

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA834/2011
[2016] NZCA 282**

BETWEEN NEW ZEALAND VENUE AND EVENT
MANAGEMENT LIMITED
Appellant

AND WORLDWIDE NZ LLC
Respondent

Memoranda: 29 October 2014 and 14 November 2014

Court: Harrison, Wild and French JJ

Counsel: A C Sorrell and S L Robertson for Appellant
M J Fisher for Respondent

Judgment: 23 June 2016 at 11 am

JUDGMENT OF THE COURT

A The appellant is to pay the respondent's costs for a standard appeal on a band A basis together with GST-exclusive disbursements.

B Interest on those costs and disbursements is to run from 11 August 2014 until they are paid.

REASONS OF THE COURT

(Given by Wild J)

Introduction

[1] This Court allowed this appeal in a judgment delivered on 2 May 2013.¹ The Court's costs order was:

The respondent is to pay the appellant costs for a standard appeal on a band A basis with usual disbursements.

[2] The Supreme Court allowed the respondent's (Worldwide's) appeal on 11 August 2014 and ordered:²

The order for costs in the Court of Appeal is set aside. If costs cannot be agreed in the Court of Appeal they should be set by that Court in light of this judgment.

[3] The parties had agreed by 14 November 2014 that the appellant (NZ Venue) should pay Worldwide's costs of this appeal for a standard appeal on a band A basis plus disbursements. But the parties disagreed over:

- (a) GST on Worldwide's disbursements; and
- (b) interest on the costs order in favour of Worldwide.

[4] The opposing positions on these two issues are:

- (a) *GST on the disbursements*: For Worldwide Mr Fisher simply sought disbursements of \$1,317.15. The invoices he provided to support that amount show that the disbursements were all GST-inclusive.

Mr Sorrell, for NZ Venue, responded:

... the GST element of the disbursements will have been recovered by the Respondent. The Respondent will not provide a GST invoice and the Appellant cannot recover it and does not expect the Respondent will account for it when paid. For these reasons in principle the GST on those items, although small, should not be included.

¹ *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC* [2013] NZCA 130, [2013] 3 NZLR 329.

² *Worldwide NZ LLC v NZ Venue and Event Management Ltd* [2014] NZSC 108, [2015] 1 NZLR 1.

(b) *Interest on costs*: Mr Fisher, for Worldwide, asked that:

... the costs judgment be treated as sealed on 23 June 2013 for interest purposes (the date on which this Court sealed judgment).

Mr Sorrell's position for NZ Venue was that:

... interest on the costs would more appropriately run from 11 August 2014 the date of the Supreme Court judgment.

[5] We deal with each point in turn. In dealing with the first point, GST on Worldwide's disbursements, the Court takes this opportunity to end the uncertainty that has existed for many years over GST on costs and disbursements, by laying down the principles that should apply.³

GST on costs and disbursements

Recoverability of GST

[6] A GST-registered party will generally recover from the Commissioner of Inland Revenue a GST input credit for the GST the party has paid to the solicitor representing it in the litigation.⁴ This GST input credit is not available to the successful party if it is not GST-registered.

Scale costs

[7] We consider it well-settled that all awards of scale costs are GST neutral.⁵ The successful party is not required to account for GST and the losing party is not able to claim a GST input credit. An award of scale costs therefore should not allow GST on those costs. This is why scale costs are referred to as "GST neutral". GST is simply omitted from the calculations.

³ We refer to the High Court Rules and related authorities throughout, but the principles are equally applicable to costs and disbursements orders in appellate courts.

⁴ *Dunedin Catering Supplies v Mr Chips Ltd* [2013] NZHC 1815, (2013) 21 PRNZ 798 at [34].

⁵ Andrew Beck (ed) *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at [HRPt14.03]; Jessie Alexander (ed) *Sim's Court Practice* (online looseleaf ed, LexisNexis) at [HCR14.2.11]; *Dunedin Catering Supplies v Mr Chips Ltd*, above n 4; *Burrows v Rental Space Ltd* (2001) 15 PRNZ 298 (HC) at [14]; *Thoroughbred & Classic Car Owners' Club Inc v Coleman* CA203/93, 25 November 1993 at 2–3; *Bellis v NZMC Ltd (No 2)* HC Christchurch CP412/90, 26 March 1992 at 3.

[8] The rationale for this principle is twofold.

[9] First, an award of scale costs in New Zealand represents a *reasonable contribution* to the costs actually and reasonably incurred.⁶ Importantly, the assessment of what constitutes a reasonable contribution does not depend on the actual costs incurred by the successful party.⁷ This distinguishes scale costs from other types of costs awards. That scale costs will often not fully indemnify the successful party reflects the fact that litigation is generally an uncertain process in which the unsuccessful party has not acted unreasonably and should not be penalised by having to bear the successful party's full costs.⁸ Setting scale costs at the level of approximately two-thirds of deemed actual and reasonable costs is also intended to encourage resolution of disputes efficiently and to disincentivise unnecessary or protracted litigation.⁹

[10] Second, the losing party is not paying for a service provided to it by the successful party or its lawyers.¹⁰

Increased costs

[11] The Court has an overriding discretion in making costs awards.¹¹ That includes a power to order increased costs.¹² In so ordering, the court uplifts from scale, rather than awarding a percentage of the actual costs incurred; but it may take into account the costs actually incurred by the successful party, including, where applicable, the GST component of those costs.¹³

[12] If the successful party is not able to recover GST, it should inform the Court, so the Court has the opportunity to take this into account. Otherwise, the Court will

⁶ *McGechan on Procedure*, above n 5, at [HR14.2.01(4)]; *Sim's Court Practice*, above n 5, at [HCR14.2.3]; *Glaister v Amalgamated Dairies Ltd* [2004] 2 NZLR 606 (CA) at [10]–[14]; *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1991] 3 NZLR 457 (CA) at 460; *Morton v Douglas Homes Ltd (No 2)* [1984] 2 NZLR 620 (HC) at 625.

⁷ High Court Rules, r 14.2(e); *Glaister v Amalgamated Dairies Ltd*, above n 6, at [14].

⁸ *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd*, above n 6, at 460.

⁹ *McGechan on Procedure*, above n 5, at [HRPt14.02(g)] and [HR14.2.01(4)(c)]; *Sim's Court Practice*, above n 5, at [HCR14.2.3]

¹⁰ *Burrows v Rental Space Ltd*, above n 5, at [14].

¹¹ High Court Rules, r 14.1.

¹² Rule 14.6(1)(a) and (3).

¹³ *Commissioner of Inland Revenue v National Insurance Co of New Zealand Ltd* (1999) 19 NZTC 15,135 (CA) at [57].

follow its usual practice of awarding increased costs on the basis that the successful party is GST-registered and able to recover GST.

Indemnity costs

[13] An award of indemnity costs will include GST if the successful party is not able to recover the GST component. Conversely, it will not include GST if the successful party is able to recover the GST component. Usually this will simply depend on whether the successful party is GST-registered. However, in some instances, such as where GST is not recoverable by the successful party because it provides services in the nature of exempt supplies, a GST-registered party may still be awarded GST as part of the costs order.¹⁴

[14] The rationale for this rule is straightforward: awarding GST-inclusive indemnity costs to a successful party that is GST-registered would usually result in double recovery of the GST component.¹⁵ Conversely, failing to award GST to a successful party that is not GST-registered means it would not achieve full recovery.

[15] Indemnity costs are treated differently to scale costs in relation to GST because an award of indemnity costs aims to provide the successful party with *full recovery* (or at least something very close to it), rather than merely a reasonable contribution to its costs. There cannot be a proper determination of the full recovery amount without knowing the GST liabilities of the successful party.¹⁶

[16] As when awarding increased costs, the Court will proceed on the basis that the successful party is GST-registered and entitled to a GST input credit. Accordingly, a party that is not able to recover GST should inform the Court so that this may be taken into account. This basis ensures double recovery is avoided and puts the onus on the successful party to inform the Court of its inability to recover GST if it wants fully to recover its costs.

¹⁴ *Hogan v Commercial Factors Ltd* CA225/03, 7 March 2005 at [2]. In this case the respondent provided financial services in the nature of exempt supplies.

¹⁵ *Dunedin Catering Supplies v Mr Chips Ltd*, above n 4, at [35]; *Crown Money Corporation Ltd v Grasmere Estate Trustco Ltd* (2008) 19 PRNZ 591 (HC) at [7]; *Suttie v Bridgecorp Ltd* HC Auckland CIV-2006-404-3667, 8 December 2006 at [19]–[20].

¹⁶ Andrew Beck “Litigation” [2009] NZLJ 69 at 70.

Disbursements

[17] The position in relation to disbursements is the same as for indemnity costs. If a successful party is to be fully reimbursed for its actual claimable expenses, then the Court must know whether it is registered for GST. The aim when allowing disbursements is full recovery, so that the successful party is not left out of pocket.¹⁷

Application to this case

[18] It follows from these principles that we allow Worldwide costs for a standard appeal on a band A basis with the disbursements claimed, but without GST on those disbursements. The GST component of those disbursements can be claimed by the respondent in the usual way (and almost surely was claimed, long ago).

Interest on costs

[19] In *Chesterfields Preschools Ltd v Commissioner of Inland Revenue*, this Court held that, for interest on costs to accrue under r 11.27 of the High Court Rules, the Court must have either:

- (a) awarded costs in a specific sum; or
- (b) although not awarding a specific sum, made a costs order in terms that enable the costs to be calculated or determined without reference back to the Court. The Court went on to say this could be by reference to the High Court Rules relating to costs, or some other mechanism stipulated by the Court.¹⁸

[20] Further, in that case this Court agreed with Fogarty J that there was no jurisdiction under r 11.27 to award backdated interest on costs.¹⁹ Fogarty J's

¹⁷ *Air New Zealand Ltd v Commerce Commission* [2007] NZCA 27, [2007] 2 NZLR 494 at [48]. In terms of r 14.12(2) of the High Court Rules, disbursements are only allowable to the extent they are reasonable in amount and were incurred in, and were reasonably necessary for, the conduct of the proceeding.

¹⁸ *Chesterfields Preschools Ltd v Commissioner of Inland Revenue* [2013] NZCA 44, [2013] 2 NZLR 499 at [20].

¹⁹ At [18]; and see *Chesterfields Preschools Ltd v Commissioner of Inland Revenue* [2012] NZHC 1532, (2012) 25 NZTC ¶20-131 at [17].

1 May 2009 costs order had been overturned by this Court and remitted back to the High Court.²⁰ The High Court did not properly fix costs until 30 August 2012. Part of the problem in that case was that there were several errors in the original calculation and there was a further claim for indemnity costs and costs for other matters not originally claimed.²¹

[21] In *Chesterfields Preschools* this Court also rejected an argument that an award of interest could have been made under s 87 of the Judicature Act 1908. The Court explained:²²

[Section 87] gives a court²³ a discretionary power to include in the judgment sum interest on all or any part of the debt or damages for the whole or any part of the period between the accrual of the cause of action and the date of judgment. That has no applicability to an award of costs. Costs are consequent upon and not part of a judgment for a “debt or damages”, except when they are awarded as damages, which was not the position here.²⁴ We view s 87 as having no application to the situation here.

[22] In allowing the appeal in the present case, the Supreme Court held that a sum of money owing does not need to be ascertained or readily ascertainable to come within s 87(1) of the Judicature Act.²⁵ Where s 87 is engaged, a court may award interest on debt or damages from the point at which the cause of action arose.

[23] The Supreme Court did not refer to this Court’s judgment in *Chesterfields Preschools*, because s 87 has no application to costs unless they comprise part of the “debt or damages”. The principles in *Chesterfields Preschools* set out in [19] and [21] above remain good law.

[24] The Court in *Chesterfields Preschools* was applying r 11.27 of the High Court Rules, which is narrower on its face than r 53 of the Court of Appeal (Civil) Rules 2005, the provision we are applying in the present case. But the same

²⁰ *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2010] NZCA 400, (2010) 24 NZTC 24,500; overturning *Chesterfields Preschools Ltd v Commissioner of Inland Revenue* (2009) 24 NZTC 23,504 (HC).

²¹ *Chesterfields Preschools Ltd v Commissioner of Inland Revenue (No 2)* [2012] NZHC 2216 at [8]–[9].

²² *Chesterfields Preschools Ltd v Commissioner of Inland Revenue*, above n 18, at [11].

²³ Section 87 expressly applies to the High Court, Court of Appeal and Supreme Court.

²⁴ Costs can form part of an award of damages in a situation where they have been incurred as a result of the defendant’s breach of contract or tortious conduct.

²⁵ *Worldwide NZ LLC v NZ Venue and Event Management Ltd*, above n 2, at [36].

principle applies — interest on costs cannot run until costs have been awarded in a specific sum or in terms that enable the parties to calculate the costs without reference back to the Court.

[25] This is consistent with the Supreme Court’s interpretation of s 87. Interest under s 87 may run from the point at which the cause of action arose on the basis the wronged party should be compensated for its loss of use of the money owed to it. Even if the liable party does not know the amount it is liable to pay, it knows it is liable. But liability to pay costs arises independently of the cause of action and is at the court’s discretion. Interest on costs cannot run until and unless the court makes an order in accordance with [19] above.

[26] The costs order this Court made in its 2 May 2013 judgment stood until the Supreme Court set that order aside in its 11 August 2014.²⁶ Given that situation, we do not see on what principled basis interest on the costs award we are now making could be backdated in the respondent’s favour to 23 June 2013. Strictly, on the principles we have outlined above, interest should only run from today. However, Mr Sorrell has very generously conceded that interest on the costs order can run from 11 August 2014. Given the lengthy and regrettable delay that has occurred in this Court dealing with the two outstanding costs issues raised in counsel’s memoranda of late October and November 2014, Mr Sorrell’s concession is a welcome and appropriate one. Accordingly, we order that interest on the costs is to run from 11 August 2014.

Result

[27] NZ Venue is to pay Worldwide’s costs for a standard appeal on a band A basis together with GST-exclusive disbursements.

[28] Interest on those costs and disbursements is to run from 11 August 2014 until they are paid.

²⁶ *Worldwide NZ LLC v NZ Venue and Event Management Ltd*, above n 2.

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