IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

CIV-2011-441-000827
[2012] NZHC 2910

BETWEEN	FRESHMAX NZ LIMITED Plaintiff
AND	OAK GLEN ORCHARDS LIMITED First Defendant
AND	FAMILY TRIO LIMITED Second Defendant
AND	MICHAEL JOHN ALCOCK Third Defendant
AND	DONALD BRUCE STEEDMAN Fourth Defendant

Hearing: 31 May 2012
with written submissions received 16 July 2012; 31 July 2012; and 14 August 2012
(Heard at Napier)

Appearances: M Keall for Plaintiff
D Kerr for Defendants

Judgment: 6 November 2012

JUDGMENT OF ASSOCIATE JUDGE OSBORNE
[as to costs and disbursements]

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[1] My judgment on the plaintiff's summary judgment application was delivered on 4 July 2012.

[2] Counsel have dealt with the issue of costs and disbursements through written submissions.

The costs issue

[3] The plaintiff was successful in its summary judgment application. It is common ground that costs should follow the event.

[4] In my judgment on the summary judgment application,[1] I reserved the costs but summarised the nature of the issue which arose in this way:

> The plaintiff is also entitled to costs upon the basis that they follow the event. Again, pursuant to discussion with counsel at the hearing I will reserve costs. Freshmax relies upon provisions in the guarantees which provide for the recovery of legal fees on a full indemnity basis. Mr Keall accepted that there was no equivalent provision in the principal contracts. Costs remain in the discretion of the Court. It would be an unusual outcome if the Court were to order solicitor/client costs against the guarantors but costs on some lesser basis against the principal obligant. My preliminary view is that, taking into consideration both the contractual provision as against the guarantors and a degree of lack of success (by $16,106.94) for the plaintiff, a costs award on a 2B basis together with disbursements as fixed by the Registrar might be appropriate. Leave will be reserved to the parties in relation to costs.

The plaintiff's position on costs

[5] The plaintiff seeks indemnity costs.

[6] The plaintiff's actual legal costs in its attempts to recover the debt before proceedings were issued and in the period of the proceedings were $44,151.38 (including GST but excluding disbursements). Disbursements were $3,264.72 (including GST).

[7] To the extent that an award of indemnity costs would involve earlier costs of attempted recovery rather than costs in preparation of the litigation (the earlier recovery costs are not available through an application limited to the High Court Rules themselves: *Paper Reclaim Ltd v Aotearoa International Ltd*).[2]

[8] In this case, the plaintiff pleaded and relies on a contractual provision in the guarantees allowing recovery of all legal fees incurred in enforcing the guarantees on

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1 *Freshmax NZ Ltd v Oak Glen Orchards Ltd* [2012] NZHC 1560 at [90].
2 *Paper Reclaim Ltd v Aotearoa International Ltd* 3 NZLR 188 (CA) at [160].

a full indemnity basis.[3] It is the second, third and fourth defendants who were guarantors.

[9] As against the first defendant (which entered into the principal contract which did not contain a clause as to recovery of solicitor/client fees on an indemnity basis), the plaintiff seeks costs of $13,731. That sum arises from a calculation of items on a 2B basis at a daily recovery rate of $1,990). As an alternative to the plaintiff's primary position (of 2B scale costs against the first defendant and indemnity costs against the second, third and fourth defendants) Mr Keall, for the plaintiff, submits that a harmonising of legal costs between all of the defendants might lead to an uplift from $13,731 of between 50 per cent (a total of $20,956.60) or 100 per cent ($27,462).

[10] The plaintiff seeks disbursements, in any event, of $3,264.72 (including GST).

The defendants' position on costs

[11] For the defendants, Mr Kerr submits that the Court ought to adopt the course tentatively outlined in my judgment of 4 July 2012, by limiting the awards of costs to scale. Mr Kerr submits that it would be unusual and improper to have the "guarantee" defendants ordered to pay actual costs when the principal debtor is liable only for a substantially lower sum on account of costs. As with Mr Keall, Mr Kerr did not point me to any case dealing with a contractual situation similar to that in this case.

[12] Mr Kerr further submitted that the Court, in the event of awarding actual costs, should award only those costs which the Court finds to be actual and reasonable. There is clear authority to support the requirement of objective reasonableness: *Watson & Son Ltd v Active Manuka Honey Association*.[4] Mr Kerr submitted that the solicitor/client costs claimed by the plaintiff in this case exceed what is reasonable. He made these points:

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3 Below at [33].

4 *Watson & Son Ltd v Active Manuka Honey Association* [2009] NZCA 595 at [40].

(a) Costs of over $44,000 are disproportionate in relation to a judgment sought for $96,566.93 (plus GST and interest);

(b) A comparison with the defendants' own costs (stated by Mr Kerr to be $12,995 including GST) highlights the disproportionate and unreasonable nature of the plaintiff's costs.

[13] Mr Kerr, relying on *Strachan v Denbigh Property Ltd*,[5] submitted that the onus of establishing reasonableness rests on the plaintiff. The implication of his submission was that the plaintiff had not discharged the onus.

[14] Mr Kerr invoked r 14.13, which provides that costs ordered to be paid to a successful plaintiff must not exceed the costs and disbursements that the plaintiff would have recovered in the District Court if the proceeding could have been brought there, unless the Court otherwise directs. He noted that although there was no mechanism for immediate commencement of summary judgment proceedings in the District Court at the time this proceeding was commenced, a summary judgment procedure was available in the District Court after a judicial settlement conference.

[15] Mr Kerr took issue with travel expenses included within the plaintiff's disbursements. By reference to *Russell v Taxation Review Authority*[6] he submitted that counsel's travel and accommodation will be recoverable only where there were particular reasons to justify the instruction of counsel from a distance. His submission was that in this case the plaintiff could have instructed Hawke's Bay counsel, rather than having its Auckland solicitors instruct an Auckland barrister who practises at the independent Bar.

[16] Mr Kerr further submitted that the level of costs should not be affected by virtue of the fact that out of 12 or 13 grounds of opposition the defendants ultimately actively pursued only six. Mr Kerr emphasised that none of the grounds of opposition was formally abandoned – rather, the six ultimately advanced were "simply prioritised".

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5 *Strachan v Denbigh Property Ltd* HC PN CIV-2010-454-000232, 3 June 2011 per Associate Judge Gendall at [27].

6 *Russell v Taxation Review Authority* (2000) 14 PRNZ 515.

[17] Turning to a 2B calculation of scale costs, Mr Kerr submitted that the daily rate of $1,880 was applicable rather than the rate of $1,990 which was only substituted as from 14 June 2012 (after the hearing).

[18] Mr Kerr took exception to two specific items in the plaintiff's calculation (relating to the defendants' successful application to file further evidence on a matter on which the plaintiff was ultimately unsuccessful) which were included in the plaintiff's 2B calculation.

Discussion

[19] It is convenient to discuss my approach to costs under a different order of headings than those adopted by counsel.

Calculation of costs on a 2B basis

[20] The amending legislation (r 4 High Court Amendment Rules 2012) did not by its transitional provisions clearly identify how the change in daily appropriate rate was to operate in relation to steps taken before the change. The inference I draw and the justice of the situation suggests that it was intended that items would be assessed by reference to the daily rate in force at the time the item occurred. I respectfully adopt the more detailed conclusions reached on the transition by Associate Judge Abbott in *FM Custodians Ltd v Pati*.[7] I therefore accept Mr Kerr's submission that the old rate of $1,880 should apply in this case.

[21] I also accept Mr Kerr's submission that there should be no allowance for the two items which reflected the defendants' successful application to file further evidence on an issue on which the plaintiff was ultimately unsuccessful.

[22] Bringing together the applicable daily recovery rate and the remaining items, the 2B calculation for this proceeding amounts to $11,656.

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7 *FM Custodians Ltd v Pati* [2012] NZHC 1902 at [30]-[39].

Relevance of the District Court scale?

[23] I turn to the possibility of adopting the District Court scale. That possibility arises because r 14.13 High Court Rules requires the costs in this situation not to exceed the costs the plaintiff would have recovered in the District Court where this proceeding could have been brought. The rule is subject to a contrary direction by the Court.

[24] The commentators in *McGechan on Procedure*[8] observe:

> Reservation of a discretion to the Court acknowledges that some proceedings within the current ... jurisdiction of the District Court are nevertheless properly brought in the High Court.

The commentary goes on to give examples of relevant considerations such as the amounts claimed, the complexity of the proceeding and its importance. The commentary refers to the Court of Appeal decision in *Fuehrer v Thompson*[9] in which (in relation to an application for removal of a District Court proceeding into the High Court) the Court identified as a key consideration whether it was "desirable" that the proceedings be heard in a particular Court.

[25] As is evident from the outcome in this case, this case lent itself to a summary judgment application. The District Court Rules at the time did not provide for an immediate summary judgment procedure, a situation which has been recognised by the subsequent decision to reintroduce such a procedure in that jurisdiction.

[26] I find that it was desirable to have this litigation commenced in this Court. There is accordingly justification under r 14.13 to deal with costs other than in terms of District Court recovery. I proceed on that basis.

Costs to be paid by the first defendant

[27] Mr Keall submitted that the Court might make an order of costs in this case (including as against the first defendant) on the basis of a 2B calculation with an

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8 *McGechan on Procedure* at HR 14.13.01.
9 *Fuehrer v Thompson* [1981] 1 NZLR 699.

uplift of between 50 per cent and 100 per cent. His submissions contained two reasons why such an uplift might occur as regards the first defendant:

(a) The plaintiff was required to deal with 12-13 grounds of defence (up to the hearing) of which the defendants actively pursued only five or six grounds and had a degree of success on only two grounds.

(b) By uplifting the award against the first defendant, the Court might be able to "harmonise" the quantum of legal costs as between defendants.

[28] I reject the second approach as not based on principle. The Court cannot appropriately uplift the award against one defendant on the basis that other defendants are liable for more costs.

[29] The first consideration is however a relevant consideration in relation to increased costs. The most relevant provision is r 14.6(3)(b)(ii) High Court Rules which permits an order of increased costs if a party has pursued an unnecessary argument or an argument that lacks merit. Although the points not pursued by the defendants through argument at the hearing were not formally abandoned, I was satisfied that none of them could advance the defendants' defences. They can appropriately be categorised as either unnecessary, or unmeritorious, or both. When the arguments in that category are as numerous as in this proceeding, and the plaintiff's evidence has to deal with each, and in preparation for the hearing, counsel for the plaintiff has to deal with each, a significant uplift is justified. An alternative approach would have been to apply, under r 14.5, Band C instead of Band B, upon the basis that a comparatively large amount of time was involved in relation to evidence and submissions. As both counsel proceeded on the basis of a B allocation, I am content to do the same.

[30] In the tentative view as to costs expressed at the conclusion of my judgment, I overlooked the extent of the unnecessary arguments. Instead, I put some focus on a degree of lack of success on the part of the plaintiff (which succeeded in relation to a judgment at $80,349.99 plus GST but failed in relation to a further $16,106.94. Of itself, the impact of the unsuccessful element in this case is modest when compared

to the impact on time and preparation generally arising from the defendant's unnecessary arguments.

[31] I am satisfied that an uplift of approximately 50 per cent over a 2B calculation is justified in this case. Having regard to the starting point of $11,656, I will fix the costs award, taking account of an uplift, at $17,500.

[32] That is the appropriate award as against the first defendant.

The contractual agreement between the plaintiff and the "guarantee" defendants

[33] When the second, third and fourth defendants entered into their contract of guarantee with the plaintiff, they expressly agreed that:

> The Guarantor's liability under this guarantee is limited to $200,000 plus any costs and expenses incurred by Freshmax in enforcing the guarantee (including legal fees on a full indemnity basis) and interest from the date of repayment until payment in full.

[34] The second defendant company is closely related to the first defendant company. The third and fourth defendants are directors and shareholders of both companies. Given the closeness of the relationship, Mr Keall submitted that any uneven application arising from the agreement as to indemnity costs is more theoretical than real. I accept that submission. This is not a case of relatively independent guarantors. The guarantors in this case were integrally involved in the relevant business operations of the first defendant.

[35] As I have observed in my previous judgment, the situation which arises – whereby guarantors have agreed to pay indemnity costs but the principal obligant has not – is unusual. It is altogether a different thing to suggest, as Mr Kerr suggested, that the imposition of accordingly different levels of costs would be improper. Mr Kerr did not cite any authority for the suggestion of impropriety. The situation does however call for some careful reflection precisely because it is unusual.

The contractual aspect of this case

[36] I now accept that when I tentatively suggested that a scale award of costs against the "guarantee" defendants that was to pay insufficient regard to the contract between the parties.

[37] The clause relied on by the plaintiff in this case,[10] properly construed, clearly includes the legal costs associated with enforcing the guarantee (that is to say not only the legal proceeding itself) on an indemnity basis.

[38] The general approach to the interpretation of indemnity clauses of the kind adopted by the parties in this case was set out by the Court of Appeal in *Beecher v Mills*[11] where the Court said:

> 24. ...
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> The applicable rule is stated by *Halsbury* (Vol 20 para 314) [see now *Halsbury's Laws of England* (5 ed) [1265]] as follows:
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> > In all cases where there is a contract of indemnity the costs of legal proceedings properly incurred by the person indemnified are recoverable under the indemnity.
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> A distinction may be drawn between a person entitled by contract to an indemnity for costs and one who is simply recovering costs as damages (*Great Western Railway Co v Fisher* [1905] 1 Ch 316, 324). In the case of a contract 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 (*Simpson and Miller v British Industries Trust Ltd* (1923) 39 TLR 286, 289). 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. A contractual obligation of that kind is enforceable unless contrary to public policy and, as in *ANZ Banking Group (New Zealand) Ltd* …, we are unable to see how requiring the Beechers in this case to meet all costs (calculated on a solicitor/client basis) properly incurred by Mr Mills in relation to the performance of the indemnity under cl 20 could be said to impede the administration of justice or otherwise be contrary to any discernible public policy considerations.

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10 Above [33].

11 *Beecher v Mills* [1993] MCLR 19 at 24-25; adopted by the Court of Appeal in *Watson & Son Ltd v Active Manuka Honey Association* [2009] NZCA 595 at [24].

[39] The Court of Appeal, in its subsequent decision in *Watson & Son Ltd v Active Manuka Honey Association*,[12] adopted its earlier statement of principle from *Beecher v Mills*. The Court then dealt with an argument that a Court retains an overriding discretion to decline an indemnity for costs notwithstanding a clear contractual provision to that effect. The Court referred to a number of authorities[13] before concluding:[14]

> It is clear in principle and on authority that once it is established that the indemnity is applicable in the circumstances and that, properly construed, it includes solicitor–client costs, no discretion remains available other than on public policy grounds or as part of an assessment by the court as to whether the amount of the solicitor–client costs is objectively reasonable: ...

[40] These authorities indicate that when I expressed a tentative view in relation to costs in my judgment and commented that "costs remain in the discretion of the Court" (a reference to r 14.1 High Court Rules), that was too simplistic. This Court retains no discretion other than on public policy grounds or as part of the assessment of objective reasonableness.

[41] There has been no suggestion that public policy grounds cut across the parties' agreement as to indemnity in this case. The guarantors, closely associated to the first defendant, agreed to indemnity costs as part of their bargain when they entered their guarantees. Policy considerations militate in favour of rather than against the enforcement of the contractual provisions in this case.

[42] Equally, this is not a case where I find there to be any evidence that the fees and disbursements charged to the plaintiff have been unreasonable. Counsel for the plaintiff has produced not only the detailed fee statements but also time records to support them. More time was spent on evidence and on submissions than that might have occurred in a case with limited points in issue but this was not such a case. The defendants put many points in issue. The plaintiff had to meet those numerous points. The plaintiff's solicitor/client costs and disbursements appear reasonable and I so find.

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12 Above, n 4.
13 Ibid at [32]-[34].
14 Ibid at [35].

[43] In doing so, I have not disregarded Mr Kerr's comparison between the plaintiff's costs and what he has recorded to be the defendants' costs. I simply find the statement of the latter not to be particularly helpful or instructive. The plaintiff has incurred a significant proportion of their enforcement costs before the litigation was drafted. By reason of the contractual provisions the plaintiff is entitled to include those enforcement costs in the claim. There is no suggestion that the defendants' much lower costs include any attendances of that nature. Further, the Court has no evidence as to the extent to which the defendants involved their solicitors in the drafting of their narrative evidence. Given that counsel for the plaintiff had to prepare for hearing on the basis that all issues were in play, I cannot draw any relevant conclusions from the fact that the defendants' solicitors may have been able to severely limit preparation given that they were selecting which defences to concentrate on.

[44] I therefore find that there is no basis, on grounds of unreasonableness of fee, to exercise a residual discretion against awarding costs on a full indemnity basis as the parties provided for in their contract.

[45] The defendants' only complaint in relation to the plaintiff's disbursements related to the plaintiff's use of Auckland solicitors and counsel, with resulting costs of accommodation and travel. I find no merit in that objection. Whether engagement of out-of-town counsel is reasonably necessary will depend on the circumstances of the particular case: *Buis v Accident Compensation Corporation.*[15] The *Buis* decision illustrates that where it is otherwise appropriate for out-of-town counsel to be instructed, for example where the client's head office and all deponents of affidavits are in a certain locality, it is reasonable for out-of-town counsel to continue through to hearing.[16]

[46] Those observations apply to this case. The defendants may well have ended up facing greater disbursements and legal costs if the plaintiff's Auckland solicitors

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15 *Buis v Accident Compensation Corporation* (2010) 19 PRNZ 585 at [25].

16 *Buis v Accident Compensation Corporation* above at [26]; see also *Cooper v Peach Cornwall & Partners* HC Wanganui CIV-2009-483-000325, 3 August 2011, per Associate Judge Gendall at [2].

had chosen to seek to brief local counsel in relation to what were the manifold defences being run by the defendants.

[47] Accordingly, I will allow all the plaintiff's disbursements in this case.

Orders

[48] I order:

(a) The first defendant is to pay to the plaintiff costs in the sum of $17,500.00 together with disbursements of $3,264.72.

(b) The second, third and fourth defendants are jointly and severally to pay to the plaintiff the sum of $44,151.38, together with disbursements of $3,264.72

(c) The costs and disbursements orders referred to in paragraphs (a) and (b) above are not cumulative.

(d) I fix the costs of submissions on the costs issue at $796 (based on $1,990 at 0.4) and order that the first, second, third and fourth defendants pay that sum to the plaintiff in addition to the above sums.

Associate Judge Osborne

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