favour the order of costs is made was not a party to the proceeding and has acted reasonably in relation to the proceeding; or
- (e) the party claiming costs is entitled to indemnity costs under a contract or deed; 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.

Increased costs

[11] Rule 14.6(3) sets out a non-exhaustive list of situations in which the Court can make increased awards of costs.

[12] The correct approach for calculating increased costs was outlined by the Court of Appeal in *Holdfast NZ Ltd v Selleys Pty Ltd*.³ To succeed, an applicant must:

- First categorise the proceedings as category 1, 2 or 3;⁴
- Work out a reasonable time for each step in the proceeding. This involves reference to the appropriate daily recovery rates under r 14.4 and Schedule 5;⁵
- Apply extra time for a particular step if required under r 14.6.3(a);⁶ and
- Then, and only then, step back, look at the amount of costs the applicant would recover following the process to this point and then argue for additional costs if it is considered that r 14.6.3(b) can be relied on.⁷

³ *Holdfast NZ Ltd v Selleys Pty Ltd* (2005) 17 PRNZ 897 (CA).

⁴ At [43].

⁵ At [44].

⁶ At [44].

⁷ At [45].

[13] In *Holdfast*, Chambers J warned that the Court is not likely to go above 50 per cent but acknowledged that there may be circumstances where a higher award may be justified.⁸

Indemnity costs

[14] To succeed in an application for indemnity costs an applicant must show that the respondent party has acted vexatiously, frivolously, improperly or unnecessarily in commencing, continuing or defending a proceeding or a step in the proceeding or has breached the other subclauses of r 14.6(4). The threshold that must be met before an order for indemnity costs is made is, however, a high one.⁹

Scale costs

[15] Judge Phillips categorised these proceedings for costs purposes on a Schedule 2B basis at a judicial conference on 27 October 2017. I see no reason to depart from that determination. These proceedings were largely straightforward and adjustments to reflect issue issues of a more complicated nature can be addressed by increased costs rather than changing the category.

[16] However, the schedule attached to the defendants' submissions calculates costs at a daily rate of \$1550. This was the daily rate for category 2 proceedings, as set out in Schedule 5 to the District Court Rules until it was amended in July 2015 to \$1780. It appears the defendants have miscalculated costs based on an error as to the appropriate daily rate.

[17] Applying the current daily rate of \$1780, Schedule 2B costs amount to \$19,936 along with disbursements of \$1381.68, to a total of \$21,317.68. I approach matters based on that figure.

⁸ At [48].

⁹ *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] 3 NZLR 188 (CA).

Discussion

[18] In *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*,¹⁰ the Court of Appeal discussed the approach to be taken to the award of indemnity costs. Applying the principles set out in *Bradbury v Westpac Banking Corp*,¹¹ the Court of Appeal referred to the three broad approaches to costs:¹²

- (a) Standard scale applies by default where cause is not shown to depart from it;
- (b) Increased costs may be ordered where there is failure by the paying party to act reasonably; and
- (c) Indemnity costs may be ordered where that party has behaved either badly or very unreasonably.

[19] The non-exhaustive categories in which indemnity costs have been ordered were summarised as:¹³

- (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

¹⁰ *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2014] NZCA 348, (2014) 22 PRNZ 322.

¹¹ *Bradbury v Westpac Banking Corporation* [2009] NZCA 234, [2009] 3 NZLR 400.

¹² At [15].

¹³ At [16].

- (e) Making allegations which ought never to have been made or unduly prolonging a case by making groundless contentions, summarised in French J's "hopeless case" test.

[20] A "hopeless case" which might invite indemnity costs occurs where "a party persists in what should on proper consideration be seen as a hopeless case".¹⁴ In reaching that determination French J referred to an earlier decision where the Court held that it was appropriate to consider an award of indemnity costs "whenever it appears that an action has been commenced or continued in circumstances where the applicant, properly advised, should have known that he had no chance of success".¹⁵ That the proceedings were prepared and conducted by senior counsel will not immunise a party to a hopeless case from an award of indemnity costs.¹⁶

[21] Here, the plaintiff's case failed on a fundamental point: his proceedings were filed outside the limitation period. The law relating to this issue was not complicated and well-settled.¹⁷

[22] In respect of the causes of action founded in negligence, the limitation period commenced no later than 31 May 2010 when the plaintiff's agreement to sell his share of the building was settled. The plaintiff did not commence his action against the defendants until 13 April 2017, nearly one year after the limitation period had expired.

[23] In relation to the cause of action based on fraud, leaving entirely to one side the merits of the claim, the action had to be commenced within six years of discovery of the fraud or the date on which it could with reasonable diligence have been discovered. In this instance the factual basis the allegation of fraud was founded concerned the sale of shares in the building by another owner based on a lower valuation. On his own case, the plaintiff acknowledged becoming aware that such sale did not proceed sometime between the 22 February 2011 and 13 May 2011 (although

¹⁴ *J Corp Pty Ltd v Australian Builders Labourers Federation Union of Workers (WA Branch)* (No 2) (1993) 46 IR 301, at 303.

¹⁵ *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397 at 401.

¹⁶ *Ben Nevis Forestry Ventures*, above n 10, at [28], citing *Bradbury v Westpac Banking Corporation*, above n 11, at [73](b) and [91].

¹⁷ See [33] - [36] of the judgment.

it is plainly arguable that he could have discovered that much earlier). Thus, the period of limitation commenced (at the latest) on 13 May 2011. To avoid being statute barred the plaintiff needed to commence this cause of action by 13 May 2017. His claim based on fraud was not brought until 28 February 2018, outside the limitation period.

[24] In relation to the claim based on a breach of an alleged fiduciary duty, I found that the limitation period applicable to the action in negligence should apply by analogy. The limitation period thus commenced on 26 May 2010; as the plaintiff did not commence an action against the defendants until 13 April 2017, the claim was statute barred.

[25] I consider that on proper consideration of the law and the facts (even approaching the matter on the most generous interpretation to the plaintiff) it should have been obvious that the causes of action in negligence and fraud were time barred. Continuing those actions in the face of the limitation defence raised by the defendants could not be justified. The plaintiff's approach necessitated the defendants' continued engagement in the proceedings and compliance with the usual directions such as orders for discovery and the like. That resulted in ongoing and substantial costs to the defendants.

[26] I accept that the limitation issue was more complicated in respect of the claim based on a breach of a fiduciary duty.

[27] But for the claim based on a breach of fiduciary duty I would have little hesitation in finding that this was a "hopeless case", permitting the award of indemnity costs.

[28] In the circumstances, and acknowledging indemnity costs should only be awarded in exceptional circumstances, I exercise my discretion not to award indemnity costs in this case, particularly considering the amount sought by the plaintiff in the first place.

[29] However, I consider that increased costs are appropriate. The plaintiff commenced the proceedings when it should have been obvious that he was statute

barred on claims based on negligence and fraud, and a claim based on breach of fiduciary duty may well be considered as essentially an alternative for the same conduct resulting in the very real prospect of this claim also being statute barred. The plaintiff persisted with the claim even when the defendants raised the defence of limitation and offered multiple opportunities to settle. While he claims the defendants engaged in conduct which he considers to be “excessive and unnecessary”, the reality is he was driving the proceedings, filing two amended statements of claim and refusing multiple offers to settle. I do not consider the defendants’ conduct can be criticised. In the face of the plaintiff refusing to acknowledge the limitation defence, the defendants were required to proceed and the course the proceedings took was entirely normal, involving discovery of documents and the provision of further and better particulars. Having viewed the documents, I consider the plaintiff could be criticised for providing unhelpful if not evasive responses to the request for further and better particulars.

[30] In circumstances where the determined progression of a case with little if any merit has resulted in the defendants incurring significant expense, I consider an uplift of 65% on scale costs is justified.

Result

[31] The defendants are entitled to costs against the plaintiff in the sum of \$32,894.40, being costs on a 2B basis (\$19,936) uplifted by 65%, together with disbursements of \$1381.68 as set out in the defendants’ memorandum on costs dated 14 September 2018.

M B T Turner
District Court Judge