

**THIS JUDGMENT WAS RECALLED TO CORRECT AN ERROR IN THE  
AMOUNT OF COSTS SOUGHT AT PARAGRAPH [25] AND REISSUED**

**IN THE DISTRICT COURT  
AT NELSON**

**I TE KŌTI-Ā-ROHE  
KI WHAKATŪ**

**CIV-2022-042-000355  
[2023] NZDC 21632**

BETWEEN

JODY ANN DORRINGTON  
Applicant

AND

BARRY STEVEN MCLEOD  
MARGARET LILA MCLEOD  
Respondents

Hearing: In chambers on the papers  
Counsel: C Maslin-Caradus for the Applicant  
G Praat for the Respondents  
Judgment: 6 October 2023  
Reissued: 9 October 2023

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**JUDGMENT OF JUDGE A A ZOHRAB  
[as to costs]**

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**Introduction**

[1] On 25 August 2023 I issued an oral judgment declining the respondent's application for leave to adduce further evidence. I held that:

- (a) The issue regarding the garage had always been there to be considered by the Court.
- (b) It was unclear why the proposed evidence had not been adduced earlier. The respondents had been working on the proposed evidence in the background but not communicating with the Court.

- (c) Allowing additional evidence would cause significant prejudice to the applicant and would likely place in doubt the two days set aside for the hearing.
- (d) It was not in the interests of justice to endorse the respondents' failure to cooperate with the originating application trial process and timetabling.

[2] Put another way, my view was that if I permitted the evidence to be adduced it would amount to an abuse of process given that both parties had filed their evidence and the agreed close of pleadings date had long since passed. The respondents were effectively treating the timetabling process, the applicant, and the Court with contempt.

[3] I indicated that indemnity costs would be awarded to the applicant and counsel were invited to file and serve costs memoranda. Both parties have filed costs memoranda.

#### **Applicant's costs submissions**

[4] The applicant seeks indemnity costs in the sum of \$9,840.62 including GST.

[5] Counsel for the applicant submits that the applicant's costs in opposing the application were increased as a result of:

- (a) The respondents filing the actual proposed evidence from three new experts which required the evidence to be analysed and argued against.
- (b) The respondents did not provide written submissions in support of their application as required by the District Court Rules, and as such the applicant's submissions needed to cover all matters.
- (c) The respondents only provided written submissions at the hearing, meaning that the hearing had to be adjourned and then reconvened.

- [6] The applicant also seeks ancillary management directions directing that:
- (a) The proposed affidavits of Mr Robertson, Mr Judge and Mr Rowe be removed from the court file.
  - (b) The trial directions made in my minute dated 9 March 2023 stand.
  - (c) The respondents must attend the hearing on 16 to 17 October 2023.
  - (d) Payment of Ms Dorrington's costs should be made by the respondents to Fletcher Vautier Moore within 14 days.
  - (e) The respondents' opposition to Ms Dorrington's application should be struck out in the event that the respondents do not comply with any of the Court's directions, in light of previous non-compliance.

### **Respondents' costs submissions**

[7] The respondents oppose the awarding of indemnity costs referring this Court to the decision of *Bradbury v Westpac Banking Corporation* and submitting that whilst the factors considered in that case were not an exhaustive list of factors which might lead to an award of indemnity costs, what was clear was that an order for indemnity costs is only to be imposed in exceptional circumstances.<sup>1</sup> It was submitted that there were no exceptional circumstances on the facts of this case.

[8] Counsel submitted that there was no suggestion that the respondents were irresponsible and/or unreasonable in bringing an application for leave to admit further evidence, and the proposed evidence is relevant to a matter at issue in the proceedings, more particularly the exercise of the Court's discretion to grant any relief to the applicant.

[9] It submitted that the only basis which the Court appears to have acted in determining the basis on which indemnity costs might be awarded was that if the

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<sup>1</sup> *Bradbury v Westpac Banking Corporation* [2009] NZCA 234.

application for leave had been granted the respondent would have been provided an indulgence in being allowed to file further evidence after the close of pleadings, and thereby jeopardise the applicant's position with regard to preparation of the hearing.

[10] The appellant made the point that given the Court did not grant leave to admit the new evidence, the applicant's position was not prejudiced in that regard.

[11] Whilst not explicit in the context of the respondents' potential liability for costs on an indemnity basis, it was submitted that it was clear that the Court was disconcerted by the fact that the respondents' previous counsel had agreed to a close of pleadings date of 9 March 2023 and that extra time was sought to file submissions with no mention being made of the intention to file further evidence, when it is now apparent that the respondents were taking steps to obtain further evidence.

[12] It was submitted that this does not of itself provide the Court with an adequate basis for making "an extraordinary cost awards" against them on this application.

[13] It was submitted that given the applicant has suffered no greater prejudice than simply having to deal with the interlocutory application in the ordinary way, that in itself does not mark out the respondents' conduct as sufficiently bad or unreasonable so as to warrant the sanction of a costs award on an indemnity basis.

[14] If indemnity costs are to be awarded it is submitted that such an award of costs is not open ended.

[15] It was submitted that in the case this interlocutory application the indemnity costs which are claimed are unreasonably high pointing out that:

- (a) Scale costs under cost category 2B are no higher than \$3,629.
- (b) By way of contrast the respondents' actual costs on the application are \$4,455.10 (albeit that this does not include the cost of the preparation of the affidavits).

- (c) Whilst the applicant has submitted two invoices the work is not detailed.

[16] Counsel for the respondents submitted that this Court should look to the decision of *Spicer v Boulcott Development Group Ltd* case for assistance in calculating indemnity costs.<sup>2</sup> The respondents contend that the indemnity costs claimed are “unreasonably high”.

[17] It was submitted that applying the formula in *Spicer* to the application for leave to admit further evidence an appropriate measure of indemnity costs using an adjusted hourly rate of \$400 per hour for 13 hours was the sum of \$5,200.

[18] Finally, Counsel’s primary submission was that the application was not so unreasonable as to warrant indemnity costs and should be dealt with costs according to scale. If, however indemnity costs are to be awarded they should be reasonable and calculated in accordance with *Spicer*.

#### **District Court Rule 14.6 increased cost and indemnity costs**

[19] 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

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<sup>2</sup> *Spicer v Boulcott Development Group Ltd* [2012] NZHC 906.

- (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.

### **Discussion and decision**

[20] The respondents were unsuccessful in their application and the applicant is entitled to costs. Costs are at the discretion of the Court but should be predictable and expeditious.

[21] My view is that costs should be awarded on an indemnity basis because a timetable was set and the parties filed their evidence, the close of pleadings date passed and the applicant filed her submissions, and all that was required for compliance of the timetabling orders was for the respondents to file their submissions. This was against a background where the applicant had had to seek an injunction to enable her expert to enter onto the property and where there had been non-compliance by the respondents with timetabling orders.

[22] The proposed “fresh evidence” was not new in the sense that the garage issue had been touched upon in Mr McLeod’s original affidavit. What the application to adduce fresh evidence revealed is that this fresh evidence seemed to have been contemplated for some time, with the only reasonable conclusion being that it was deliberately held back by the respondents.

[23] The respondents failed without reasonable justification to comply with the timetable order, and deliberately ignored and disobeyed the timetabling order. The inference I drew is that they acted in a calculated way which I would characterise as acting badly or unreasonably.

[24] In my view an award of indemnity costs in the circumstances of this case is consistent with Rule 14.6 of the District Court Rules 2014 and the observation in *Bradbury v Westpac Banking Corporation* at [27] that indemnity costs are appropriate where a party has behaved badly or very unreasonably.

[25] The applicant seeks costs of \$9,840.62 including GST. The respondents calculate that on a 2B basis the applicant would be entitled to costs of \$3,629, and

applying the guidance in the *Spicer* case an appropriate measure of indemnity costs would be \$5,200. I also note the respondents' actual costs, albeit that did not include preparation of the affidavits. Taking into account all of these matters, together with the nature of the application and the matters at issue, and more particularly the unreasonable behaviour, my view is that it is appropriate to order the respondents to pay indemnity costs of 2/3<sup>rds</sup> of the actual costs incurred by the applicant. Standing back and looking at it that is a proportional response to the respondent's behaviour.

[26] My trial direction of 9 March 2023 still stands and if the respondents were to fail to attend then the applicant would be entitled to seek to proceed in their absence.

[27] The affidavits of Mr Robertson, Mr Judge and Mr Rowe are to be removed from the court file.

[28] I am not prepared to make directions in relation to payment of fees or what might happen if there is further non-compliance by the respondents. Any further issues of non-compliance will be dealt with by the trial judge.

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Judge AA Zohrab

District Court Judge | Kaiwhakawā o te Kōti ā-Rohe

Date of authentication | Rā motuhēhēnga: 06/10/2023