IN THE DISTRICT COURT
AT NORTH SHORE

CIV-2016-044-001624
[2017] NZDC 29042

BETWEEN	GILLIAN ANNE BARRON Plaintiff
AND	MELT JACOBUS LOUW AND TONI MARIE WARREN Defendants

Judgment: 21 December 2017
(On the papers)

DECISION OF JUDGE G M HARRISON ON COSTS

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[1] Ms Barron issued proceedings against her neighbours, Mr Louw and Ms Warren, seeking effectively an order against them to remediate ongoing drainage issues affecting Ms Barron's land.

[2] In my decision of 17 November 2017 I held that according to longstanding legal authorities no nuisance had been created justifying legal intervention and the claim failed.

[3] The parties have been unable to agree on the question of costs and memoranda have now been filed, pursuant to leave reserved to do so.

[4] The defendants seek indemnity costs or, failing that, increased costs or, failing that, costs assessed according to 2B.

[5] The first matter for resolution was the form of trial. At a directions conference held before me on 12 May 2017 I recorded firstly that on the basis of the defendants' objection the proceeding should not proceed to a judicial settlement conference. I then directed that a two-day trial was to be allocated, with pretrial standard directions as

for a short trial. A short trial is not expected to exceed a hearing time of one day – r 10.1(3)(c).

[6] A two-day trial is a full trial. The rules do not prescribe pretrial directions for a full trial. In directing a two-day trial I directed that the pretrial standard directions as prescribed by r 10.3 should apply. In his memorandum of 26 April 2017 Mr McDonald for the defendants submitted that the matter should be set down as a short trial with an estimated hearing time of one day.

[7] For the reasons given, that submission was not accepted. As the proceeding progressed Mr McDonald later sought the trial be extended to three days, but the trial duration was maintained at two days. It was heard on 10 and 11 October 2017 although my decision records only one day of hearing for 10 October 2017 which is an uncorrected oversight.

[8] I therefore proceed to determine the issue of costs as for a two-day full trial.

Indemnity costs

[9] This claim is advanced on the basis that on 9 February 2017 the defendants wrote to the plaintiff's solicitor inviting the withdrawal of the plaintiff's claim. No monetary offer was made in the sense of a contribution towards the cost of remedial work or other monetary compensation.

[10] In the absence of any contractual agreement to pay full solicitor/client costs the discretion to award indemnity costs was set out by the Court of Appeal in *Bradbury v Westpac Banking Corp* [2009] 3 NZLR 400. The categories are:

(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, constituting a "hopeless case".

[11] None of those criteria apply in this case. The defendants apply for indemnity costs on the basis of the refusal of the plaintiff to accept the "walk away" offer. In my view that is not a basis for an award of indemnity costs for the reasons just given. I note too that none of the criteria in r 14.6(4) empowering the Court to make an order for indemnity costs applies in this case. Indeed no mention is made of the failure to accept what is known as a Calderbank offer as justification for an award of indemnity costs.

Increased costs

[12] Again, r 14.6(3) sets out criteria on which a Court may order a party to pay increased costs. One of those is contained in Subrule (3)(b)(v):

> Failing, without reasonable justification, to accept an offer of settlement, whether in the form of an offer under r 14.10 or some other offer to settle or dispose of the proceeding.

[13] It is on that basis that the defendants seek increased costs.

[14] The issue is dealt with in the commentary in Lexis Nexis "District Courts Practice (Civil)" at para DCR 14.14.6.5. Reference is made to an unreported decision of *Easton Agriculture Limited v Manawatu-Whanganui Regional Council* (HC Palmerston North, CIV 2008-454-31, 22 December 2011) where the Judge referred to prior case authority on the same issue and determined:

> The onus is on the party claiming increased costs to persuade the court the award is justified. That party must satisfy the court that the failure to accept the offer of settlement was unreasonable. The reasonableness of a rejection must be assessed at the time of rejection, not just against the subsequent result. If an award of increased costs is made, the correct approach is to uplift from the scale costs.

The judge held that it was not unreasonable for the plaintiffs to reject the defendant's walk away offer and proceed to trial. He said further:

> First, the court is conventionally cautious in awarding increased costs where the successful party has made only a walk away (or "drop hands") offer. In *Hira Bhana and Co Limited v PGG Wrightson Limited* a walkaway offer was made by the defendant in August 2004. The proceedings went to trial in late 2005. The plaintiff lost. The Court of Appeal held that it was not unreasonable for the plaintiff to reject the walk away offer. The credibility of witnesses was a crucial factor in that case. It was not unreasonable to proceed to trial to test credibility.

[15] The commentary goes on to say:

> Secondly, the reason the courts take a conservative approach to imposing increased costs in the context of walk away offers is that they effectively value the opponent's claim, the opponent's prospects of success, and their own litigation risk all at nil. As the plaintiffs put it in their submissions, it ranked the plaintiffs' chance of success "at zero percent". It will be a rare case where it is unreasonable for a plaintiff to take a more optimistic view of their own prospects than "zero percent". It may be noted also that the plaintiffs were represented by very senior and able counsel.

[16] Applying those criteria I am not satisfied that the "walk away" offer of the defendants justifies any award of increased costs. The issue between the parties was essentially a legal one requiring careful consideration of the obligation of lower land to receive surface water flowing from higher land, and whether in those circumstances a nuisance was created.

[17] Both parties retained expert witnesses. In my view they were entitled to rely on the advice of their experts, and in the case of the plaintiff its expert was of the view that the surface water constituted a nuisance on the lower part of the land on which the plaintiff's residence was constructed, after the subdivision of the original block of land was granted. There was no relevant New Zealand case authority since that of Mahon J in *Davis v Lethbridge* cited in 1976, referred to in my decision. That was approximately 40 years ago and in my view the plaintiffs were entitled to maintain that a nuisance had been created, particularly where more recent but non New Zealand authority was to the effect that a plaintiff may be entitled to relief even if coming to an existing nuisance. The defendants maintained the traditional approach, that there existed a natural servitude on the plaintiffs land and that no nuisance existed.

Conclusion

[18] For those reasons, therefore, I am of the view that costs should follow the event assessed on a 2B basis as for a two-day full trial.

[19] The plaintiff accepts that costs may be awarded on a 2B basis, although the calculation attached to Mr San Diego's memorandum of 13 December 2017 assesses those costs as for a short trial.

[20] For the reasons given the proper calculation is for a two day full trial as calculated by Mr McDonald in attachment B to his memorandum of 1 December 2017. I certify that costs of $6,319 are payable to the defendants plus expert witness fees of $10,862.75 and disbursements of $75.

G M Harrison
District Court Judge