

**IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

CIV 2005 409 2833

BETWEEN

JOSEPH ROGER HESLOP AND
JENNIFER ROBERTA
Plaintiff

AND

JENNIFER ROBERTA HESLOP AND
LINDSAY DONALD SMITH AS
TRUSTEES OF THE ROGER HESLOP
FAMILY TRUST
Second Plaintiffs

AND

CLIVE JOHN COUSINS
Defendant

Judgment: 6 August 2007

**JUDGMENT OF CHISHOLM J AS TO COSTS, BNZ SETTLEMENT AND
INTEREST**

[1] The substantive judgment delivered on 15 June 2007 left the following issues open for discussion between the parties and, if necessary, determination by the Court:

- Costs and disbursements (including expert witness expenses)
- Implications of BNZ settlement
- Interest.

To a large extent the parties have been able to resolve the interest issue. However, the other issues require determination by the Court and detailed memoranda have been submitted by counsel.

Costs And Disbursements

[2] Up to the time of judgment the plaintiffs incurred the following costs and disbursements:

• Legal costs	\$546,784
• Expert witness costs	\$ 64,500
• Other disbursements	\$ <u>97,122</u>
Total	\$708,406

The plaintiffs seek an award of indemnity costs in the sum of \$708,406 (which excludes GST). Their fall back position is that there should be at least an increased award of costs.

[3] In addition the plaintiffs also seek post-judgment costs in relation to the following:

• Stay application	\$ 8,600
• The matters covered by this judgment	\$ <u>26,745</u>
Total	\$ 35,345

Again these claims reflect solicitor/client costs incurred by the plaintiffs.

Categorisation

[4] At the first case management conference the proceeding was categorised by an Associate Judge as 2B. The plaintiffs contend that the proceeding should be re-categorised as category 3, at least from August 2006 following the mediation conference. It is also submitted that some of the steps fall into band C rather than band B. Certification for second counsel is also sought.

[5] In terms of r 48(2) the initial categorisation of the proceeding applies to all subsequent determinations in the proceeding unless there are special reasons to the contrary. In *Capital Property Ltd v BM Cook* (High Court, Auckland Registry, COP 257-IM-02, 3 February 2003) Fisher J commented:

[12] ... I accept that a costs categorisation of the kind made at a judicial conference on 7 October 2002 does not bind subsequent courts (as to skill category see in particular R 48(2) but it is at least persuasive. There are policy reasons for not departing from a judicial prediction of that sort without good reason. It can be expected that in choosing how to conduct the proceedings the parties will have been influenced by the advance indication as to the level at which costs would ultimately be addressed ...".

And in *Kolmar Investments Ltd v Hannah & Co Ltd* (High Court, Auckland Registry, CIV-2002-404-001861, 24 November 2004) Harrison J concluded that he had jurisdiction to consider an increased award of costs notwithstanding his indication in the substantive judgment (without hearing counsel) that the defendant was entitled to costs according to category 2B.

[6] I am satisfied that there are special reasons for a re-categorisation from category 2 to category 3 from August 2006 following the mediation conference.

[7] Before the hearing began counsel on both sides appear to have seriously under-estimated its complexity. They were confident that the hearing could be completed within the two weeks allocated. That proved to be very wide of the mark. In fact the hearing ran into a fifth week. It could not possibly be described as a proceeding of "*average complexity requiring counsel of skill and experience considered average in the High Court*". To the contrary, it was a complex proceeding requiring special skill and experience. Thus it is appropriate for category 3 to apply from August 2006 following the mediation conference.

[8] I am also satisfied that it is inappropriate for band B to apply to all the steps in the proceeding. Clearly a number of steps in the proceeding required a comparatively large amount of time in terms of r 48B(2)(c). Mr Johnstone accepts on behalf of the defendant that the appropriate band for different steps of the proceeding may alternate between bands B and C. I accept the submission of Mr Parker and Ms Cooke that Band C is appropriate for preparation of the claim,

preparation for hearing and conducting the hearing. Band B will apply to the other steps. There should also be an allowance for second counsel.

Increased Costs Or Indemnity Costs?

[9] Rule 48C provides:

“48C Increased costs and indemnity costs

(1) *Despite rules 47 to 48B, 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*

(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, documents, or accept a legal argument; or*

(iv) *Failing, without reasonable justification, to comply with [[an order for discovery, a notice]] for further particulars, notice for interrogatories, or 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 48G ... 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 which 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 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 which justifies the Court making an order for indemnity costs despite the principle that the determination of costs should be predictable and expeditious.”*

The onus is on the plaintiff to justify increased or indemnity costs: *Radfords Ltd v Advertising Works New Zealand Ltd* (High Court, Auckland, CIV 2006 404 325), 26 April 2006).

[10] In broad terms the plaintiffs rely on the same factors to justify indemnity costs or, failing that, increased costs: this is an exceptional case involving “*deplorable*” conduct and a breach of fiduciary duty by the defendant; under those circumstances the fiduciary should be required to restore the plaintiffs to their previous position; the defendant unreasonably refused to settle before trial; and unnecessary and unmeritorious steps taken in the conduct of the defence impacted on the costs incurred by the plaintiffs. Extremely detailed submissions with reference to authority have been advanced by counsel for the plaintiffs.

[11] For the defendant it is emphasised that the focus should be on reasonable, as opposed to actual, costs; any departure from the scale should be particularised and principled; the appropriate method is to uplift from the scale, not award a percentage of actual costs; any indemnity award of costs requires a very high threshold to be

passed; and there are no circumstances in this case justifying either indemnity costs or an increased award. Mr Johnstone also noted that the plaintiffs' costs are significantly greater than those incurred by the defendant.

[12] It is well established that a very high threshold must be passed before indemnity costs will be awarded: *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] 3 NZLR 188 at [152], [155] and [160]. I adopt the approach of Goddard J in *Hedley v Kiwi Co-operative Dairies Ltd* (2002) 16 PRNZ 694 at [8] that indemnity costs will be reserved for cases where "*truly exceptional circumstances*" exist. Although the cases cited by Mr Parker and Ms Cooke illustrate that breaches of fiduciary duty have attracted indemnity costs, that is not a hard and fast rule and each case needs to be considered on its merits.

[13] Rule 48C(4) sets out the circumstances that may give rise to an order for indemnity costs. While the defendant's conduct attracted severe criticism in the substantive judgment, it was also accepted that the defendant's conduct reflected "*poor judgment rather than intentional wrongdoing or conscious recklessness*": see [315]. Having reflected on the submissions and the particular categories in r 48C(4), I have reached the conclusion that although this case comes close to warranting an award of solicitor/client costs, in the end result it falls short of meeting the very high threshold that needs to be surmounted. Under those circumstances I am not prepared to award indemnity costs.

[14] On the other hand, I am satisfied that increased costs in terms of r 48C(3) are justified. In my view both paragraphs (b) and (d) apply.

[15] In relation to paragraph (b)(ii), I am satisfied that the defendant's conduct in relation to its intention to adduce evidence from Andrew Marsh (the plaintiffs' solicitor) and expert evidence in relation to Mr Heslop's computer unnecessarily contributed to the plaintiffs' expense in pursuing its claim. In the case of Mr Marsh there was no real possibility of the defendant adducing evidence from this witness. And in the case of the computer expert, the defendant ultimately decided not to adduce any evidence.

[16] Paragraph (b)(iv) also applies. On 2 August 2006, which was approximately three and a half months before the trial began, the plaintiffs made an offer without prejudice except as to costs to settle their claim against the defendant for \$675,000. The defendant rejected the offer. At trial the plaintiffs were awarded more than twice that amount. In my view the plaintiffs' offer to settle was, as counsel for the plaintiffs put it, "*generous*" and the defendant's rejection could not be categorised as reasonable.

[17] It was submitted on behalf of the defendant that r 48C(3)(b)(v) only applies to an offer of settlement by a defendant. I reject that proposition. There is nothing in the Rule to suggest that "*an offer of settlement*" is confined to an offer by the defendant. Indeed, given that the rule concerns increased and indemnity costs it is more likely to apply to offers by the plaintiff whereas r 48D(e)(v), which applies to the refusal of, or reduction in, costs, is more likely to apply to offers by the defendant. As counsel for the plaintiffs point out in their memorandum in reply, the Rule is designed to encourage parties to reach settlement and the purpose of the Rule would be undermined if only defendant's offers were taken into account.

[18] I also note that counsel for the plaintiffs alleged in their memorandum of 13 July that after the Court encouraged the parties to consider settling at the end of the second week of the trial (because there was going to be a delay before the trial could be resumed) "*the plaintiffs through counsel invited the defendant to consider settlement but this did not occur*". This has not been denied by the defendant. While this matter falls outside r 48C(3)(b)(v), it can nevertheless be taken into account under r 48C(3)(d).

[19] I also take into account under r 48C(3)(d) that although it was accepted that the defendant's conduct reflected poor judgment rather than intentional wrongdoing or conscious recklessness, it was nevertheless deplorable. In particular the defendant put his own interests ahead of those of his clients.

[20] Taking those matters into account I have decided that the appropriate course in this case is to uplift the scale costs by 50%. That uplift will not, however, apply to the post-judgment costs (i.e. the costs awarded in [32] below).

Disbursements

[21] The plaintiffs seek full disbursements including expert and witnesses expenses. On the other hand, the defendant claims that the “*two thirds*” rule applicable to legal costs should be applied to the expert and witnesses expenses. To support that proposition Mr Johnstone relies on *Progressive Enterprises Ltd v North Shore City Council* (2005) 17 PRNZ 919. He also takes issue with the mediation fee claimed by the plaintiffs, the additional expenses incurred because of the use of “*out of town*” counsel, and photocopying.

[22] I agree that the claim in relation to the mediation conducted by Mr Sowerby should be deleted. In other respects, however, the plaintiffs’ claim for disbursements has been made out.

[23] Although in *Progressive Enterprises Ltd v North Shore City Council* Baragwanath J considered that the two thirds rule should apply, the Court of Appeal has recently indicated that since the enactment of r 48H the winning party is generally entitled to recover the actual expenses of expert witnesses, provided they satisfy the criteria in r 48H(2): see *Air New Zealand Ltd v Qantas* [2007] NZCA 27 at [47] and [48]. There is no suggestion that the criteria in r 48H(2) has not been met in this case. Moreover, in the overall context of this case I cannot see any justification for declining to award full reimbursement of disbursements (other than for the mediation).

[24] As to the out of town counsel issue, while it is true that there was a considerable increase in costs by virtue of the fact that counsel for the plaintiff were from out of town, this has to be put in context. The defendant is a well known Christchurch lawyer and it was entirely understandable and reasonable that the plaintiffs decided to engage out of town counsel.

[25] Finally, in relation to the photocopying issue, Mr Johnstone submitted that only photocopying directly related to the presentation of the plaintiffs’ case at trial should be allowed. As recorded in the substantive judgment the documentary evidence at trial ran into several thousand pages. Mr Parker and Ms Cooke provided

a detailed explanation of the charge in their memorandum of 13 July and I have no reason to believe that the charge is beyond the scope of r 48H(1)(b)(iii).

[26] Now I turn to the plaintiffs' application for costs in relation to the stay issue. The plaintiffs seek solicitor/client costs, first, on the basis that they were the successful party on the defendant's application for stay and, second, that the defendant had unreasonably rejected their attempts to settle the stay issue. The defendant opposes any order for costs and submits that costs should lie where they fall because neither party was wholly successful.

[27] I am not prepared to make any order as to costs. Both parties enjoyed a measure of success. This was not a situation where either party was wholly successful. Under those circumstances the appropriate course is for costs to lie where they fall.

[28] It remains to determine the plaintiffs' application for solicitor/client costs in relation to the matters covered by this judgment. As already mentioned, the amount claimed is \$26,742 (excluding GST). It is submitted that more than the usual amount of work was required in the preparation of memoranda as to costs, interest and the implications of the BNZ settlement.

[29] For the defendant it is submitted that costs should not be granted because this is not the normal practice: *Air New Zealand Limited v Commerce Commission* (2005) 17 PRNZ 786 at [97]. While Mr Johnstone accepts that counsel for the plaintiff have gone to "*extreme effort*" to present their submissions, it is submitted that this should not be visited on the defendant.

[30] In *The Beach road Preservation Society Inc v Whangarei District Council* 16 PRNZ 13 Chambers J made it clear at [15] that costs can be awarded on a costs argument in accordance with the normal principles applying to interlocutory applications set out in r 48E. I agree. In this case further submissions were required on the implications of the BNZ settlement and interest, as well as the question of costs. I am satisfied that there should be some award to reflect that further post-judgment attendances were required on several topics. However, while I accept that

counsel for the plaintiffs have devoted a good deal of effort to their submissions and the supporting documentation, I have not been persuaded that there should be indemnity costs or an increased award.

[31] Costs in relation to the matters covered by this judgment are awarded on a 3B basis. Given that the matter has been determined on the papers, the calculation should be made on the notional basis that there was a one day hearing.

Implications Of BNZ Settlement

[32] As a result of the settlement with BNZ the plaintiffs received \$100,000 with a denial of liability on a cost avoidance basis. The payment was not tagged to any specific part of the claim. According to the memorandum from counsel for the plaintiffs, the plaintiffs incurred costs of approximately \$82,000 plus GST in relation to the bringing and settling of that claim, leaving a net recovery against the BNZ of \$18,000. That figure has not been challenged and I accept it. In other words, I proceed on the basis that the actual amount received by the plaintiffs was \$18,000.

[33] For the plaintiffs it is submitted that as a matter of policy and principle there is no reason why the defendant should receive any benefit from a commercial decision by other defendants to settle the claim on a cost avoidance basis. It is submitted that it would be unjust for an unreasonable party who refuses to settle to receive a benefit due to the actions of a reasonable settling party. While it is acknowledged that the plaintiffs had sought the same relief from BNZ/Duncan Cotterill as from the defendant, it is submitted that if there had been no settlement with BNZ the claim would have probably been amended to include an alleged overcharging of interest by BNZ. Thus, it is submitted, the potential exposure for the BNZ was different to the defendant's exposure. It is submitted that the amount received by the plaintiffs from BNZ can only be relevant to an award of solicitor/client costs and that if anything less than solicitor/client costs is awarded the \$18,000 net recovery "*should be absorbed into the unrecovered component of the plaintiffs' costs*".

[34] Counsel for the defendant emphasises that the relief sought against the bank is the same as that sought against the defendant and that although different causes of action were pleaded the claims arose out of the same circumstances. It is also emphasised that the payment was not tagged in any way. Mr Johnstone notes that the arguments advanced on behalf of the plaintiff do not specify what policies and principles are relied on and he submits that the settlement payment constitutes recovery of compensation for losses suffered by the plaintiffs and under those circumstances should be applied to the special damages for lost option awarded to the second plaintiff.

[35] Given that the relief sought against BNZ was the same as the relief sought against the defendant, the claims arose out of the same circumstances, and the settlement was not tagged in any way, I cannot ignore the net payment of \$18,000 to the plaintiffs. Failure to do so would allow the plaintiffs to receive double compensation, which would be contrary to principle.

[36] Taking a pragmatic approach I have decided that the appropriate course is to reflect the payment in the award of costs. In other words, the costs awarded to the plaintiffs will be reduced by \$18,000. This will avoid the need to re-open the interest calculations that have already been agreed.

Interest

[37] The parties have already reached agreement that interest accrues on the various judgment sums at 7½% as set out in 65 and 105 of the plaintiffs' memorandum of 13 July. As I understand it, the only outstanding issue in relation to interest is the question of whether there should be interest on costs and disbursements. Such an order is opposed by the defendant.

[38] An award of interest on costs and disbursements would be unusual. No authority for such an award has been cited. Given that the defendant will be obliged to make payment to the stakeholder within five days of this judgment, I cannot see any basis on which an order for interest on costs could be justified.

Outcome

[39] From August 2006 (following the mediation conference) the costs category is changed from category 2 to category 3. The order that band B is to apply is also changed so that bands B and C apply in terms of [8]. Scale costs up to the date of judgment are to be increased by 50% in terms of r 48C(3). However, there is to be a reduction of \$18,000 to reflect the BNZ settlement. There is a certificate for second counsel.

[40] Subject to the deletion of mediation costs relating to the Sowerby mediation, disbursements, including expert witnesses expenses, as claimed are to be paid by the defendant.

[41] Costs in relation to the stay application are to rest where they fall. On the other hand, the plaintiffs are entitled to costs in relation to the matters giving rise to this judgment on a 3B basis.

[42] Leave is reserved to apply should the need arise.

Solicitors: Parker & Associates, Wellington for Plaintiffs
 Wynn Williams, Christchurch for Defendant