

General Marine Services Ltd v The Ship “Luana”

[2012] NZCA 374

Court of Appeal, (CA117/11)
Arnold, Randerson, White JJ

5 July;
2 August 2012

Costs — Increased or indemnity costs — Appeal from High Court costs order — Whether proceeding so lacking in merit as to justify indemnity costs — Whether quantum of award reasonable — High Court Rules, r 14.6.

The appellant appealed against the High Court’s decision to award indemnity costs to the owners of the ship *Luana*, Yachts West Pty Ltd (Yachts West), and the quantum of those costs.

The *Luana* motorboat was built for Yachts West by Boat 90 Holdings Ltd (Boat 90). At the time Boat 90 went into liquidation, Yachts West had made significant payments for the construction of the *Luana*. Although construction had not been completed, the receiver agreed that Yachts West could take possession of the *Luana*. However, the *Luana* was put under arrest before Yachts West could take physical possession. Agreement was reached for its release from arrest, but the appellant lodged a caveat against the release because it claimed to be owed \$2,189.46 for the supply of fittings for the construction of the *Luana*. The appellant also issued an Admiralty action in rem in the High Court claiming to be entitled to maintain the caveat.

The High Court set aside the caveat on the basis that the appellant’s three causes of action lacked merit. The High Court awarded indemnity costs to Yachts West on the grounds that the appellant had acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding. The lodging of the caveat, with the proceeding, was an abuse of process because it was a “contrived claim” without merit.

Held, (1) the acknowledgement by GMS of its inability to pay damages in the event that its caveat was not sustained would of itself have warranted the removal of the caveat, but the inevitability of this outcome was ensured by the other reasons given by Woodhouse J for exercising the Court’s discretion to do so. In particular, the three causes of action would not only have been difficult to establish but would also have resulted in a lengthy trial, the costs of which would have far exceeded the claim by GMS for \$2,189.46. Under r 25.46(4) of the High Court Rules the onus was on GMS to show that it had a proper basis for sustaining the caveat. It clearly had failed to do so. (para 22)

(2) The lodging of the caveat and the subsequent commencement of this proceeding were abuses of Court processes. Lodging a caveat against the *Luana* to secure \$2,189.46 and issuing the proceeding in the Court’s Admiralty jurisdiction for that amount were steps disproportionate to the amount at stake, especially as there were more appropriate avenues available to GMS. The caveat was lodged and the proceeding was pursued by GMS as part of a contrived plan to force Yachts West and Mr Norman to pay all the unsecured creditors of Boat 90 before Yachts West and Mr Norman could take possession of the *Luana*. (para 24)

(3) Woodhouse J did not exercise his discretion to order indemnity costs on a wrong principle, take into account any irrelevant consideration, or fail to take into account any relevant consideration nor was he in any other respect wrong. In these circumstances it was not appropriate for this Court to interfere with the exercise of the High Court Judge's discretion. (para 28)

(4) Following the Court of Appeal's approach in *Bradbury v Westpac Banking Corporation* (cited below), there was no good reason to review the quantum of costs fixed by Woodhouse J. No affidavit from an expert had been filed challenging the Judge's appraisal. Approaching the case in the round, it was not shown that the indemnity costs claimed by Yachts West and Mr Norman were unreasonable or disproportionate to the services provided by their solicitors and counsel in successfully having the caveat set aside as a matter of urgency. (para 32)

Bradbury v Westpac Banking Corporation [2009] NZCA 234, [2009] 3 NZLR 400, (2009) 19 PRNZ 385, followed

Cases referred to

Bradbury v Westpac Banking Corporation [2009] NZCA 234, [2009] 3 NZLR 400, (2009) 19 PRNZ 385

Hedley v Kiwi Co-operative Dairies Ltd (2002) 16 PRNZ 694 (HC)

Shirley v Wairarapa District Health Board [2006] NZSC 63, [2006] 3 NZLR 523

Reference

McGechan on Procedure para HR14.6.03

Application

This was an appeal against a High Court decision to award indemnity costs and the quantification of those costs.

E J Grove for appellant

G P Blanchard for respondent

Cur adv vult

The judgment of the Court was delivered by

WHITE J

Background

[1] General Marine Services Ltd (GMS) appeals against the judgments of Woodhouse J in which he:

- (a) Set aside a caveat lodged by GMS on 1 April 2010 against the release from arrest of the *Luana*;¹
- (b) Gave reasons for setting aside the caveat and awarded indemnity costs to Yachts West Pty Ltd (Yachts West), the owner of the *Luana*,² and;
- (c) Fixed the quantum of costs and disbursements payable by GMS in the sum of \$61,737.17.³

1 *General Marine Services Ltd v The Ship "Luana"* HC Auckland CIV-2010-404-2435, 16 June 2010 ("the caveat judgment").

2 *General Marine Services Ltd v The Ship "Luana" (No 2)* HC Auckland CIV-2010-404-2435, 7 February 2011 ("the costs judgment").

3 *General Marine Services Ltd v The Ship "Luana"* HC Auckland CIV-2010-404-2435, 3 May 2012 ("the quantum judgment").

[2] The caveat was lodged by GMS because it claimed to be owed \$2,189.46 for the supply of fittings for the construction of the *Luana*, a motorboat built for Yachts West by Boat 90 Holdings Ltd (in liquidation) (Boat 90), a wholly-owned subsidiary of Salthouse Marine Ltd (in receivership) (Salthouse Marine).

[3] Mr Christopher Norman is a director and shareholder of Yachts West. He resides in Perth, Western Australia. Mr Norman was also a non-executive director of Salthouse Marine and associated with a trust which, indirectly, owned 50 per cent of the shares in Salthouse Marine. The other 50 per cent of the shares was owned by a trust associated with Ms Julie Salthouse, who was also a director of the company. She was the sole director formally appointed to Boat 90, but GMS alleged that Mr Norman was at all material times a de facto director of Boat 90.

[4] Ms Salthouse had provided GMS with a personal guarantee for Boat 90's debt of \$2,189.46.

[5] Prior to the lodging of the caveat, Yachts West had made payments totalling \$3,505,375 to Boat 90 for the construction of the *Luana*. The construction agreement between Yachts West and Boat 90 provided that the *Luana* and all materials intended for its construction were the property of Yachts West, but Boat 90 had a lien on the *Luana* for any unpaid purchase moneys.

[6] When Boat 90 was put into liquidation, the liquidator's report showed that in excess of \$900,000 had been paid by Boat 90 to other Salthouse Marine subsidiaries for the payment of their debts.

[7] Salthouse Marine went into receivership in February 2010. Although construction of the *Luana* had not been completed, the receiver, after making independent inquiries, agreed that Yachts West could take possession of the *Luana*.

[8] Before Mr Norman could arrange for the *Luana* to be shipped to Perth, however, a warrant for its arrest was issued in March 2010 on the application of Boat 93 Ltd (another subsidiary of Salthouse Marine) and the trustees of the Jim Delegat Business Trust (the Delegat trustees). The applicants alleged that \$284,500 had fraudulently been transferred from Boat 93 to Boat 90 and used in the construction of the *Luana*. Yachts West and Mr Norman, who denied the allegation of fraud, entered into an interim agreement with Boat 93 and the Delegat trustees for the payment of \$350,000 into a trust account as security for their claims in consideration of the immediate release of the *Luana* from arrest.

[9] The solicitors for Boat 93 and the Delegat trustees were Jones Young. They were also the solicitors for GMS. Boat 93, the Delegat trustees and GMS also shared the same counsel, Mr C T Patterson.

[10] On 1 April 2010 Lowndes Associates, the solicitors for Yachts West, advised Jones Young at 9.57 am that they were holding \$350,000 in cleared funds in trust in accordance with the interim arrangement. Jones Young was asked to attend immediately to the release of the *Luana* from the arrest as agreed. At 12.10 pm Lowndes Associates sent a further email to Jones Young requesting the release. This was copied at the same time to Mr Patterson together with a draft release of arrest document. At 12.16 pm Jones Young advised Lowndes Associates that Mr Patterson was attending to the release. At approximately 2.30 pm Mr Patterson advised the High Court Registrar that he had the release of arrest which would be filed "at his earliest opportunity but before the Registry closed". Acting on instructions from or on behalf of GMS received that day, Jones Young or Mr Patterson filed a caveat against release on behalf of GMS at 4.15 pm. The release from arrest in relation to the claims by Boat 93 and the Delegat trustees was then filed at 4.55 pm.

[11] GMS subsequently claimed it had a security interest in all of Boat 90's present and after-acquired property that it had performed services on or to or in which goods

or materials supplied or financed by GMS had been attached or incorporated. The security was not registered, or sought to be registered, until sometime after 4 February 2010 by which time Yachts West was the owner of the *Luana*.

[12] GMS issued an Admiralty action in rem in the High Court claiming to be entitled to maintain the caveat and to be entitled to a proprietary remedy against the *Luana* in respect of the unpaid purchase price for the fittings owned by Boat 93.

[13] Yachts West, however, sought an order setting aside the caveat. Following a hearing on 15 June 2010, this was granted by Woodhouse J in his caveat judgment on 16 June 2010.

The Judge's findings

[14] While the Judge indicated that he would give his reasons for doing so later, he recorded that following the hearing he had received a memorandum from counsel for GMS dated 16 June 2010 which included the following statement:

While Counsel does not have instructions to withdraw [GMS's] caveat, counsel does have instructions to advise this Honourable Court that [GMS] would take no issue (by way of review, appeal or otherwise) with a determination by Your Honour that, irrespective of what weight or significance (if any) is given to the other factual and/or legal issues raised in these proceedings, [GMS's] inability to pay such damages warrants Your Honour exercising your discretion to remove/discharge [GMS's] caveat over the *Luana*.

[15] In his subsequent costs judgment, Woodhouse J examined and struck out each of the three causes of action relied on by GMS and entered summary judgment for Yachts West dismissing GMS's claim. In essence the Judge's reasons were:⁴

- (a) While GMS was entitled to apply to the Court under s 301 of the Companies Act 1993 for relief in respect of Mr Norman's alleged breaches of duty under ss 135 and 136 of the Companies Act, the claim would be against Mr Norman and not against the *Luana*. The alleged breaches of statutory duty by Mr Norman would not give rise to the proprietary relief sought by GMS against the *Luana*, whether by way of an institutional constructive trust, as pleaded, or the more elusive remedial constructive trust. Furthermore, no principled basis was advanced for converting a proprietary claim to some fittings into a general proprietary claim to an undefined share of the entire boat.
- (b) A presumption in favour of GMS could not arise in this case to produce a trust in favour of GMS. The relationship between GMS and Boat 90 was that of vendor and purchaser of goods.
- (c) Contrary to GMS's allegation, it was clear beyond reasonable argument that title to the *Luana* was not transferred pursuant to some sort of improper action in March 2010, but was held by Yachts West from the commencement of the contract between Yachts West and Boat 90 for construction and sale of the *Luana* in June 2009. As the transfer of possession of the *Luana* in March 2010 was authorised by the receiver of Salthouse Marine, s 346(1) of the Property Law Act 2007, which was relied on by GMS, had no application.

[16] The Judge then indicated that he would not have sustained the caveat not only because of the lack of merit in the claims but also because:⁵

- (a) In relative terms, the claims were complicated claims in the Admiralty jurisdiction of the High Court for a very small sum of money.

⁴ At [17]-[34].

⁵ At [35].

- (b) The amount claimed would be dwarfed by legal costs.
- (c) A proprietary claim would be a secondary claim against the *Luana*, at best, because the primary defendants, on GMS's allegations, were Mr Norman and Yachts West.
- (d) It appeared that GMS might be unable to meet any substantial award against it as confirmed by the memorandum of counsel filed after the hearing.
- (e) There was no suggestion that Mr Norman or Yachts West could not meet a judgment in favour of GMS for the small sum claimed, together with interest and costs. The significant security provided on the claim by Boat 93 and the Delegat trustees indicated the opposite.
- (f) The lodging of the caveat, and the subsequent commencement of the proceeding, were abuses of process.

[17] Finally, on the basis of the decision of this Court in *Bradbury v Westpac Banking Corporation*,⁶ Woodhouse J decided that Yachts West was entitled to an order for indemnity costs under r 14.6(4)(a) of the High Court Rules on the grounds that GMS had acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding.⁷ In addition to the reasons already given for setting aside the caveat, the Judge indicated that he was satisfied that the lodging of the caveat, with the proceeding, was an abuse of process because it was a "contrived claim" without merit. It was devised to nullify the consequences of the arrangements made in the separate proceeding by Boat 93 and the Delegat trustees against Yachts West and Mr Norman. It was also implemented by the same solicitors and counsel who had an obligation immediately to file the release from arrest.⁸ The Judge noted that there was some evidence from Yachts West indicating the possibility of arrangements having been made between the Delegat trustees and a number of the creditors of Boat 90.⁹

[18] The Judge fixed the amount of the indemnity costs in his quantum judgment in the sum of \$61,737.17.

[19] We were informed during the hearing that the separate proceeding by Boat 93 and the Delegat trustees against Yachts West and Mr Norman was settled in October-November 2011. The proceeding was apparently discontinued on the basis that the security of \$350,000 was retained by Yachts West and Mr Norman and there was no issue as to costs.

[20] We were also informed that the unsecured creditors of Boat 90, including GMS, are pursuing a separate claim against the directors of that company under s 301 of the Companies Act on the basis of alleged breaches of ss 305 and 306 of the Act.¹⁰ The amount involved is some \$301,830. Mr Grove confirmed that no allegation of fraud is involved in this separate proceeding. We understand that it is currently being heard in the High Court at Auckland.

Issues on appeal

[21] On the present appeal, GMS has, with two significant exceptions, challenged Woodhouse J's decision to award indemnity costs and his quantification of those costs.

⁶ *Bradbury v Westpac Banking Corporation* [2009] 3 NZLR 400, (2009) 19 PRNZ 385 (CA).

⁷ At [37].

⁸ At [37].

⁹ At [39].

¹⁰ *Delegat v Norman* [2012] NZHC 2358.

In particular, GMS claims that the Judge erred in deciding that GMS's three causes of action were so hopeless that indemnity costs ought to have been awarded against GMS. The two exceptions to GMS's challenge are:

- (a) The Judge's finding that GMS would be unable to meet any substantial award against it. This finding reflected the memorandum of counsel for GMS dated 16 June 2010, which we have already set out.¹¹
- (b) The amount involved in the challenge to the quantum of indemnity costs, which is limited to \$16,000-\$18,000.

Discussion

[22] The acknowledgement by GMS of its inability to pay damages in the event that its caveat was not sustained would of itself have warranted the removal of the caveat, but the inevitability of this outcome was ensured by the other reasons given by Woodhouse J for exercising the Court's discretion to do so. In particular, as Mr Grove realistically accepted, the three causes of action would not only have been difficult to establish but would also have resulted in a lengthy trial, the costs of which would have far exceeded the claim by GMS for \$2,189.46. Under r 25.46(4) of the High Court Rules the onus was on GMS to show that it had a proper basis for sustaining the caveat. It clearly failed to do so.

[23] While GMS would have been unable to have met an order for costs if unsuccessful, it was not suggested that Mr Norman or Yachts West could not have met the claim and any order for interest and costs. They had after all paid \$3,505,375 for the *Luana* and provided security of \$350,000 on the claim by Boat 93 and the Delegat trustees.

[24] We also agree with Woodhouse J that the lodging of the caveat and the subsequent commencement of this proceeding were abuses of the processes of the Court. In reaching this conclusion, we take into account the following factors:

- (a) GMS had no perfected security interest in the *Luana* when it supplied the fittings to Boat 90 in November-December 2009.
- (b) No evidence was put forward to justify the allegations of fraud against Yachts West and Mr Norman. The fact that such allegations have not been included in the subsequent proceeding by the unsecured creditors under s 301 of the Companies Act is telling.
- (c) Lodging a caveat against the *Luana* to secure \$2,189.46 and issuing this proceeding in the Admiralty jurisdiction of the Court for that amount were steps disproportionate to the amount at stake, especially as there were more appropriate avenues available to GMS, including a claim in the Disputes Tribunal which has jurisdiction for claims under \$15,000,¹² enforcement of the personal guarantee from Ms Salthouse, and the separate High Court proceeding with the other unsecured creditors against the directors of Boat 90 under s 301 of the Companies Act.
- (d) The caveat was lodged and the proceeding was pursued by GMS as part of a contrived plan to force Yachts West and Mr Norman to pay all the unsecured creditors of Boat 90 before Yachts West and Mr Norman could take possession of the *Luana*. As Mr Grove explained to us, the proceeding was "spearheaded" by the Delegat trustees and it was "a reasonable inference" to draw from the fact that the same lawyers were involved that GMS was "riding on the coattails of Delegat". In these

¹¹ At [14].

¹² Disputes Tribunals Act 1988, s 10(1A)(b).

circumstances we do not accept Mr Grove's submission that GMS was justified in accepting the assistance of the Delegat trustees in proceeding with this inappropriate plan. Mr Norman's refusal to meet the payment was therefore quite understandable.

- (e) The actions of Jones Young and counsel on 1 April 2010 were also questionable. In their capacity as lawyers for Boat 93 and the Delegat trustees, they were under an obligation to implement the interim agreement which had been reached between their clients and Yachts West to release the *Luana* from arrest immediately on notification from Lowndes Associates that \$350,000 was held in trust. Their failure to do so until after they had filed the caveat against release for their other client GMS was therefore questionable.¹³

[25] Once it is accepted that the removal of the caveat was warranted on these grounds, the remaining issue on the appeal is simply whether Woodhouse J was correct to order GMS to pay indemnity costs of \$61,737.17.

[26] The discretionary power of the High Court to order indemnity costs is conferred by r 14.6(4) 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—

- (a) the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding; or
- (b) the party has ignored or disobeyed an order or direction of the court or breached an undertaking given to the court or another party; or

...

- (f) some other reason exists which justifies the court making an order for indemnity costs despite the principle that the determination of costs should be predictable and expeditious.

[27] This Court considered the interpretation and application of these parts of r 14.6(4) in *Bradbury v Westpac Banking Corporation*.¹⁴ In the judgment of the Court delivered by Baragwanath J, the Court said:

- [29] We therefore endorse Goddard J's adoption in *Hedley v Kiwi Co-operative Dairies Ltd* (2002) 16 PRNZ 694 (HC) at para [11] of Sheppard J's summary in *Colgate-Palmolive Co v Cussons* at para [24]. While recognising that the categories in respect of which the discretion may be exercised are not closed (see r 14.6(4)(f)), it listed the following circumstances in which indemnity costs have been ordered:

- (a) the making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud;
- (b) particular misconduct that causes loss of time to the court and to other parties;
- (c) commencing or continuing proceedings for some ulterior motive;
- (d) doing so in wilful disregard of known facts or clearly established law; or
- (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.

¹³ Compare Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 2.3, and Duncan Webb *Ethics, Professional Responsibility and the Lawyer* (2nd ed, LexisNexis, Wellington, 2006) at [13.5].

¹⁴ At [9]-[29].

[28] As we have already noted, Woodhouse J made the order for indemnity costs under r 14.6(4)(a). We have not been persuaded on appeal that he exercised his discretion to do so on a wrong principle, took into account any irrelevant consideration or failed to take into account any relevant consideration or was in any other respect wrong. The reasons given for setting aside the caveat, which we have upheld, provided the basis for making the order. In these circumstances it is not appropriate for this Court to interfere with the exercise of the High Court Judge's discretion.¹⁵

[29] We add, however, that the Judge's decision to award indemnity costs is reinforced in terms of r 14.6(4)(a) and (f), together with the circumstances listed by this Court in *Bradbury v Westpac Banking Corporation*, by the following further factors:

- (a) The breach by GMS of the interim agreement to file the release from arrest immediately on payment of the \$350,000 into the Lowndes Associates' trust account.
- (b) The fact that GMS was on notice from Yachts West and Mr Norman that it ought to pursue the claim under the personal guarantee and that if it failed to do so indemnity costs would be claimed.

[30] The final issue then is whether the quantum of the award of \$61,737.17 for indemnity costs was reasonable.

[31] The approach of this Court on an appeal against an award of indemnity costs on this ground is explained in *Bradbury v Westpac Banking Corporation*:¹⁶

Assessment of costs is par excellence a matter for the Judge who had the conduct of the case throughout. Harrison J conducted a careful review of the costs and applying the r 48C (14.6) test of "the actual costs, disbursements and witness expenses *reasonably* incurred by a party" deducted over \$686,000 from the claimed figure. No affidavit from an expert was filed challenging the Judge's appraisal. Nor, sensibly, did Mr Gedye attempt to dissect it in his submissions. From such assessment of the case in the round as it has been possible to make in the course of hearing and considering the parties' submissions in the light of the record we discern no sense of disproportion. Certainly the experience has reinforced the need to retain, as far as practicable, the control inherent in the scale, which is also the basis for increased costs. But this case falls clearly within the exception to that rule. The order for reasonable actual costs was fully justified and there is no basis to challenge its amount. (original emphasis)

[32] Following that approach in the present case, we are not satisfied that there is any good reason to review the quantum of costs fixed by Woodhouse J. We note that, as in *Bradbury v Westpac Banking Corporation*, no affidavit from an expert was filed challenging the Judge's appraisal. While Mr Grove endeavoured to persuade us that the award of indemnity costs should be reduced by some \$16,000-\$18,000 to reflect items it was alleged did not relate to this proceeding or were otherwise inaccurate, we do not accept that Woodhouse J erred in deciding otherwise. Having considered Mr Grove's submissions on these issues and approaching the case in the round, we do not consider that it has been shown that the indemnity costs claimed by Yachts West and Mr Norman were unreasonable or disproportionate to the services provided by their solicitors and counsel in successfully having the caveat set aside as a matter of urgency. We agree with Woodhouse J,¹⁷ that the total of the costs incurred over a three-month period in order to secure the release of an asset worth \$3.5 million was

15 *Shirley v Wairarapa District Health Board* [2006] 3 NZLR 523 (SC) at [15].

16 At [88].

17 The quantum judgment at [11]-[12].

a reasonable sum taking into account the serious nature of the allegations made by GMS and the entitlement of Yachts West and Mr Norman to respond to them in the way in which they did.

Result

[33] For these reasons, the appeal is dismissed.

[34] As to costs in this Court, we have agreed with the Judge that the lodging of the caveat and the issue of this proceeding were abuses of process. Similarly, we consider that the bringing of this appeal was unjustified and vexatious. In these circumstances, we consider that an award of indemnity costs is justified.¹⁸ GMS is therefore ordered to pay indemnity costs, together with usual disbursements, to Yachts West Pty Ltd in respect of the appeal.

Appeal dismissed

Reported by Jane Herschell

¹⁸ Court of Appeal (Civil) Rules 2005, r 53E(3).