IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2012-404-007500
[2015] NZHC 3368

BETWEEN	ROBIN JOHN LEARY KELLY, PATRICIA ANN KELLY AND LINDA GLASSWELL as Trustees of THE KELLY FAMILY TRUST Plaintiffs
AND	LASQUE CONSTRUCTION LIMITED First Defendant
	SIGNATURE RESIDENTIAL LIMITED Second Defendant
	SIGNATURE HOMES LIMITED Third Defendant
	STEWART CRAIG WILSON Fourth Defendant

Hearing: On the papers

Appearances: A R Gilchrist and A V Shinkarenko for Plaintiffs
C M Meechan QC and A Durrant for Defendants

Judgment: 22 December 2015

JUDGMENT OF WOOLFORD J

This judgment was delivered by me on Tuesday, 22 December 2015 at 11:30 am pursuant to r 11.5 of the High Court Rules 1985.

Registrar/Deputy Registrar

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Solicitors: Blackwells, Auckland
Wiltshire Stone, Auckland
Copy to: A Gilchrist, Auckland
C Meechan QC, Auckland

[1] I gave judgment in this proceeding in favour of the defendants on 18 August 2015.[1] The parties have been unable to reach agreement on three discrete aspects of their costs claims - the costs to be awarded for answering interrogatories, the costs to be awarded for expert witness fees, and whether an uplift from scale costs is necessary.

[2] The proceedings have been categorised as standard 2B proceedings.

[3] I consider each issue in turn.

Answer to Interrogatories

[4] The plaintiffs issued one comprehensive notice to answer interrogatories and served it on all the defendants. The defendants correspondingly seek four one day allocations of time for answering those interrogatories, reflecting the time required for that step for each defendant.

[5] The plaintiffs say that the defendants all had common legal representation for each of the four responses necessary, and that the matter should therefore be treated as requiring just one allocation of time. They say that it was obvious which questions were directed to which party. On the other hand, the defendants say that the lack of four separate notices required the interrogatories to be broken down, and a separate affidavit for each defendant to be prepared, the time for which is not reflected if just one allocation is granted.

[6] In the alternative, the plaintiffs submit that the step should be categorised as band A, as the reasonable time for each answer to interrogatories would only be a comparatively small amount of time.

Analysis

[7] In *Body Corporate No 189855 v North Shore City Council*, the two plaintiffs in that case sued seven defendants. They claimed that category C costs should apply to each of the interrogatories they answered. Venning J held that given the number

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1 *Kelly v Lasque Construction Ltd* [2015] NZHC 1957.

of plaintiffs and defendants, multiple time allowances were available for the interlocutory steps, but took into account that there would be a degree of repetition in that work.[2] He awarded the first attendances on a band C basis, with subsequent attendances on band B.

[8] In this case, the opposite is claimed, in the sense that the four linked defendants seek separate band B costs on the one combined interrogatory which was provided. I consider that the fact that common counsel represented all of the defendants would minimise the amount of work required. However, separate affidavits were still necessary, requiring additional drafting time. Further, the interrogatories were relatively lengthy and thus would have taken time to work through.

[9] I take account of the repetition in that work across common counsel, as did Venning J. However, I still consider it is appropriate to award time allocation of costs for each interrogatory. I agree with counsel for the plaintiffs that costs at a band A level is appropriate, as a comparatively small amount of time would be necessary for the work undertaken compared to other cases in which separate counsel were appointed.

Expert Witness Fees

[10] The plaintiffs agree that one of the expert witnesses, Mr Barnes, was reasonably necessary for the conduct of the proceedings. However, they contest whether attendances of experts other than Mr Barnes were necessary, and the time allocations and amounts paid to the witness.

[11] Two invoices were provided for the expert witnesses from Barnes Beagley Doherr, a quantity surveying firm. The first, from March 2014, shows that one lump sum was charged for providing an independent estimate of reclad works, with no hourly breakdown. There is also a charge for 22.5 hours of work by Simon Barnes, and 26.5 hours of work by Taylor Boyd-Hunter. The description of the work carried

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2 *Body Corporate No 189855 v North Shore City Council* HC Auckland CIV-2005-404-5561, 2 October 2008.

out is that they were reviewing meetings, and doing a comparative review and progress on the compilation of the Brief of Evidence.

[12] The second, from June 2014, shows that Barnes Beagley Doherr was used to provide expert witness services, including reviewing the evidence of Mr G Bayley, provide reply evidence, attend Court during Mr Bayley's evidence and to testify in court. While Mr Barnes did 33 hours of work, there were some small amounts of work done by Mr Doherr, Ms Chimhundu and L Ratsep. There is no description of specifically what that work involved.

Analysis

[13] In determining whether the disbursements claimed by the relevant witnesses are appropriate, the onus is on the defendants to show that the particular attendance or category of attendance was specific to the conduct of the proceeding, reasonably necessary for the conduct of the proceeding, and that the sum claimed was reasonable in amount.[3] In a recent case, Katz J set out relevant considerations in ascertaining the reasonableness of a witness' costs:[4]

> (a) Determine whether a particular attendance (or category of attendances) was reasonably necessary for the conduct of the proceeding. This requires a sufficient description of the particular work undertaken. A supporting affidavit from an independent expert practising in the same field may be necessary or appropriate when the quantum claimed is significant.
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> (b) Consider the amount of time claimed for the relevant attendance (or category of attendances) and whether it is reasonable, allowing for the significance and complexity of the particular work. A table showing the various steps taken and the costs associated with each step may assist.
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> (c) Consider the hourly rate charged for each author and whether that is reasonable, relative to the experience of that author and the complexity of the work undertaken.
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> (d) Consider any additional evidence which is relied upon to show that the rate charged is a reasonable one (or that the overall costs are reasonable). Again, in some cases (such as where the quantum claimed is particularly large) it may be necessary to file a supporting affidavit from an independent person practising in the same field as the relevant expert(s), deposing that the hourly rates claimed are appropriate and in accordance with industry standards.

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3 High Court Rules, r 14.12.

4 *Auckland Waterfront Development Agency Ltd v Mobil Oil New Zealand Ltd* [2015] NZHC 470 at [44].

[14] The parties agree that Mr Barnes' evidence was reasonably necessary. However, the plaintiffs contest whether the other experts, who evidently form part of Mr Barnes' team, were necessary. Based on the invoices provided, it is clear that the other experts were primarily assisting Mr Barnes in preparing his evidence (he carried out the bulk of the work and it is clear that the other authors were assisting him in that process). From the description of the general work undertaken, as noted at the top of each invoice and repeated above at [11] and [12], it appears that the work done was reasonably necessary to the proceeding.

[15] Although it would be preferable to have a breakdown of the work undertaken by every author, insofar as it is accepted that Mr Barnes' evidence was necessary, some assistance to him by other members of his company toward preparing that evidence is likely to be necessary also. Particularly, using more junior members of the team (reflected in the lower charge-out rates) and having work peer reviewed by other senior members are generally expected parts of preparation for an expert witness, who is unlikely to complete the work solely alone. I agree with the defendants that, although the onus is on the defendants to show that any work undertaken was reasonably necessary, using junior members of the team to carry out certain tasks is an established practice for expert witnesses generally and will have lowered the costs overall.

[16] Based on the descriptions of the work provided, I am also satisfied that the work was specific to the conduct of this proceeding.

[17] In relation to whether the amount charged was reasonably necessary, the defendants submit that the plaintiffs have not submitted any evidence to show that the expert fees are not reasonable, and invite the Court to make the award as originally sought in those circumstances. However, as stated above, it is the defendants who have the onus of proving that the expert evidence was reasonably necessary. There is no obligation on the plaintiffs to submit such evidence.

[18] Although again, comparative evidence showing the general rates of quantity surveyors would be helpful in establishing the reasonableness, as an area of billing the Court is unlikely to be familiar with, the per hour charge out rate for Mr Barnes

does not appear particularly high, at around $220 per hour, as the most senior member of the team. I also accept that Mr Barnes' subsequent increase in charge out rate between March and June, of $40 per hour to $260 per hour, does not appear to be an excessive increase, nor does it escalate the per hour cost to an apparently unreasonable amount.

[19] The use of flat "lump sum" fees for expert work also ought not to be discouraged by the court denying disbursement claims in respect of those sums. Mr Barnes has stated in a subsequent letter that the lump sum charge of $2000 reflects 4 hours of work at a director level (charging $220 per hour) and 11 hours at a senior quantity surveyor level (charging $150 per hour). The total charge, if billed at an hourly rate, would be $2530. The lump sum was obviously an overall saving for the defendants. I am satisfied by the evidence provided by Mr Barnes that this approach represented an overall saving for the defendants, and correspondingly the plaintiffs, and was not unreasonable.

[20] Of the invoices, totalling $23,162.44, just $4611.25 is attributable to authors other than Mr Barnes. The charge out rates for those authors varied from $85 per hour to $260 per hour for another principal of the firm to carry out half an hour of work. These appear to be lower level surveyors, and some office workers.

[21] In this case, no affidavit evidence has been offered to compare the claimed costs against other quantity surveyors' costs, and determine the relative appropriateness of the costs in this case. The most information provided is a letter from Mr Barnes stating that his charge out rate of $220 per hour was at the lower end for surveyors of his seniority. He states that the increase to $260 per hour is still at the lower end for surveyors of his seniority.

[22] Although such information would be preferable for the court in determining the appropriate disbursements, I do not consider extensive affidavit evidence to be strictly necessary in order to determine whether a claimed disbursement meets the test for being reasonably necessary. In this case, the quantum claimed for costs is not of the "significant" quantum sought in *Mobil*, being just five per cent of the overall quantum sought in the litigation, despite being a significant proportion of the

overall costs sought in this claim. Commissioning extensive separate affidavits in the context of a claim of this size could have been a disproportionate expense.

[23] Although none of the charge out rates appear unreasonable I accept that the dearth of supporting evidence as to comparable rates does leave the Court with some difficulties given the onus on the defendant to prove, to a balance of probabilities, the appropriateness of the costs. In *Auckland Waterfront*, Katz J reduced costs by 30 per cent (which she commented was at the high side) where the invoices provided from experts left Her Honour unable to tell how the relevant fees were calculated or what precisely they were for.[5] In that case, the deficiencies in the invoices provided were far more substantial than here, as was the overall sum being sought of over $800,000 in expert witness costs.

[24] I am not convinced that a substantial reduction is appropriate here. Any deficiencies in the claim are minor compared to those in *Auckland Waterfront*, and consist primarily of a lack of ability to compare the charge out rates from Barnes Beagley Doherr with similar firms. Further, as I have noted, obtaining separate affidavit evidence in a claim of this scale would not be necessary. However, further evidence could have been put forward as to the relative seniority of the various authors in order to distinguish their charge out rates.

[25] I consider that to mark the need for the defendants to establish their claim on the balance of probabilities, a modest reduction in the claimable witness costs of around 10 per cent is reasonable. That reduces the claim by $2,316.24, to $20,846.20.

Increased Costs

[26] Finally, the defendants seek increased costs of 25 per cent on scale. They say that the plaintiffs ran a legally unsustainable claim in circumstances where the defendants identified the absence of legal foundation to the claims early in the course of the litigation. Secondly, they say that the plaintiffs did not accept a reasonable settlement offer. They say that the plaintiffs may have issued the proceedings in the

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5 *Auckland Waterfront v Mobil Oil*, above n 4, at [54].

hope that a more generous approach might have been taken to settlement, but that this did not justify pursuing claims that were bound to fail.

[27] The plaintiffs say that just because a party is unsuccessful does not mean that their claim lacked merit. In this instance, the claim rested primarily on factual matters rather than untenable legal arguments. In relation to settlement, the plaintiffs say that in the scale of the likely remediation necessary, the offer of $100,000 was not unreasonably refused.

Analysis

[28] Increased costs may be granted, under r 14.6, if the party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in it by either pursuing an argument that lacks merit, or for failing without justification to accept a reasonable settlement offer.[6]

[29] The Court of Appeal in *Westpac v Bradbury* stated that increased costs were warranted where there has been a failure by the paying party to act reasonably.[7] In relation to pursuing an argument that lacks merit, the question then is whether the arguments that were run by the plaintiffs were unreasonable.

[30] In *Powell v Hally Labels*, the Court of Appeal described a party as advancing some untenable arguments, and taking a needlessly uncompromising approach, but still accepted that its principal arguments were not without merit.[8] In *Lyons v Breslin*, Priestley J noted that although the case was weak it was not hopeless – there were conflicting authorities and the issue was relatively fact-specific which meant that the claim did not entirely lack merit for the purposes of increased costs.[9]

[31] As evidenced from the judgment, the underlying claim brought by the plaintiffs could not succeed. The statement of claim was not clear, and there were some major flaws in the legal underpinnings of the claim in relation to the identities of the various companies and individuals involved representing Lasque and

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6 High Court Rules, r 14.6(3)(b)(ii) and (v).
7 *Bradbury v Westpac Banking Corporation* [2009] NZCA 234, [2009] 3 NZLR 400 at [27].
8 *Powell v Hally Labels Ltd* [2015] NZCA 11 at [4].
9 *Lyons v Breslin* [2012] NZHC 3106.

Signature Homes. The defendants say that the plaintiffs' case was doomed to fail on these points. I agree that in relation to the contractual and Fair Trading Act claims there were relatively serious legal and evidential stumbling blocks to the claim succeeding. Although there were some fact-specific areas, particularly the meaning and implication of Mr Wilson's statements, the legal identity of the defendants at the time of the purported oral guarantees were a substantial, and ultimately, complete bar to recovery. Despite the factual conflicts, the underlying legal arguments also suffered substantial defects. In my view, the plaintiffs' claim would warrant some recognition in an award of costs.

[32] In relation to the failure to accept a settlement offer, two settlement offers were made. The first, on 23 October 2013, identified the position of the defendants in relation to the claim, which was that there was no valid claim available against any defendant other than Lasque, and that the longstop period had run out against Lasque. In the second letter, sent on 19 December 2013, the defendants offered a sum of $100,000 in full and final settlement of the claims. That offer was made because Lasque was being shut down as the last house it had completed was finished, and $100,000 was the balance left available to the company after all other liabilities were paid. The defendants noted that the $100,000 would otherwise be put toward defending the claim, meaning there would be little money left over for settlement afterwards. The defendants also pointed out that there was a very real possibility that the only defendant against whom the plaintiffs would obtain judgment would be Lasque.

[33] The reasonableness or unreasonableness of rejecting an offer must be judged at the time the rejection is made, not on the ultimate result of the hearing or the ability to enforce judgment against one defendant.[10] Further, it is established that it is not unreasonable for a plaintiff to reject an offer which is too little in proportion to the damages claimed.[11] The offer here was for $100,000 in the context of a claim of around $500,000. That was a relatively substantial portion of the claim, although

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10 *Renner v Renner* [2015] NZHC 2451 at [25]; New Zealand Sports Merchandising v DSL Logistic Ltd HC Auckland CIV 2009-404-5548, 19 August 2010.

11 Andrew Beck and others *McGechan on Procedure* (online looseleaf edition, Westlaw) at [HR14.6.02(2)]; *Loktronic Industries Ltd v Diver* [2014] NZHC 1189.

overall it would not have met the needs of the plaintiffs to complete a remediation of their house.

[34] However, although the settlement offer was not overly substantial, in the circumstances, I consider it was a reasonable offer. There was little prospect of any claim succeeding against Lasque, given the longstop period identified, and as I have found, the arguments made as to the legal responsibility of the various parties were also ultimately unmeritorious. In *Loktronic Industries v Diver*, a factor which meant that rejecting the settlement offer was not unreasonable was the fact that the plaintiff's case was not obviously doomed and would turn substantially on what witnesses said at trial.[12] That can be contrasted to the case here, in which the underlying legal claims faced substantial barriers. Although a settlement offer need not be accepted simply because of the claim that a party will go into liquidation or will otherwise be unable to pay any more than the sum being offered in the letter, in the context of identified deficiencies in the plaintiffs' legal claim at the basic level of the identity of the relevant parties (even if an oral guarantee had been made out) I consider that the plaintiffs should have accepted the settlement offer.

[35] Increased costs are therefore appropriate.

Conclusion

[36] The defendants are entitled to 2B costs generally, with a 20 per cent increase on scale. However, for the interrogatories, I award costs to each defendant on a band A basis only.

[37] The defendants are also entitled to disbursements of $20,846.20 for expert witness fees.

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Woolford J

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[12] *Loktronic Industries Ltd v Diver*, above n 9, at [15].