

Hannam v Herd

High Court, Auckland (CIV-2008-404-5195)
White J

29 November;
3 December 2010

Costs — Increased or indemnity costs — Indemnity costs awarded — Application for stay of application costs application pending complaint to Law Society — Whether stay appropriate — Relationship between indemnity costs order and actual costs — Lawyers and Conveyancers Act 2006, ss 132, 161; Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, rr 9, 9.1.

In an earlier judgment in the proceeding relating to the transfer of shares, the Court awarded solicitor-client costs against the defendant, with memoranda to be filed if the parties were unable to agree on quantum. The sealed judgment related to the orders for the transfer of shares, but not indemnity costs.

When the application for costs was called before the Court, the defendant applied for an order staying the application pending determination of his complaint to the Law Society about the amount of costs charged by the solicitors and counsel acting for the defendant.

Held, (1) indemnity costs are determined with reference to actual costs, but may be less than the actual costs if the courts consider they were not reasonably incurred. (para 12)

(2) The jurisdiction and power to make an order for indemnity costs and to determine the quantum of the order is conferred on the Court by the High Court Rules. The Standards Committee of the Law Society has no power to make such an order, or to determine the quantum of the actual costs “reasonably incurred” by a party to the proceeding. (para 17)

(3) Actual costs held by the Court not to be “reasonably incurred” for the purposes of an indemnity costs order may still be “fair and reasonable” as between the lawyer and the client. (para 18)

(4) Unless and until the Court makes an order for indemnity costs and determines the quantum of the order, there is no order of the Court able to be enforced and the liable party is not required to meet any of the legal costs incurred by the other party. Once determined, a proceeding to enforce the court order for indemnity costs would not then be proceedings for recovery of the amount of a bill of costs rendered by a lawyer. There would therefore be no basis for the Court to grant a stay under the Lawyers and Conveyancers Act 2006 in respect of proceedings to enforce the court order. (para 19)

Cases referred to

Bradbury v Westpac Banking Corporation (2008) 18 PRNZ 859 (HC)

Bradbury v Westpac Banking Corporation [2009] 3 NZLR 400 (CA)

Crown Money Corporation Ltd v Grasmere Estate Trustco Ltd (2008) 19 PRNZ 591 (HC)

Simpson Grierson v Gilmour (2009) 19 PRNZ 865 (HC)

Watson & Son Ltd v Active Manuka Honey Association [2009] NZCA 595

Reference

McGechan on Procedure at [HR 14.6.03(2)]

Application

This was an application for an order staying an application for costs.

G P Blanchard for plaintiff

J B Samuel for defendant

Cur adv vult

WHITE J

[1] In a judgment delivered on 17 November 2008 John Hansen J granted orders sought by the plaintiff, Mr Hannam, for the transfer of certain shares and for indemnity costs. The Judge concluded at [21]:

Accordingly, on this proceeding there will be solicitor/client costs to the plaintiff. If the parties dispute quantum, the Court will ultimate [sic] determine that on memorandum filed, such memoranda to be filed within ten working days of today's date.

[2] The judgment of the Court sealed on 20 November 2008 related to the orders for the transfer of the shares, but not to the order for indemnity costs.

[3] There has been no appeal against the judgment of John Hansen J and Mr Samuel confirmed that the defendant does not dispute his liability for indemnity costs.

[4] The parties were unable to agree on quantum and, as envisaged by [21] of the judgment of John Hansen J, memoranda were filed on 1 December 2008 by the plaintiff, on 23 December 2008 by the defendant and on 21 January 2009 by the plaintiff in reply. The plaintiff sought costs and disbursements in the sum of \$41,170.15. The defendant suggested that costs in the range of \$14,000-\$19,600 would be fair and reasonable.

[5] It appears that the court file may have been misplaced because it was not brought back before a judge until 1 November 2010 when Courtney J issued a minute recording that:

This is a very old costs application which has had an unfortunate history and needs to be resolved as soon as possible. Unfortunately, the defendant's solicitor responsible for the matter is not available today and not available because he is going overseas for two weeks. I therefore direct that the matter be listed in a Duty Judge List at 10.00 am on 29 November 2010 with a note that it ought to proceed on that day unless there is a very good reason otherwise.

[6] It appears that Courtney J had decided that the application should proceed in any event and notwithstanding that on 23 September 2010 the defendant, Mr Herd, had lodged a complaint with the New Zealand Law Society about the amount of the costs charged by the solicitors and counsel acting for Mr Hannam.

[7] When the application was called before me in the Duty Judge list on 29 November 2010, Mr Samuel for Mr Herd applied under s 161(1) of the Lawyers and Conveyancers Act 2006 for an order staying the application pending the determination by the New Zealand Law Society Standards Committee of Mr Herd's complaint. Mr Samuel submitted that as Mr Herd was a person "chargeable with a bill of costs" in terms of s 132(2) of the Lawyers and Conveyancers Act 2006 the

Standards Committee had jurisdiction to determine his complaint and that it should do so before the Court considered the issue of quantum for the indemnity costs order. Mr Samuel referred to *Simpson Grierson v Gilmour*.¹

[8] Mr Blanchard submitted in response that jurisdiction to determine the question of the quantum of the indemnity costs order remained with the Court as envisaged by John Hansen J in his judgment and the quantum of the indemnity costs order should not be determined by the Standards Committee. Mr Hannam had paid his lawyers' accounts and had not complained to the Law Society. Mr Herd was not a person "chargeable with a bill of costs" under s 132(2) so the Standards Committee had no jurisdiction to consider the bills of costs and therefore there was no basis for the Court to grant the stay.

[9] I indicated that I agreed with Mr Blanchard's submission on the stay issue and that I would give my reasons for declining to grant the stay sought by Mr Samuel later. Mr Samuel then asked for an adjournment, but on reflection agreed with Mr Blanchard that I should determine the question of quantum on the basis of the memoranda which had already been filed. At the same time counsel also agreed that they should have a further opportunity to endeavour to reach agreement on quantum to avoid the need for a further court decision. It was agreed that counsel should have an opportunity to do so by 5 pm on Wednesday 1 December 2010.

[10] These are now the reasons for my decision that it is for the Court to determine the quantum of indemnity costs in this case and not the Law Society Standards Committee and that therefore no stay should be granted.

[11] The power to award indemnity costs is conferred on the Court by what is now r 14.6 of the High Court Rules, the relevant part of which provides:

- (1) Despite rules 14.2 to 14.5, the court may make an order—
 - (a) ...
 - (b) that the costs payable are the actual costs, disbursements, and witness expenses reasonably incurred by a party (**indemnity costs**).

The circumstances in which the Court may exercise its discretion to order indemnity costs are now set out in r 14.6(4).

[12] It is clear from r 14.6(1)(b) that indemnity costs are determined with reference to actual costs, but may be less than the actual costs if the Court considers they were not reasonably incurred: *McGechan on Procedure*.² As Harrison J said in *Bradbury v Westpac Banking Corporation*:³

the phrase "reasonably incurred" envisages a degree of judicial oversight of awards of indemnity costs. The discretion must be exercised in a manner which delivers a just and fair result.

In *Bradbury* the Judge then reviewed all relevant steps in the proceeding, an exercise he described as "quintessentially one of judgment" and "necessarily imprecise and unscientific", but informed by his participation in interlocutory hearings and at trial: [206]-[219]. The Judge considered the actual costs charged by the lawyers involved in order to determine the legal costs "reasonably incurred". A substantial reduction in the amount of the costs charged was made for the purpose of the order for indemnity costs. The Judge's approach to and decision on quantum was upheld by the Court of Appeal: *Bradbury v Westpac Banking Corporation*.⁴

1 *Simpson Grierson v Gilmour* (2009) 19 PRNZ 865 (HC).

2 *McGechan on Procedure* (looseleaf ed, Brookers), vol 1 at [HR 14.6.03(2)].

3 *Bradbury v Westpac Banking Corporation* (2008) 18 PRNZ 859 (HC) at [205].

4 *Bradbury v Westpac Banking Corporation* [2009] 3 NZLR 400 (CA) at [88].

[13] In the present case Mr Samuel has submitted for Mr Herd that the Court should not determine the quantum of the indemnity costs in accordance with the judgment of John Hansen J and the High Court Rules, but should instead grant a stay under s 161(1) of the Lawyers and Conveyancers Act 2006 pending the determination by the Law Society Standards Committee of Mr Herd's complaint under s 132(2) of the Act about the amount of the bills of costs rendered to Mr Hannam by the lawyers acting for him in this case. According to Mr Samuel, the Standards Committee should determine whether the bills of costs were fair and reasonable for the purpose of the quantum of the indemnity costs order.

[14] The two provisions in the Lawyers and Conveyancers Act 2006 relied on by Mr Samuel provide:

132. Complaints about practitioners, incorporated firms, and their employees

...

- (2) Any person who is chargeable with a bill of costs, whether it has been paid or not, may complain to the appropriate complaints service about the amount of any bill of costs rendered by a practitioner or former practitioner or an incorporated firm or former incorporated firm (being a bill of costs that meets the criteria specified in the rules governing the operation of the Standards Committee that has the function of dealing with the complaint).

161. Stay of proceedings for recovery of costs

- (1) If, under section 141, a Standards Committee gives notice to a practitioner or former practitioner or an incorporated firm or former incorporated firm that it has received a complaint under section 132(2) about the amount of a bill of costs rendered by that practitioner or former practitioner or incorporated firm or former incorporated firm, no proceedings for the recovery of the amount of the bill may be commenced or proceeded with until after the complaint has been finally disposed of.

[15] As pointed out by Stevens J in *Simpson Grierson v Gilmour* at [39], a complaint to the Law Society about a bill of costs will involve consideration of the obligation on the lawyer involved to charge a fee that is no more than fair and reasonable. That obligation is established by r 9 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 which provides in part:

- 9 A lawyer must not charge a client more than a fee that is fair and reasonable for the services provided, having regard to the interests of both client and lawyer and having regard also to the factors set out in rule 9.1.

Reasonable fee factors

9.1 The factors to be taken into account in determining the reasonableness of a fee in respect of any service provided by a lawyer to a client include the following:

- (a) the time and labour expended;
- (b) the skill, specialised knowledge, and responsibility required to perform the services properly;
- (c) the importance of the matter to the client and the results achieved;
- (d) the urgency and circumstances in which the matter is undertaken and any time limitations imposed, including those imposed by the client;
- (e) the degree of risk assumed by the lawyer in undertaking the services, including the amount or value of any property involved;
- (f) the complexity of the matter and the difficulty or novelty of the questions involved;

- (g) the experience, reputation, and ability of the lawyer:
- (h) the possibility that the acceptance of the particular retainer will preclude engagement of the lawyer by other clients:
- (i) whether the fee is fixed or conditional (whether in litigation or otherwise):
- (j) any quote or estimate of fees given by the lawyer:
- (k) any fee agreement (including a conditional fee agreement) entered into between the lawyer and client:
- (l) the reasonable costs of running a practice:
- (m) the fee customarily charged in the market and locality for similar legal services.

[16] On the basis of these statutory and regulatory provisions, Mr Samuel argues that the Court should defer to the Standards Committee as to whether Mr Hannam's legal costs were "reasonably incurred" and should stay the present application for the quantum of indemnity costs to be determined by the Court. For the following reasons I do not agree.

[17] First, the jurisdiction and power to make an order for indemnity costs and to determine the quantum of the order is conferred on the Court by the High Court Rules. The Standards Committee has no power to make such an order or to determine under r 14.6(1)(b) of the High Court Rules the quantum of the actual costs "reasonably incurred" by a party to the proceeding.

[18] Secondly, the Court and a Standards Committee have different functions and apply discrete criteria. The Court is required to determine the quantum of an order for indemnity costs under r 14.6(1)(b) of the High Court Rules by considering whether the actual costs of the successful party were "reasonably incurred" following the approach described in *Harrison J in Bradbury v Westpac Banking Corporation*. A Law Society Standards Committee, on the other hand, is required to determine whether a complaint about a lawyer's bill of costs is made out by considering whether the lawyer's fee is "fair and reasonable" having regard to the interests of both client and lawyer and the factors set out in r 9.1 of the Conduct and Client Care Rules. Actual costs held by a court not to be "reasonably incurred" for the purposes of an indemnity costs order under r 14.6(1)(b) of the High Court Rules may still be "fair and reasonable" as between the lawyer and the client in the context of r 9 of the Rules of Conduct and Client Care. Two different exercises are involved. As the decision in *Bradbury v Westpac Banking Corporation* shows, the quantum of costs "reasonably incurred" in a proceeding for the purpose of an indemnity costs order between parties to the proceeding is not necessarily the same as the quantum of costs which it is "fair and reasonable" for the lawyer for the successful party to charge the client.

[19] Thirdly, unless and until the Court makes an order for indemnity costs and determines the quantum of the order, there is no order of the Court able to be enforced. Until the Court determines the quantum of the actual costs "reasonably incurred", the liable party is not required to meet any of the legal costs incurred by the other party. Once the Court has determined the quantum of the order for indemnity costs, the court order may be enforced by the successful party. Proceedings for enforcement of the court order for indemnity costs would not then be proceedings for the recovery of the amount of a bill of costs rendered by a lawyer in terms of s 161(1) of the Lawyers and Conveyancers Act 2006. The quantum of the indemnity costs order determined by the Court under r 14.6(1)(b) of the High Court Rules may well differ from the quantum of the lawyer's bill of costs. There would therefore be no basis for the Court to grant a stay under s 161(1) of the Lawyers and Conveyancers Act 2006 in respect of proceedings to enforce the Court order.

[20] It is not necessary for me to determine whether in these circumstances the Standards Committee has jurisdiction to consider Mr Herd's complaint about the bills of costs rendered by Mr Hannam's lawyers. There is no application before the Court by Mr Hannam seeking to prevent the Standards Committee from proceeding with Mr Herd's complaint. The Standards Committee may, however, wish to consider whether Mr Herd is a person "who is chargeable with a bill of costs" in terms of s 132(2) of the Lawyers and Conveyancers Act 2006. The issue appears to be whether the reference to "any person chargeable with a bill of costs" is limited to a person, who as a result of a contractual relationship with a lawyer or a third party, such as a lessor, mortgagee or guarantor, or as a result of a statutory or regulatory obligation is liable to meet a lawyer's costs (compare *Simpson Grierson v Gilmour* at [63]-[65], *Crown Money Corporation Ltd v Grasmere Estate Trustco Ltd*⁵ and *Watson & Son Ltd v Active Manuka Honey Association*⁶) or whether, in addition to beneficiaries who are expressly entitled to complain about certain costs under s 160 of the Lawyers and Conveyancers Act 2006, it extends to anyone else, including a party in a proceeding who is ordered by the Court to pay indemnity costs to another party in the amount which the Court determines was "reasonably incurred".

[21] For the reasons I have given I consider that the quantum of the order for indemnity costs payable by Mr Herd in accordance with the judgment of John Hansen J should be determined by the Court exercising its jurisdiction and power under r 14.6(1)(b) of the High Court Rules in the manner described by Harrison J in *Bradbury v Westpac Banking Corporation*. There is no basis for an order under s 161(1) of the Lawyers and Conveyancers Act 2006 staying Mr Hannam's application for determination of the quantum of the order for indemnity costs in this case: compare *Simpson Grierson v Gilmour* at [66].

[22] As Mr Blanchard has advised by memorandum dated 2 December 2010 that the parties have not been able to reach agreement on quantum, it is now necessary for the Court to determine the quantum of the order for indemnity costs.

Application dismissed

Reported by Jessica Gorman

5 *Crown Money Corporation Ltd v Grasmere Estate Trustco Ltd* (2008) 19 PRNZ 591 (HC).

6 *Watson & Son Ltd v Active Manuka Honey Association* [2009] NZCA 595 at [18]-[23].