

**IN THE DISTRICT COURT  
AT MANUKAU**

**CIV-2015-092-002104  
[2017] NZDC 22790**

BETWEEN	INNOVATIONS DEVELOPMENT GROUP INTERNATIONAL Plaintiff
AND	KANI HUNIA First Defendant
AND	TOMAIRANGI KIIRA LANCE FOX Second Defendant
AND	ANDREW MARUTUEHU KUSABS Third Defendant

Counsel: Michael Keall for the plaintiff  
John Te Manihera Chadwick for the defendant

Judgment on the papers: 6 October 2017

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**DECISION OF JUDGE RECORDON  
[Costs]**

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**Plaintiff's submissions**

[1] The plaintiff seeks costs on a 2B basis. A 50 per cent uplift is claimed under r 14.6(3)(b)(ii) on the basis that the defendants have contributed unnecessarily to the time and expense of the proceeding. The defendant has not filed costs submissions. Sadly, Mr Chadwick who acted for the third named defendant Mr Kusabs passed away in June 2017.

[2] The plaintiff submits that due to full payment of the claim by the defendant on 10 May 2017, a day before the trial, the defendants have pursued a defence which evidently lacked substance.

[3] In addition, the defendants had the opportunity to settle at the judicial settlement conference on 2 February 2017.

[4] Specifically, the plaintiff seeks costs of \$1550 per day for 6.65 days (\$10,307.50) uplifted by 50 per cent to \$15,461.25. This was the Category 2 proceedings rate under Schedule 5 of the District Court Rules 2014 from 1 July 2014 until 30 June 2015. On 1 July 2015 the Category 2 proceedings rate in Schedule 4 was raised to \$1780.

[5] Interest is claimed at the prescribed rate of 5 per cent from the date of the first formal demand for repayment (10 December 2012) to the date of payment (10 May 2017). This amounts to \$11,041.10 (1612 days at \$6.85 per day)

[6] The plaintiff also claims disbursements in the amount of \$4,350.72.

## **Law**

[7] Costs awards are at the discretion of the court.<sup>1</sup> The principles for the exercise of the discretion are set out in r 14.2. The primary principle is that costs follow the event.<sup>2</sup>

[8] Specifically relevant here is r 14.6(3)(b)(ii) which provides:

- (3) The court may order a party to pay increased costs if—
  - ...
  - (b) the party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in the proceeding by—
    - ...
    - (ii) taking or pursuing an unnecessary step or an argument that lacks merit; or

[9] Increased costs may be awarded when a party has acted unreasonably in relation to the proceeding after the proceeding was commenced. The Court in

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<sup>1</sup> District Court Rules 2014, r 14.1.

<sup>2</sup> r 14.2(1)(a).

*Bradbury v Westpac Banking Corp* stated that “Increased costs may be ordered where there is a failure by the paying party to act reasonably”.<sup>3</sup>

[10] In *Holdfast NZ Ltd v Selleys Pty Ltd* the Court of Appeal set out the correct approach to calculating the extent of an uplift.<sup>4</sup> This has been helpfully summarised in *McGechan on Procedure*.<sup>5</sup>

- Step 1: categorise the proceeding under r 14.3.
- Step 2: work out a reasonable time for each step in the proceeding under r 14.5.
- Step 3: as part of the step 2 exercise a party can, under r 14.6(3)(a), apply for extra time for a particular step.
- Step 4: the applicant for costs should step back and look at the costs award it could be entitled to at this point. If it considers it can argue for additional costs under r 14.6(3)(b) it should do so, but any increase above 50 per cent on the costs produced by steps 1 and 2 is unlikely, given that the daily recovery rate is two-thirds of the daily rate considered reasonable for the particular proceeding.

### **Assessment**

[11] Step 4 is applicable. The plaintiff has prepared a schedule which sets out and calculates the plaintiff’s costs on a 2B over 6.65 days totalling \$10,307.50 not including interest and disbursements.

[12] In my view, the defendants have contributed unnecessarily to the expense of the proceeding by pursuing arguments that lacked merit and their failure to settle the matter at the judicial settlement conference on 2 February 2017. Therefore, I consider that an increase of 50 per cent on the scale costs is appropriate. The plaintiff is entitled to increased costs of \$15,461.25 plus interest of \$11,041.10 and disbursements of \$4,350.72.

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<sup>3</sup> [2009] NZCA 234 at [27].

<sup>4</sup> (2005) 17 PRNZ 897 (CA) at [43] – [48].

<sup>5</sup> Andrew Beck and others *McGechan on Procedure* (online looseleaf ed, Brookers) at [HR14.6.02].

## Liability of the defendants

[13] The second issue is the liability of the defendants to pay costs. If Mr Hunia and Mr Fox are personally liable to the plaintiff under the loan contract, it follows that they will be personally liable to the plaintiff for costs, interest and disbursements awarded to the plaintiff.

*Messrs Hunia and Fox*

[14] The plaintiff submits that Mr Hunia and Mr Fox's removal as Trustee's does not affect their obligations under the loan contract. The Trustees were removed or at least suspended following a decision of the Maori Land Court delivered on 31 August 2016 (146 Waiariki MB 281 [CB263-325]). In *Fai Money v Crawley* the Court of Appeal reiterates the general rule that Trustees are personally liable for breach of their duties as Trustees and for debts or other obligations they incur on behalf of the trusts:<sup>6</sup>

“In this case, the interpretation of any clauses limiting the liability of trustees must be considered against the liability that the law would otherwise impose on trustees. The general rule is that trustees are personally liable for breach of their duties as trustees and for debts or other obligations they incur on behalf of the trusts. However, the ability of creditors to have recourse to the personal assets of trustees may be constrained by any agreement by the person to whom the liability is owed (such as a lender) to limit the trustee's personal liability.”

[15] The plaintiff also cited *AMP General Insurance Ltd v Macalister Todd Phillips Bodkins* the relevant portions state:<sup>7</sup>

“In imposing personal liability the tax statutes do no more than recognise the general principle that liabilities incurred by a trustee in relation to a trust are always the personal liabilities of the trustee. This is an aspect of the nature of a trust, which is not a person but an equitable obligation to deal with property for the benefit of beneficiaries. A creditor has a personal right to sue a trustee and to get judgment and make the trustee bankrupt. As Latham CJ put it when referring to a trustee's liability in *Vacuum Oil Company Pty Ltd v Wiltshire*:

In respect of debts incurred by him in so carrying on the business he is personally liable to the trading creditors – the debts are his debts.

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<sup>6</sup> [2016] NZCA 219 at [55].

<sup>7</sup> [2006] NZSC 105, [2007] 1 NZLR 485 at [42] and [43].

The personal liability of a trustee is counter-balanced by equity which allows full indemnification of the trustee out of the trust's property, or for the trustee to apply the trust property in discharge of the liability..."

[16] Given the personal nature of the obligations owed by Mr Hunia and Mr Fox in relation to the loan contract, I find that they remain liable notwithstanding their removal or suspension by the Maori Land Court. My opinion on this is further reinforced by the fact that Mr Fox and Mr Hunia were Trustees at the time proceedings were commenced in 2015. Finally, there are no clauses limiting the liability of the Trustees.

#### *Mr Kusabs*

[17] The plaintiff acknowledges that the third defendant Mr Kusabs was appointed as a Trustee after the relevant debt was incurred and was not a party to the contract. However, the plaintiff submits that Mr Kusabs incurs liability because he prepared a report for the Maori Land Court on 30 September 2015 which expressly acknowledged the \$50,000 debt owed. Therefore, as a responsible Trustee it is argued that he had an obligation to make an orderly payment of the third party debts, whether or not he was personally responsible for the repayment of the advances.


[18] In my view, although he did not enter into the contract for the trust, Mr Kusabs is liable for the repayment of the advances to the plaintiff as a current responsible Trustee of A8D. Mr Kusabs was a Trustee at the time proceedings were commenced and he had acknowledged the existence of the debt on 30 September 2016.

#### **Result**

[19] The defendants are ordered to pay the plaintiff's costs on the increased scale 2B basis amounting to \$15,461.25 plus interest of \$11,041.10 and disbursements of \$4,350.72.

[20] I find that Mr Hunia, Mr Fox are personally liable for the payment of costs, interest and disbursements and that Mr Kusabs is liable for the payment of costs,

interest and disbursements as a trustee of the KAWERAU A8D AHU WHENUA TRUST.

A handwritten signature in black ink, consisting of a series of connected loops and a long, sweeping tail that extends to the right.

P Recordon  
District Court Judge