

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

CIV-2007-404-006648

BETWEEN

PARTS IMPORT CO
Plaintiff

AND

KEUNG TSE
First Defendant

AND

KEUNG TSE ALSO KNOWS AS DAVID
TSE AND SHUN HING LEUNG TSE
Second Defendants

AND

CHRIS M WALKER LAWYERS
Third Defendants

Hearing: 31 March 2009

Appearances: Ms Hindle for the first plaintiff
Mr Wadsworth for third defendant

Judgment: 31 March 2009

ORAL JUDGMENT OF ASSOCIATE JUDGE DOOGUE

Counsel

*MinterEllisonRuddWatts, P O Box 3798, Auckland
Kennedys, P O Box 3158, Auckland*

[1] The first plaintiff which is in liquidation and the other plaintiffs have settled these proceedings against the first and second defendant. They now wish to discontinue against the third defendant – however agreement on costs has not been possible Ms Hindle today told me that the first plaintiff would submit to an order for costs on a 2B basis.

[2] Mr Wadsworth for the third defendant submitted that it would be appropriate for an order for increased costs or indemnity costs to be made against the plaintiffs on discontinuing.

[3] The first of the relevant Rules that I intend to refer to is 15.23. That simply provides that where a plaintiff discontinues a proceeding against a defendant the plaintiff must pay the costs, unless the defendant otherwise agrees or the Court otherwise orders. That Rule does not provide much assistance on the question of how to approach an application for increased or indemnity costs. As Ms Hindle pointed out though the Court has, when considering applications to depart from the Rule, noted that the Court will not speculate on the merits of a case it never heard.

[4] Mr Wadsworth said that the reason why increased costs or indemnity costs should be directed here arises from the nature of the allegations that were made against the third defendant, who is a solicitor. It was claimed in the proceedings that he had put himself in a position where he was acting for parties whose interests were in conflict in that there were business arrangements between the first plaintiff and the first and second defendants which he could not properly deal with because of a conflict. M Wadsworth said that the allegations which were made that the solicitor had acted where there was a conflict of interest between his clients would have amounted at the relevant time to a breach of the ethical Rules that then applied. The second part of the allegations against the solicitor asserted that he had breached an undertaken that he had given. That too, said Mr Wadsworth was clearly an allegation of conduct contrary to ethical professional standards.

[5] For the plaintiffs Ms Hindle says that the liquidators, McDonald Vague took steps as soon as they were appointed to replace the interim liquidators (which occurred 19 May 2008), to fully investigate the situation and to assess the litigation

and also the question of all claims that the various parties would have had against the company. All this took time and she said that the liquidators acted reasonably promptly in making a proposal in September 2008 that they discontinue the proceedings if the third defendant would agree that costs should lie where they fell. She told me that the third defendant was not prepared to accept such an arrangement. She said that the liquidators then came to a settlement with the first and second defendants earlier this month and the position in regard to the third defendant is the only aspect of the litigation which now needs to be concluded.

[6] I accept that in principle it is possible for a defendant who has been discontinued against to claim costs on the increased or indemnity basis set out in Rule 14.6 of the Rules. The Rules appear to be divided into two separate parts so far as relevant to this application - subrule 3 is concerned with payment of increased costs and subrule 4 is concerned with payment of indemnity costs. But it is not possible for me to come to any conclusion in this case on the question of whether increased costs would be justified on the grounds set out in subrule (3)(b). Subrule (3)(b) requires the Court to take into account matters such as whether the party opposing took an unnecessary step or argument in the proceedings that lacked merit or failed without reasonable justification to admit facts and other matters.

[7] The grounds that justify the making of an order under subrule (4) seem to more closely approximate the grounds that Mr Wadsworth relies on for an increase/indemnity costs order. Subrule (4)(a) empowers the Court to order indemnity costs where a party has acted vexatiously, frivolously, improperly or unnecessarily in commencing continuing or defending a proceeding. If such a ground could be made out in the present case then I would agree that the third defendant might be entitled to indemnity costs. In principle if an allegation is made against a solicitor that he or she acted in circumstances where there was a conflict of interest and, *a fortiori*, where it is alleged that a solicitor breached an undertaking, then if those proceedings were later found to be improperly commenced the party affected would have a strong case to obtain indemnity costs. But the problem is that because the proceedings are going to be discontinued the Court is never going to be in the position where it will have the necessary evidence and arguments that it needs to assess that very issue. I agree that when a party discontinues a proceedings in

which it makes allegations that tends to show an absence of conviction about the allegations which are the subject of the proceedings. But there might be other reasons as well why a party elects to discontinue proceedings – lack of resources or difficulty in proving the case may be examples. For all of those reasons I do not consider that I am equipped with the necessary information to come to a firm conclusion that there has been improper vexatious etc conduct on the part of the plaintiffs in taking and maintaining these proceedings.

[8] There is no argument as I have already noted that the third defendant is entitled to costs. While I accept that Mr Wadsworth was on good ground when he said that making allegations like this against a solicitor must cause injury and concern, I am afraid that I cannot make the order sought and I simply make the order which the plaintiff is prepared to consent to which is an order that the third defendant have costs on a 2B basis together with disbursements to be fixed by the Registrar.

[9] I record Ms Hindle's advice that the plaintiffs will file discontinuances by the end of the current week.

J.P. Doogue
Associate Judge