IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-002699
[2015] NZHC 3084

UNDER	The District Courts Act 1947
IN THE MATTER	of an appeal against the judgment in the District Court at Auckland in CIV-2012-004-2138 given on 23 September 2014
BETWEEN	WIRE BY DESIGN LIMITED (IN RECEIVERSHIP AND IN LIQUIDATION) First Appellant
	HADLEY JOHN WRIGHT Second Appellant
	HADLEY JOHN WRIGHT, LORRAINE WRIGHT and DAVID SCHNAUER Third Appellants
AND	COMMERCIAL FACTORS LIMITED, COMMERCIAL FACTORS AND FINANCE LIMITED, COMMERCIAL FINANCE AND SECURITIES LIMITED Respondents

Hearing: (On the papers)

Counsel: Andrew Commons for the Appellants
Paul Dale for the Respondents

Judgment: 7 December 2015

[COSTS] JUDGMENT OF MOORE J

This judgment was delivered by me on 7 December 2015 at 4:30pm
pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

Date:

Introduction

[1] On 11 May 2015, I delivered a judgment dismissing an appeal by Wire By Design Ltd ("WBD") and other Tawil Group parties (collectively "Tawil") against a decision of the District Court holding them liable to pay a $100,000 break fee under their agreement with Commercial Factors Ltd ("CFL"). I allowed a cross-appeal by CFL against the refusal of the District Court to grant indemnity costs. I awarded indemnity costs on the appeal, and granted the parties leave to file memoranda as to quantum.

[2] Since that judgment, each party has filed several memoranda. CFL maintains its claim for indemnity costs which it says amount to $160,248.58 as at 10 June 2015. No doubt this figure has since been inflated by the ongoing debate over costs and the appellant's application for leave to appeal.

[3] By contrast, Tawil continues to argue that indemnity costs should be refused, either on the basis that no deed was pleaded providing for such costs, or because the costs claimed are unreasonable. While I addressed this issue in some detail in my judgment, it is now necessary to again address the basis for such costs to be awarded.

Indemnity costs under deed

[4] The law relating to indemnity costs under a contract or deed is reasonably well settled as set out in *Black v ASB Bank Ltd*.[1]

[5] The Court's jurisdiction to award indemnity costs originates in r 14.6 of the High Court Rules which relevantly provides:

> "**14.6 Increased costs and indemnity costs**
>
> [...]
>
> (4) The court may order a party to pay indemnity costs if—
>
> [...]

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1 *Black v ASB Bank Ltd* [2012] NZCA 384 at [69]-[108]

(e) the party claiming costs is entitled to indemnity costs under a contract or deed; […]"

[6] In *ANZ Banking Group (NZ) Ltd v Gibson* the Court of Appeal held that a contractual right to indemnity costs is enforceable. In *Frater Williams & Co Ltd v Australian Guarantee Corp (NZ) Ltd*, the Court said that where a contract gives rights to indemnity costs, the question for the Court is whether the costs claimed are reasonable.[2] However, the Court stressed that the word "reasonable" in this context does not import a discretion in the usual sense.[3] Rather, as the Court observed in *Beecher v Mills*:[4]

> "In the case of a contract [giving an indemnity for costs] 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.[5] 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 (NZ) Ltd v. Gibson*[6] 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 clause 20 could be said to impede the administration of justice or otherwise be contrary to any discernible public policy considerations."

[7] It follows that where indemnity costs are provided for under a contract or deed and where the proceedings have not been brought unreasonably, such costs are available as of right. Of course, the reasonableness criterion allows the extent of these costs to be challenged, but other than where there is a general failure on the part of the party seeking costs to act reasonably, an award should not be made for scale costs.

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2 *Frater Williams & Co Ltd v Australian Guarantee Corp (NZ) Ltd* (1994) 2 NZ ConvC 191,873 (CA) at 191,886-191,887.

3 At 181,887.

4 *Beecher v Mills* [1993] MCLR 19 (CA).

5 *Simpson v British Industries Trust Ltd* (1923) 39 TLR 286 (KB) at 289,

6 *ANZ Banking Group (NZ) Ltd v. Gibson* [1986] 1 NZLR 556 (CA) at 566,

Are indemnity costs payable?

[8] Tawil's main argument is that the deed which could provide a basis for an award of indemnity costs was the agreement between CFL and WBD. It observes that this deed was never pleaded and was not adduced at the original hearing. It thus claims CFL cannot rely on this deed.

[9] While disputing this conclusion, CFL also observes that it did adduce evidence of other deeds under which the other Tawil parties agreed to pay indemnity costs incurred in any proceedings to enforce CFL's rights under the various agreements. CFL says these deeds entitle them to indemnity costs on the present appeal. This was the basis on which indemnity costs were awarded in my 11 May judgment.

[10] Tawil's present argument is a continuation of its argument on the appeal, namely that the District Court's decision was based on a fundamental misunderstanding of the parties and their relationships. Tawil sought to rely on the legal separation of the various group members to avoid liability attaching to any party other than Eagle Wire Ltd ("EWL"). As Mr Commons, for Tawil, stressed at the hearing, it was incumbent on the Court to identify who were the parties to the agreement and, as a consequence, what were their obligations.

[11] However, in my judgment, I concluded that the agreement between CFL and Tawil was not limited to EWL. Instead the agreement was intended to bind all of the parties to the group and, in particular, whichever company ultimately assumed the role of Faulkner Collins Ltd ("FCL") within the transaction. I decided that the company was WBD.

[12] Additionally, I found that the guarantees given by the other Tawil parties extended to the obligations contained in the agreement under examination. This included the obligation to pay indemnity costs in proceedings by CFL to enforce that agreement. These guarantees were included in the evidence before the District Court and were relied upon in argument in this Court. It follows the Tawil parties are bound to pay indemnity costs under their agreements with CFL.

Are indemnity costs reasonable?

The final question is whether the costs claimed are reasonable in this case. Mr Commons submits they are not, and relies on four factors to argue the costs claimed are unreasonable, namely:

(a) Mr Dale, as a senior member of the profession, was particularly expensive and his engagement was an unnecessary extravagance;

(b) scale costs would only amount to $93,000; thus the amount claimed is excessive;

(c) much of the costs claimed relate to matters which did not become important at trial and so are "wasted costs"; and

(d) additional costs were incurred as a result of the respondents' own actions and witnesses.

[13] As already noted and as set out in my judgment, reasonableness in addressing the question of indemnity costs does not import a discretion in the usual sense. The Court is not engaged in determining what would have been a reasonable fee for the work. Instead the focus of the inquiry is whether the amount claimed is justifiable.

[14] I do not consider the arguments raised by Mr Commons demonstrate the costs claimed are unreasonable. While it is correct that Mr Dale is an experienced barrister, and his fees will be higher than those charged by some other members of the profession, CFL was entitled to its choice of counsel. The fact that its costs were guaranteed under a deed, does not alter the fundamental freedom of a litigant to choose its own representation. I am far from satisfied that in this case its choice of counsel or the fees rendered were unreasonable.

[15] Similarly, I am not assisted by Mr Commons' observation that indemnity costs are significantly more than scale costs. This is to be expected. While scale costs are generally estimated to be two-thirds of the reasonable cost of a proceeding, this is not a fine calculus, and some variation must be permitted. This is particularly

so in the present proceeding where the actions of the appellant in taking every conceivable argument has lead to the proceedings becoming a good deal more complicated and prolonged than they might otherwise. That CFL's costs, at around $160,000, are more than the $140,000 which would be estimated by calculating costs according to the scale does not satisfy me the fee is unreasonable.

[16] Likewise, the claim the respondents misdirected their claim and so "wasted" costs, adds nothing to this argument. The respondents ran a reasonable argument in response to the appeal and while I did not accept their argument in full they were the successful party. The fact that my findings departed slightly from their argument on appeal does not render their costs unreasonable.

[17] Finally, the conduct of the respondents, and in particular the allegation their witnesses gave incorrect or evasive evidence, does not mean that the costs claimed are unreasonable. The dynamics of a trial dictate a fluid process in the receipt of evidence. The reliability and credibility of witnesses requires constant judicial attention and, ultimately, assessment. Some witnesses may be unconvincing; others may be highly persuasive. Memories may vary. That a witness' evidence may not ultimately be accepted is not necessarily a consequence of a credibility finding. That a witness' evidence may not be accepted by the fact finder does not necessarily lead to disqualifying entitlement to costs or an order for reduced costs. I do not consider that the costs claimed in this matter are unreasonable on this basis either.

Quantum

[18] As at 10 June 2015, CFL's claim for indemnity costs totalled $160,248.58 including disbursements. They are entitled to this sum, and also to the further costs that have been incurred since that date, particularly in relation to the application for leave to appeal.

[19] I direct the parties to consult with a view to reaching agreement on the quantum of costs. This judgment should be of assistance in informing that discussion. In the event that the parties are unable to agree, I grant leave to each to file a further memorandum on this point.

[20] In order to avoid a proliferation of memoranda such as occurred on the present application, I direct that if orders are required, CFL is to file a memorandum of no more than two pages. Tawil may file a memorandum in reply of no more than two pages within 10 working days thereafter. CFL may file any reply of no more than one page within five working days thereafter. No further memoranda will be accepted without leave.

Moore J

Solicitors/Counsel:
Sharp Tudhope Lawyers, Auckland
Ellis Law, Auckland
Mr Commons, Auckland
Mr Dale, Auckland