

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

**CIV-2011-470-997
[2015] NZHC 341**

BETWEEN SUISSE INTERNATIONAL LIMITED
 Plaintiff

AND BEVERLEY JEAN MONK
 Defendant

On the papers

Counsel: A M Swan for Plaintiff
 P F Dalkie and D A Watson for Defendant
 P M Fee and L H Fraser for Mr Swan
 P R Rzepecky for Mr Jespersen

Judgment: 3 March 2015

JUDGMENT OF GODDARD J

This judgment was delivered by me on 3 March 2015
at 4.30 pm, pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
Jespersen and Associates, Auckland for Plaintiff
Bruce Reid Law, Auckland for Defendant
Jones Fee, Auckland for Mr Swan
McElroys, Auckland for Mr Jespersen

[1] The defendant seeks indemnity costs against the plaintiff, and against the plaintiff company's director, Mr Watt, personally. The defendant also seeks costs against both the plaintiff's solicitor, Mr Jespersen, and plaintiff's counsel, Mr Swan.

[2] Neither the plaintiff nor Mr Watt have filed any submissions in opposition.

[3] Counsel for Mr Swan and counsel for Mr Jespersen have filed memoranda in opposition to the application for an award of costs personally against them. In the event that such an application is entertained, they seek a costs hearing. Neither have addressed the matter of indemnity costs.

[4] The issue of costs requires resolution by me, notwithstanding the lack of submissions on the substantive issues from either the plaintiff or Mr Watt.

Indemnity costs

[5] Indemnity costs (excluding disbursements and for two specific items relating to an application for security for costs and applications for further and better discovery and non-party discovery) are sought in the sum of 80 per cent of \$168,016.43 = a total of \$134,413.14.

[6] The essence of the claim for indemnity costs arises from the absence of facts or pleadings to support any cause of action or allegation of fraudulent conduct. No evidence emerged at trial to substantiate any allegation of fraud or dishonesty on the part of the defendant or on the part of others associated with her case. Reference was made to paragraphs [54] and [55] of my judgment, in which I found no evidence to support the allegations made and that the claim was entirely misconceived, bordering on the vexatious.

[7] The defendant relies on High Court Rule 14.6(4)(a) to support her claim for indemnity costs and on *X v Y*, in which Penlington J stated that, "an allegation of impropriety or moral turpitude should not be made without evidence to support it".¹

¹ *X v Y* [2000] 2 NZLR 748 at [58].

Costs uplift

[8] As an alternative to indemnity costs, the defendant seeks an uplift in costs of 50 per cent on scale, viz \$62,670 + \$31,335 = \$94,005.

Costs against Mr Swan and Mr Jespersen personally

[9] The defendant also seeks an order for the costs of the proceeding to be paid by Mr Swan and Mr Jespersen personally. In support, the decision of *Harley v McDonald* was cited.² The defendant says the plaintiff and its lawyers, including plaintiff's counsel at trial, engaged in a personal, vindictive and baseless attack on her and her witnesses. That attack formed no part of any proper cause of action based on material facts.

Discussion

[10] The evidence at the hearing clearly established that the plaintiff has no assets and of itself has no ability to pay any costs ordered against it. It is also clear that Mr Watt himself was the person who stood to gain in the event of the plaintiff's proceeding being successful.

[11] As the plaintiff company has no assets and no ability to pay any costs ordered against it, and Mr Watt personally was the only possible beneficiary of the litigation, had it been successful, I am satisfied there ought to be a costs order made against him, additional to a costs order against the plaintiff company. The decision in *Dymocks Franchise System (NSW) Pty Ltd v Todd (No 2)* is authority for the proposition that a non-party who substantially controlled or stood to benefit from litigation may be required to pay costs.³

[12] The only issue is whether those costs ought to be indemnity or scale costs with an uplift.

[13] On the basis of the approach approved by the Court of Appeal in *Bradbury v Westpac Banking Corporation*, as to the circumstances in which indemnity costs are

² *Harley v McDonald* [2002] 1 NZLR 1.

³ *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No 2)* [2005] 1 NZLR 145.

appropriately ordered, I am satisfied that an award of indemnity costs is appropriate in this case.⁴ In particular, of the circumstances pointed to by the Court of Appeal in *Bradbury v Westpac Banking Corporation*, the following circumstances are apt:

- (a) the making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud;
- ...
- (e) making allegations which ought never to have been made or unduly prolonging a case by groundless contentions, summarised in French J's "hopeless case" test.

[14] I do not think it appropriate to award costs personally against either Mr Swan or Mr Jespersen.

Result

[15] There will be an award of costs on an indemnity basis, representing 80 per cent of the defendant's total costs, ie 80 per cent of \$168,016.43 = \$134,413.14.

[16] The defendant is also entitled to proper disbursements, which are to be fixed by the Registrar.

Goddard J

⁴ *Bradbury v Westpac Banking Corporation* [2009] 3 NZLR 400 at [29].