IN THE DISTRICT COURT
AT HAMILTON

I TE KŌTI-Ā-ROHE
KI KIRIKIRIROA

CIV-2021-039-000059
CIV-2021-039-000080
CIV-2021-019-001244
CIV-2021-019-001245
CIV-2022-019-000100
CIV-2022-019-000101
[2022] NZDC 15417

IN THE MATTER OF	THE PUBLIC WORKS ACT 1981
BETWEEN	THISTLEHURST DAIRY LIMITED MICHAEL VAUGHAN PAULA VAUGHAN NICKY HAMMOND CRAIG SAMPSON KAYE WILLIS Plaintiffs
AND	MINISTER OF LAND INFORMATION Defendant

Hearing: On the papers

Distribution: A Webb for the Plaintiffs
S Jerebine for the Defendant

Judgment: 19 August 2022

RESERVED JUDGMENT OF JUDGE S R CLARK
[Decision as to Costs]

Introduction

[1] In a reserved judgment dated 30 May 2022 I found for the plaintiffs. At paragraph [189] I indicated that they are entitled to costs and set out a timetabling for the filing of memoranda. I have received the following:

(a) A plaintiffs' memorandum in support of costs dated 14 June 2022;

(b) A memorandum from the defendants dated 5 July 2022;

(c) A reply memorandum from the plaintiffs dated 27 July 2022.

The parties' positions

[2] The actual costs incurred by one of the plaintiffs, Thistlehurst Dairy Ltd (TDL) are $196,762. Invoices have been provided which show that comprises of:

(a) Solicitors costs of $16,574.85; and

(b) Counsels' costs - $180,188.08.

(both excluding GST)

[3] The plaintiffs submit that an award of indemnity costs is warranted. If the Court does not award indemnity costs, the plaintiffs seek scale costs on a category 3C basis totalling $122,247. Further, they seek an increase on those costs of between 30 – 50 per cent.

[4] The defendants submit that the threshold for indemnity costs is not made out, that costs on a category 2B basis are appropriate and there should be no increase on those costs.

Indemnity costs

The plaintiff's submissions

[5] The plaintiffs submit that the defendant acted improperly and/or unnecessarily in commencing and/or continuing the proceedings. They point to attempts between 19 October 2020 through to 19 May 2021 for the parties, together with representatives from Waka Kotahi and WSP New Zealand Limited (WSP), to meet onsite to discuss a range of matters, including location, access and timing issues.

[6] The plaintiffs also point to their efforts to obtain information from Waka Kotahi and WSP about what was proposed in terms of the investigative work to be carried out. They submit that they gave "every reasonable opportunity to meet and proposed methods to resolve the dispute", and that the defendant failed to provide the information requested and explore reasonably available options that the plaintiffs proposed.

[7] The plaintiffs say their efforts to meet to try and resolve access issues are akin to offers to settle. Had the defendant acted reasonably, the proceedings would not have been necessary, or certainly continuing them would have been unnecessary. Indemnity costs are sought from 19 May 2021, being the date that the first s 111 notice was served.

[8] The plaintiffs are critical of the sequential service of s 111 Public Works Act 1981 (PWA) notices. In total six separate s 111 notices were served upon three different groups of persons, being Thistlehurst Dairy Ltd, the sharemilkers Michael and Paula Vaughan and another group referred to as the Other Occupiers. The plaintiffs say that the defendant's approach to service was haphazard, disorganised, occurred over an extended period and only occurred due to a lack of due diligence and careful consideration of the potentially affected parties. Furthermore, the plaintiffs say that it was TDL who alerted the defendant to the oversights in serving those who needed to be served. As a result, the plaintiffs say they were put to additional and unnecessary costs.

[9] The plaintiffs say that they were required to file a total of 11 memoranda relating to administrative matters throughout the course of these proceedings. It was necessary to do so to correct misstatements from the defendants, to propose a streamlined way to resolve the proceedings and address deficiencies in an Agreed Bundle prepared by the defendant. They submit that memoranda filed were in response to a defendant who, at every stage, was unreasonable and which caused the plaintiffs increased time and costs.

[10] The plaintiffs argue that the Agreed Bundle presented by the defendant to the Court was so deficient that the hearing original set down for 4-5 April 2022 could only partly proceed and then had to be adjourned. Furthermore, that when the hearing was reconvened on 5 May 2022, a copy of the Agreed Bundle was not available to the key witness for the defendant.

[11] The plaintiffs also submit that the defendant's evidence was not enough to support its position. They point to deficiencies in the documentation provided to the Court by the defendants. A proper analysis of those documents would have revealed that the defendants had little or no prospects of success.

[12] The plaintiffs say that these proceedings have been extremely expensive and stressful for TDL, the sharemilkers and the other occupiers. They point to the wider context of the defendant Minister seeking to acquire land for a roundabout and extension of the Waikato Expressway from Cambridge to Piarere. The downstream consequences are life changing for the sharemilkers and the business of TDL and that should be borne against the steadfast refusal on the part of Waka Kotahi and WSP refusing to provide information on the investigative works or meet with the sharemilkers.

The defendant's submissions

[13] The defendant submits that indemnity costs are exceptional and require "exceptionally bad behaviour" and that to justify an order for such costs the conduct complained about must be flagrant.

[14] They further submit that the threshold for indemnity costs is high and the conduct complained of by the plaintiffs does not meet that high threshold test. Specifically, the defendant says that the defendant did not act improperly, vexatiously or frivolously in continuing the defence. They say that the defence position was not so hopeless that it could not have been maintained in the first place and the Court's decision was only reached after due consideration of all material before the Court.

[15] The defendants point to a ground on which they lost, the delegation point, was not pleaded or identified by the plaintiffs until after the proceedings had been commenced. The second ground of loss, the absence of information in a series of reports, was not so hopeless that it should not have been maintained. This was not a case which involved allegations of fraud, knowing them to be false; flagrant misconduct causing loss of time to the Court and to other parties; the commencing or continuing of a proceeding for some ulterior motive; or allegations which ought never to have been made or unduly prolonged the case by groundless contention.

[16] The defendants say that the claim that the defence case had no prospect of success is not substantiated. The complaints about documents were in a large part requested by the plaintiffs as their case developed or unfolded. An exchange of documents in that context does not speak to the merits of the case.

[17] The defendant rejects the proposition that they refused without reasonable justification to accept a settlement offer. They comment upon a series of emails and letters exchanged in late 2021 and take the position that it was the plaintiffs who ultimately determined not to meet. Furthermore the defendant rejects the characterisation of any invitations to meet as constituting an offer of settlement on the part of the plaintiffs.

[18] The defendant also submits that they did not act "unreasonably and unnecessarily" on a response to the suggestion that there was an unnecessarily disorganised sequential service of the s 111 notices. The defendant was in direct discussions with TDL and upon receipt of information from them about potential occupiers, promptly notified the persons concerned.

[19] In response to allegations of timing and costs, the defendant says that none of the notices of opposition prepared were particularly complex and were largely repetitive and that a consolidation of the proceedings could not have been avoided.

[20] The defendant rejects any criticism concerning the presentation of the Agreed Bundle. They say that the bundle was for both parties to agree on in advance, the

plaintiffs had access to it prior to the hearings and the defendants were able to respond and add to it upon request.

[21] In summary, the defendant submits that the plaintiffs' claim for indemnity costs falls well short of the high threshold test required.

Legal principles

[22] The grounds upon which indemnity costs may be granted are set out at Rule 14.6 (4) of the District Court Rules 2014. It reads:

> **14.6 Increased costs and indemnity costs**
>
> ...
>
> (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.

[23] In *Bradbury v Westpac Banking Corp*, the Court of Appeal said that the discretion to award indemnity costs could be exercised in the following circumstances:[1]

[1] *Bradbury v Westpac Banking Corp* [2009] NZCA 234 at [29].

(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, summarised in French J's "hopeless case" test.

[24] In *Colgate-Palmolive Co v Cussons Pty Ltd*, the Court said that a helpful summary of circumstances for which the Court will award indemnity costs include: [2]

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

(b) Evidence of misconduct that lengthens the hearing;

(c) Commencing proceedings for an ulterior motive;

(d) Commencing proceedings in wilful disregard of known facts;

(e) The making of allegations that ought never to have been made;

(f) An imprudent refusal of an offer of compromise.

Discussion

[25] The ground relied upon by the plaintiffs is that the defendant acted *improperly or unnecessarily* in continuing the proceeding. (Emphasis added).

[2] *Colgate-Palmolive Co v Cussons Pty Ltd* (1993) 118 ALR 248 (FCA) at 256.

[26] As can be seen from the authorities, the threshold for indemnity costs is high. Indemnity costs are limited to instances where a party has behaved badly or very unreasonably.[3]

[27] The plaintiffs place considerable emphasis on their request to meet with Waka Kotahi and WSP representatives to obtain further information about what was being proposed in terms of entry and investigations to be carried out, and the negotiations around of licences to occupy.

[28] In my substantive decision, considerable attention was paid to the state of knowledge Kerry McPhail possessed about the state of negotiations between Waka Kotahi/WSP and TDL/the Vaughans. I reached the conclusion that Mr McPhail had not been properly informed about the negotiations prior to 12 May 2021. At paragraph [141] of my decision, I said:

> From what was available to him, Mr McPhail would have been left with the impression that the negotiations about an agreed entry had failed. The evidence I have indicates otherwise.

[29] At paragraph [144] I found that:

> The characterisation of Thistlehurst refusing to respond, refusing access and that negotiations were at an end were simply not correct.

[30] Those findings were important when considering, as per the *Pengelly* decision,[4] whether the defendant had the necessary information to undertake an informed and authoritative decision-making process prior to issuing the s 111 notices.

[31] In that respect I found that the defendant fell short. Whilst I accept the defendant fell short as against the legal test in *Pengelly*, the failure to properly inform themselves is in my view not analogous to a failure to accept an offer of settlement.

[32] Even on the most favourable of interpretations of the plaintiffs' evidence, what was being suggested is that a meeting was scheduled for 19 May 2021, at which there would be a site visit to discuss proposed access to the site and some detail around the

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[3] *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2014] NZCA 348 at [15].
[4] *Pengellys Marketing Ltd & Anors v Attorney-General* [2000] 3 NZLR 198.

investigations to be carried out. What in fact happened was the service of a s 111 notice, which came as a surprise to the plaintiffs.

[33] It is possible that had discussions taken place on 19 May 2021 that could have led to some mutually agreed outcomes. Even if that position had been reached that would not constitute an offer of settlement, merely an agreement to have further discussions.

[34] As to the point that the defendant's evidence was not enough to support its position and had little or no prospect of success, I do not agree. I found that the defendant failed on the basis that there was no lawful delegation and sub-delegation of the power to issue the s 111(2) notices to the Chief Executive of LINZ and in turn to the Senior Advisor Clearances, Mr Kerry McPhail.

[35] Unsurprisingly this was not an issue raised by the plaintiffs in their initial notices of objection. It was first raised by them in their legal submissions dated 11 March 2022.[5]

[36] The plaintiffs' submissions had been filed after the defendant's submissions, which had been filed on 25 February 2022. The defendants requested an opportunity to file submissions in response on that point and did so on 30 March 2022.

[37] The delegations were eventually included in the Agreed Bundle at Tabs 1-5. The defendant's position was that there had been lawful delegation and sub-delegations.

[38] By the time this matter got to hearing, the issue of whether there had been lawful delegation was not a feature of the plaintiff's case. I raised the issue during the hearing on 5 May 2022 with counsel for the defendant during her oral submissions. My concern was that Delegation 2 made no reference to s 28 of the State Sector Act 1988.

[5] Submissions for Plaintiffs dated 11 March 2022 [34]-[41] inclusive.

[39] Whilst the plaintiffs ultimately succeeded on this point it was not an issue which the defendant was aware of prior to the proceedings being commenced and then continued regardless. It was also an issue which, by the date of both hearings, did not appear to be a live issue as between the parties.

[40] It is correct that the plaintiffs sought to have questions of law determined prior to the substantive hearing. That did not occur but not due to any fault on the part of the defendant, the reason being there was simply insufficient court time available to schedule an initial hearing. That decision was made by me, not the defendant.[6]

[41] The second ground of loss required consideration of whether Mr McPhail had undertaken informed and authoritative considerations before issuing the s 111(2) notices. That required a consideration of his affidavit, his response to questions in cross-examination and an examination of reports prepared to support the notices.

[42] Ultimately, I concluded that Mr McPhail did not undertake such informed and authoritative considerations to warrant commencing the process. Whilst I concluded that the information in the reports was at times inaccurate and inadequate, that was a position I reached only after a close examination of the reports and all the evidence before me. I would certainly not characterise the case as a hopeless one.

[43] Nor can it be said that this was a case that was brought vexatiously, frivolously, fraudulently or for some improper motive. I accept that the case was important to, and indeed as counsel for the plaintiffs have submitted, no doubt stressful for the TDL representatives and the other plaintiffs. However that is not a ground for finding that the high threshold required for indemnity costs is met.

[44] I find that the claim for indemnity costs is not made out.

[6] Minute dated 18 March 2022 at [6].

Scale costs

[45] For the purpose of categorisation of proceedings, the plaintiffs submit that these are category 3C proceedings. The defendant submits that they are category 2B proceedings.

[46] On the question of costs in the District Court, all matters are at the discretion of the Court.[7] Rule 14.2 sets out the principles applying to determination of costs. An award of costs should reflect the complexity and significance of the proceeding.[8]

[47] For the purposes of categorisation, proceedings must be classified as falling within one of the following categories:

- Category 1 proceedings – proceedings of a straightforward nature able to be conducted by counsel considered junior.

- Category 2 proceedings – Proceedings of average complexity requiring counsel of skill and experience considered average.

- Category 3 proceedings – Proceedings that because of their complexity or significance require counsel to have special skill and experience.

[48] Costs should be assessed by applying the appropriate daily recovery rate to the time considered reasonable for each step reasonably required.[9] The appropriate daily recovery rates are set out in Schedule 5.[10] The daily recovery rates are:

(a) Category 1 proceedings $1,270 per day

(b) Category 2 proceedings $1,910 per day

(c) Category 3 proceedings $2,820 per day

[7] District Court Rules 2014, r 14.1.
[8] District Court Rules 2014, r 14.2(b).
[9] District Court Rules 2014, r 14.2(c).
[10] District Court Rules 2014, r 14.4.

The appropriate category

[49] The Court normally determines in advance the appropriate category for costs. That did not happen in this case and falls to be considered now.

[50] These proceedings are unusual, at least for the District Court. The first step is taken by the defendant serving a notice pursuant to s 111(2) of the PWA. The next step is that the owner or occupier has ten working days in which to file a notice of objection with the District Court nearest the land concerned. Thus, whilst the process is initiated by the relevant Minister the first document filed in Court is the notice of objection.

[51] What the Court is then required to do is consider whether the Minister has met the legal test set out in *Pengelly*. In this case, although the owners and occupiers were referred to as the plaintiffs, in fact it was for the Minister of Land Information as the defendant to satisfy the Court that it had met the grounds set out in the *Pengelly* case.[11]

[52] At an early stage in the conferencing for these proceedings, I did inquire of counsel as to what type of proceedings these were. They were not an originating application nor are they a statutory appeal. Although they are not, they are more akin to judicial review proceedings.

[53] During this case evidence and submissions were considered concerning the delegation of ministerial authority and whether a ministerial delegate had taken steps to be sufficiently and properly informed prior to the issue of s 111 notices.

[54] This case cannot be characterised as a test case but there is very little authority on point. There is one leading authority, the *Pengelly* case and very few other cases on point.

[55] What I think is important is that this is one of relatively few decisions which have considered the rights and ability of a Minister to issue s 111 notices under the PWA. This is also a case which directly considers a challenge to ministerial delegation

[11] Minute dated 18 February 2022 at [5].

and authority. It is a case which involved an interpretation of a section in the PWA and a consideration of administrative and public law concepts. For those reasons, it is appropriate to classify these as category 3 proceedings which, because of their complexity and significance, required counsel to have special skill and experience.

[56] In their respective submissions both the plaintiffs and defendant set out a schedule of what they consider to be the appropriate steps, drawing on schedule 4 of the Rules. There is some agreement on the appropriate steps but not all and disagreement about the appropriate times to be allocated to those steps.

The appropriate steps-schedule 4 District Court Rules 2014

Step 6 – Preparing and serving notice of opposition

[57] The plaintiffs claim three days per application x 6 applications, which equals 18 days at category 3C, totalling $50,760. The defendant submits that the notices of opposition were five to six pages long each and were largely repetitive.

[58] In the substantive decision I referred to the notices of opposition for the roundabout project at paragraphs [13]-[19] and for the expressway project at paragraphs [23]-[26].

[59] Although the notices of opposition filed by the sharemilkers and other occupiers in respect of both projects raised additional points, in broad terms they were similar to the notices filed by TDL. I accepted that when considering the position of the sharemilkers and the other occupiers in the substantive decision, I was at pains to point out that for each plaintiff separate considerations needed to be undertaken by the ministerial delegate.

[60] Nevertheless, having reviewed the notices of opposition again I agree that they are broadly similar and to an extent repetitive. I do not consider that 18 days is appropriate for the preparation of those documents. I am of the view that the appropriate category for that step is Category 3B. I allow 1.5 days x 6 @ $1,910 = **$17,190**.

Steps 9.5, 9.6 and 9.7 – List of documents on discovery/production of documents for inspection/inspection of documents

[61] The plaintiffs submit that although formal lists of documents were not prepared, the Agreed Bundle and supplementary bundles were largely as a result of repeated requests for specific documents by the plaintiffs. The effect was the same as preparing formal lists and it would be putting form over function to reject the costs sought for these steps.

[62] The defendant submits that no list of documents was prepared, no documents were produced for inspection and inspection did not occur, therefore there should be no allowance for claims pursuant to these steps. They submit that there is no applicable analogy available to be drawn here.

[63] It is correct that in this case no formal lists of documents were prepared, nor did inspection in the conventional sense take place. What happened was that the defendant first filed their evidence, which was then responded to by the plaintiffs. Thereafter there was considerable discussion and debate about whether additional documents needed to be filed. Indeed, the original hearing on this matter had to be adjourned on 5 April 2022 to allow for the proper inspection of documents which had been served moments before the hearing commenced. What was also required was the preparation of some supplementary bundles.

[64] This is a case which was heavily dependent upon a close examination of documents provided by the defendants, in particular the authorisation and action reports. Those documents were identified as relevant and requested by the plaintiffs. They were served shortly prior to the hearing starting on 4 April and ultimately had to be inspected and considered by the plaintiffs.

[65] Whilst it is correct to say that no list of documents was prepared, I am prepared to allow by analogy the discrete step at 9.7 for the inspection of documents. Clearly the plaintiffs were required to consider and inspect documents produced by the defendant. I allow for that on a category 3C basis. I allow 4 days @ $2,820 = **$11,280**.

Steps 9.8-9.9 – Filing and serving memorandum and appearance at judicial conferences

[66] Eleven memoranda were filed by the plaintiffs. The plaintiffs seek costs on a category 3C basis. The defendant submits that many of the memoranda filed concerned procedural issues and that costs on a 2B basis is appropriate.

[67] I have reviewed the memoranda filed and the minutes of the judicial conferences. The memoranda raise various issues, including whether to have a prehearing determination on questions of law, timetabling issues-responding to misunderstandings of the timetable by the defendant, disclosure issues, as well as those types of matters that could be considered administrative or procedural. I see no reason to award costs less than on a 3C basis. For the filing of memoranda, I allow .75 per day x 11 = 8.25 days @ $2,820 = **$23,265**. For appearances at judicial conferences I allow .3 per day x 2 conferences @ $2,820 = **$1,692**.

Steps 14 & 15 – Preparation for simplified trial and appearance at hearing

[68] The plaintiffs and defendant agree that steps 14 and 15 are appropriate but disagree upon the appropriate category and time allocation. The defendant refers to the plaintiffs' preparation consisting of three relatively short affidavits, a slim bundle of authorities and relatively short submissions. They also point to the hearing taking approximately two days.

[69] I see no reason to depart from category 3C on that basis. For the reasons I have already said, these were hearings of some complexity, involving administrative and public law considerations, and a challenge to ministerial authority. Although the volume of documentation filed by the plaintiffs is modest it is clear, based upon the requests for crucial documentation and the cross-examination of Mr Kerry McPhail, that considerable preparation went into the plaintiffs' case.

[70] For step 14 preparation for a simplified trial, I allow at 2.5 days @ $2,820 = **$7,050.** For step 15 being appearance at hearing, I allow 1 day x 4 @ $2,820 = **$11,280.**

[71] In total I allow for costs of $71,757. I have set these out in a schedule attached to this decision.

Increased costs

[72] The Court may order a party to pay increased costs pursuant to Rule 14.6 (3) of the District Court Rules 2014. That reads:

> **14.6 Increased costs and indemnity costs**
>
> ...
>
> (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.

[73] The onus is on a party seeking an increase in costs under Rule 14.6 to demonstrate that they are justified. The approach taken is to first identify the appropriate scale, and then if an increase is justified, to order an "uplift of the scale".[12] Increased costs may be ordered where there is a failure by the paying party to act reasonably.[13]

[74] Examples of the Courts granting increased costs are:[14]

(a) Against persons who invoke statutory demand or liquidation procedures for ulterior or unmeritorious reasons;

(b) Where a defendant pursued without reasonable justification an application for summary judgment;

(c) Where serious allegations have been made by plaintiffs without foundation, claims lack merit and included unnecessary and unwarranted personal attacks;

(d) Where a creditor issues a statutory demand but withdraws it before trial;

(e) Where the Court increased costs accompanying an order for a mandatory injunction because of the conduct of a defendant;

(f) Where a party pursued one hopeless cause of action due to limitation periods and the second cause of action was essentially an alternative argument;

(g) Where second counsel appear in a case which warrants the appearance of only one counsel.

[12] *Holdfast NZ Ltd v Selleys Pty Ltd* (2005) 17 PRNZ 897.
[13] *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2014] NZCA 348.
[14] Stephen Harrop *District Court Practice (Civil)* (online ed. Lexis Nexis) at [DCR 14.14.6.5]

[75] The plaintiffs have raised concerns about the failure of the defendant to negotiate an agreed access regime. If that had been achieved, the plaintiffs say that the proceedings may not have been necessary. The plaintiffs submit that the case was lost in part due to defects in the defendant's own documentation. The proceedings are important not only to the plaintiffs, but given the background context, are also important to other potentially affected landowners and others who may in future wish to challenge s 111(2) notices, thus there is a public good aspect to these proceedings. Finally, the plaintiff is concerned that documentation ultimately relied upon by the Court was not made available until moments before the commencement of the hearing on 4 April 2022.

[76] As I have said earlier, although there were discussions and negotiations about a potential meeting, those matters were ongoing. Nothing had been concluded. There is nothing which I consider could be conclusively said that an offer to settle these proceedings had been made.

[77] Whilst the plaintiffs ultimately lost on the delegation and informed and authoritative consideration point, that is not to say their case was without merit. The plaintiffs make a valid point about the late disclosure of documentation. That could have been avoided of course by both parties seeking discovery earlier and of course by insisting on that happening formally. Be that as it may, when documents were identified, they were made available by the defendant and formed an important part of the considerations I needed to take into account.

[78] It is fair to say that at times I expressed my frustration with both counsel as to how the proceedings were being conducted. In a minute dated 5 April 2022 I expressed an observation that: [15]

> The proceedings have suffered from a lack of cooperation between counsel which hampered progress to date. I take the view that the responsibility for ensuring proceedings are ready to proceed in an orderly fashion largely rests with counsel.

[15] Minute 5 April 2022 on a request for adjournment.

[79] Having said that, this was a case which did evolve from that which was originally pleaded. Ultimately it was decided on matters which were not originally raised in the notices of objection. My decision was informed to a large extent upon a consideration of documentation which were supplied by the defendant.

[80] When I step back and consider the conduct on the part of the defendant in this case, I did not consider it to have been unreasonable and there is no justification for an increase in costs.

Summary

[81] In summary, I find:

(a) The case for indemnity costs is not made out;

(b) The appropriate costs category is category 3. The time allocations I have approved are on a 3C basis, except for Step 5, which I approve at 3B. The scale costs I approve total $ 71,757 as set out in annexure A ;

(c) The case for increased costs is not made out;

(d) Disbursements, if any, are to be fixed by the registrar.

_____
Judge SR Clark
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 25/08/2022

Time Allocation	Activity	Category 3	Quantum
6	Preparing and serving Notice of Opposition	1.5 days per application (x 6 applications) = 9 days @ $1,910	17,190
9.7	Inspection of documents	4 days @ $2,820	11,280
9.8	Filing and serving memorandum in anticipation of judicial conference	.75 day (x 11 memoranda) = 8.25 days @ $2,820	23,265
9.9	Appearance at judicial conference	.3 day (x 2 conferences) = 0.6 days @ $2,820	1,692
14	Preparation for simplified trial	2.5 days @ $2,820	7,050
15	Appearance at hearing	1 day (x 4 days) = 4 days @ $2,820	11,280
			$71,757