IN THE EMPLOYMENT COURT
WELLINGTON

[2012] NZEmpC 165
WRC 8/09

IN THE MATTER OF	costs on the strike out proceedings
BETWEEN	LYNNE FRANCES SNOWDON Plaintiff
AND	RADIO NZ LTD Defendant

Hearing: On the papers

Counsel: Mr R Fletcher, counsel for plaintiff
Mr J Tizard, counsel for defendant

Judgment: 25 September 2012

COSTS JUDGMENT OF JUDGE B S TRAVIS

---

[1] On Tuesday 14 June 2011,[1] on the application of the defendant, I struck out all references to Mr Quigg or his firm Quigg Partners, Barristers & Solicitors, in the plaintiff's second amended statement of claim, dated 18 August 2010 (the fraud proceedings). I found that the allegations against Mr Quigg and his firm were made without any evidentiary foundation and I struck them out.

[2] I invited Mr Tizard, who is counsel for the defendant in these proceedings to file a memorandum as to costs, with a view to granting indemnity costs and invited Mr Fletcher, counsel for the plaintiff to reply. Mr Tizard duly filed a memorandum and explained that in light of the plaintiff's decision not to amend the second amended statement of claim in these proceedings which alleged fraud against the defendant's solicitor and counsel, Mr Quigg and his firm, the defendant was obliged to obtain separate independent advice as to its representation in the future conduct of

[1] [2011] NZEmpC 73.

all of the proceedings before the Court. That involved two other sets of proceedings which were complex and dated back to 2004.[2]

[3] As Mr Tizard explained, that necessarily involved attendances on Mr Quigg and others in his firm to ascertain the general nature of the various claims and the relevant documentation upon which those claims were made and then perusing and considering that material before giving the defendant appropriate advice as to the steps open to it in the fraud proceedings. Mr Tizard pointed out that the plaintiff's statements of claim were prolix and far from coherent and contained recurring references to affidavits and other material filed earlier in the proceedings. That necessitated considerable time to analyse the material in order to be able to fully advise the defendant. The defendant wished to retain the services of Mr Quigg because of his knowledge and long involvement with the proceedings, and eventually elected to make an application to strike out any allegations of fraud against him and his firm. Mr Tizard's memorandum set out the steps taken in relation to the proceedings and advised that the total time involved on the part of his firm, Oakley Moran, was not less than 25 hours at the rate of $350 per hour plus GST. By my calculation this totals $8,750. Additional disbursements of $12.50 unspecified are also claimed.

[4] Mr Tizard advised that the position of Quigg Partners was also to be considered. The cost to the defendant, he advises, would be much greater in engaging separate representation if Quigg Partners had not incurred significant time in briefing counsel. Those costs will be charged to the defendant.

[5] Quigg Partners advised that it had spent 10.2 hours in respect of the application to strike out, at $350 per hour and its costs were therefore $3,750 plus GST.

[6] On my calculations the total amount sought therefore is $12,500.

[7] Mr Tizard submitted that both the costs of Oakley Moran and Quigg Partners were reasonable and should be paid by the plaintiff who had both ample warning of

[2] WRC 17/04 and WRC 19/05.

the defendant's intention to seek indemnity costs and ample opportunity to abandon its allegations against Mr Quigg and Quigg Partners.

[8] In response counsel for the plaintiff stated that the plaintiff did not intend to make submissions in reply and would rely on the Court exercising its discretion regarding costs.

[9] These are unusual proceedings and for new counsel to be properly briefed in order to advise on and bring the strike out application a significant amount of material would have had to have been canvassed.

[10] In my judgment of 24 June 2011 I noted, for example, that there were 675 pages of "will say" statements on behalf of two chartered accounts and 598 pages in the two briefs of evidence of a forensic information technology analyst and accountant, filed on behalf of the plaintiff. There was considerable more material than that for counsel for the defendant to peruse.

[11] Although not addressed in the memorandum, because of presumably the indication that I gave that I would consider indemnity costs, I found considerable guidance from the decision of the Court of Appeal in *Saunders v Winton Stock Feed Ltd.*[3] The Court of Appeal confirmed, that in general, orders for costs are to be a reasonable contribution to actual costs. That general approach yields where it does not deliver a just result and in such cases the Court will exercise its discretion to make an order that is just. The Court of Appeal referred to *Prebble v Huata,*[4] where the Supreme Court observed that indemnity costs have not been awarded in New Zealand except in rare cases, generally entailing breach of confidence or flagrant misconduct. The Supreme Court endorsed the statement of Cooke P in *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd,*[5] where he stated:

> [The costs scheme] reflects a philosophy that litigation is often an uncertain process in which an unsuccessful party has not acted unreasonably and should not be penalised by having to bear the full party-and-party costs of his adversary as well as his own solicitor-and-client costs. If a party has acted unreasonably – for instance by pursuing a wholly unmeritorious and

[3] [2009] 19 PRNZ 342 (CA).
[4] [2005] 2 NZLR 467.
[5] [1991] 3 NZLR 457.

> hopeless claim or defence – a more liberal award may well be made at the discretion of the Judge, but there is no invariable practice. **P 460**

[12] The *Saunders* case also involved a strike out application but in that case it was unsuccessful. The Court of Appeal found that the unsuccessful application was not vexatious, frivolous, improper or unnecessary. It found that the particular application was not wholly unmeritorious or hopeless and therefore indemnity costs should not be awarded against the appellants. The wording used is a reference to the rules as to when the High Court may order indemnity costs in that case r48C(4)(a) of the High Court Rules. This has now become r4.16(4) which provides:

> 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…

[13] The Court of Appeal held that the word "unnecessarily" in the equivalent r48C(4)(a) took its meaning and flavour from the adverbs which preceded it "vexatiously, frivolously, improperly".

[14] I have applied the High Court Rules because reg 6(2) of the Employment Court Regulations 2000 provides that where no form of procedure has been provided by the Employment Relations Act 2000 or the Regulations the Court must dispose of the case in accordance with the provisions of the High Court Rules affecting any similar case.

[15] In the present case the plaintiff was warned of the defendant's intention to seek indemnity costs if she did not amend her second amended statement of claim to delete the allegations of fraud against Mr Quigg and his firm. The second amended statement of claim ran to 77 pages and also contained a schedule of changes which ran to a further 15 pages.

[16] The defendant and the Court were able to examine the extensive briefs of evidence and will say statements filed by the plaintiff which were relied on by counsel for the plaintiff to support the allegations made against Mr Quigg and his

firm. In my interlocutory judgment of 24 June 2011[6] I set out the authorities relied on by Mr Tizard which establish, that allegations of fraud must be alleged with precision and that there are responsibilities on counsel when making allegations of fraud which are higher than in respect of other allegations. Where fraud is alleged there must be clear and sufficient evidence to support it: see for example *Carter Holt Harvey v Commerce Commission*[7]. Mr Tizard also cited r13.8 of the Rules of Conduct and Client Care 2008 which provides:

> **Reputation of other parties**
>
> 13.8 A lawyer engaged in litigation must not attack a person's reputation without good cause in court or in documents filed in court proceedings.
>
> 13.8.1 A lawyer must not be a party to the filing of any document in court alleging fraud, dishonesty, undue influence, duress, or other reprehensible conduct, unless the lawyer has taken appropriate steps to ensure that reasonable grounds for making the allegation exist.
>
> …

[17] The evidence relied on by counsel for the plaintiff to support the allegations of fraud against Mr Quigg and his firm did not provide any grounds at all for making them. I therefore had no hesitation in striking them out.

[18] The plaintiff's opposition to the strike out application was entirely without merit. For the present purposes, in relation to costs, I find that the plaintiff acted vexatiously, frivolously, improperly and unnecessarily in commencing and continuing to make allegations of fraud against Mr Quigg and his firm which were completely unsupported by the evidence she was intending to rely on at trial. This was in spite of being given the opportunity by the defendant to file an amended set of proceedings which did not make those allegations.

[19] In maintaining those serious fraud allegations in such circumstances, without a shred of evidence to support them, amounted, in my view, to flagrant misconduct which justifies the imposition of indemnity costs.

---

[6] [2011] NZEmpC 73.
[7] [2009] NZCA 40, [2009] 3 NZLR 573 at [80]

[20] The costs incurred, by both firms acting for the defendant and counsel for the defendant in view of the complexity of the documentary material filed by the plaintiff, appear to be reasonable and fair. I exclude GST, which I do not consider should be included, in accordance with the usual principles: see *Burrows v Rental Space Ltd*.[8] I therefore order the plaintiff to pay to the defendant, within 28 days, the total sum of $12,500.

[21] As the incidental disbursements of $12.50 were not specified, I do not order their payment.

B S Travis
Judge

Judgment signed at 3.30pm 25 September 2012

[8] (2001) 15 PRNZ 298.