IN THE COURT OF APPEAL OF NEW ZEALAND

CA324/2008
[2009] NZCA 234

BETWEEN	CLIVE RICHARD BRADBURY First Appellant
AND	BRADBURY & MUIR Second Appellant
AND	WESTPAC BANKING CORPORATION First Respondent
AND	RICHARD WILLCOCK Second Respondent

Hearing: 24 March 2009

Court: O'Regan, Arnold and Baragwanath JJ

Counsel: N S Gedye for Appellants
J S Kós QC and B A Scott for Respondents

Judgment: 8 June 2009 at 3.00 p.m.

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants must pay the respondents costs for a standard appeal on a band A basis and usual disbursements.

JUDGMENT OF THE COURT

(Given by Baragwanath J)

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[1] The issue is whether the High Court was right to award indemnity costs to Westpac Banking Corporation (Westpac) on the abandonment by Mr Bradbury and the firm Bradbury & Muir of their claim against it. Because the award is unusually high we have taken time to consider the principles against which it is to be tested. The appellants tendered as new evidence an affidavit by its junior counsel at trial as to comments made by the trial Judge and exchanges between him and counsel. The application was opposed by Westpac which tendered an affidavit in opposition by a solicitor employed by Westpac's instructing solicitors who had been present

throughout the trial. Counsel agreed that we should receive the material *de bene esse* and determine its admissibility in the judgment.

Context

[2] The first appellant, Mr Bradbury was a partner in the second appellant, Bradbury & Muir, an Auckland law firm. Mr Bradbury had performed specialist legal services for the respondent Westpac until the bank ended their relationship in 2005. The firm sued the bank and Richard Willcock, its group secretary and legal counsel, for damages, alleging breach of a claimed contractual obligation to retain the firm for so long as it continued to perform to the satisfaction of the bank and to meet certain obligations of loyalty. There were secondary causes of action in estoppel, defamation and conspiracy. The claim was originally for special damages of $13.9 million as well as general, aggravated and punitive damages of $500,000, $250,000 and $250,000 plus interest. The special damages figure was reduced before trial to $5.415 million.

[3] In closing submissions on day seven of the hearing counsel for the firm (not Mr Gedye) progressively abandoned each cause of action. Harrison J inferred that the firm recognised that its case was hopeless. The bank claimed indemnity costs of $1.683 million plus disbursements of $136,865 and alternatively an award of increased costs. The firm submitted that its liability should be limited to scale costs of $89,250 plus disbursements of $57,515. By his costs judgment of 23 May 2008 the Judge ordered the firm to pay the bank $996,712 as being what he assessed as a reasonable figure for the bank's actual costs, together with witness expenses and disbursements of $60,917.25, a total of $1,057,691.25.

[4] This appeal is from that order.

The costs rules

New Zealand

[5] This case is subject to the former High Court Rules. The new Rules, which took effect on 1 February 2009, are materially the same.

[6] Indemnity costs form an exception to the normal New Zealand costs regime. While expressed to be at the discretion of the court (r 46(1), now r 14.1), that general discretion is qualified by the specific costs rules and is exercisable only in situations not contemplated or not fairly recognised by them (*Glaister v Amalgamated Dairies Ltd* [2004] 2 NZLR 606 (CA)). Ordinarily the loser must pay the winner's costs according to scale. The scale reflects the complexity and significance of the proceeding and are assessed at 2/3 of the daily rate set by the Rules Committee (r 47, now r 14.2). The rate is reviewed annually.

[7] But the court may make an order either increasing scale costs or, departing from the scale, that the costs payable are "the actual costs, disbursements and witness expenses reasonably incurred by a party" (indemnity costs) (r 48C, now r 14.6). An order for increased costs is permitted by r 48C(3) (now r 14.6(3)) if:

> …
>
> (b) the party opposing the costs order has contributed unnecessarily to the time or expense of the proceeding or step in it by—
>
> > (i) failing to comply with these rules or with a direction of the court; or
> > (ii) taking or pursuing an unnecessary step or an argument that lacks merit; or
> > (iii) failing, without reasonable justification, to admit facts, evidence, documents, or accept a legal argument; or
> > (iv) failing, without reasonable justification, to comply with an order for discovery, a notice for further particulars, a notice for interrogatories, or other similar requirement under these rules; or
> > (v) failing, without reasonable justification, to accept an offer of settlement whether in the form of an offer under rule 14.10 or some other offer to settle or dispose of the proceeding; or
>
> …
>
> (d) some other reason exists which justifies the court making an order for increased costs despite the principle that the determination of costs should be predictable and expeditious.

By r 48C(4) (now r 14.6(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;…
>
> …
>
> (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.

Other criteria are of no present relevance and may be disregarded.

[8] Mr Gedye for the appellants submits that justice would be done by an increased costs order. Mr Kós QC for the respondents supports the Judge's order for indemnity costs. The question for us is two-fold:

(a) what test is appropriate in this case?

(b) what answer does that test provide?

Discussion of the test

[9] Departure from the scale entails a fundamental shift from the currently conventional New Zealand approach to costs. Our presumptive "2/3 of what the Rules Committee sets as reasonable" sits between the customary United States approach, that no party and party costs are awarded, and that in England and Australia (and formerly in New Zealand) where a form of indemnity costs is the norm. There is an important question as to how readily, or reluctantly, a court should depart from the scale.

[10] Access to justice is a fundamental right, recognised as such in the Legislation Advisory Committee Guidelines (2001) at 50:

> The principle that the citizen is entitled to access to the courts.

There is cited in support the decision of the English divisional court in *R v Lord Chancellor ex p Witham* [1998] 1 QB 575 which struck down increased fees for filing court proceedings as being unconstitutional in unreasonably inhibiting access to justice. The decision is notable in that, in terms of the empowering legislation, the most senior English judges had consented to their making. The access to justice

principle is of quite general application. It is a significant, although not dominant, factor supporting the New Zealand position in limiting a losing party's liability for costs.

[11] Also of importance is the principle of the rule of law that it be administered consistently and in a manner which allows people to be guided by knowledge of the law's content: Finnis *Natural Law and Natural Rights* (1980) at 270 - 271. Those considerations are of particular force where the claim is for the opponent's legal advisors' indemnity costs which, of their nature, are unpredictable.

[12] In assessing the implications of making the shift from scale, and the difference between increased and indemnity costs, it is helpful to consider briefly the practice in other common law jurisdictions.

United States

[13] The policy behind the United States approach, first announced in 1796, was stated by Warren CJ in a trademark case *Fleischmann Distilling Corp v Maier Brewing Co* 386 US 714 (1967) at 718:

> In support of the American rule, it has been argued that since litigation is at best uncertain one should not be penalised for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponent's counsel… Also, the time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorney's fees would pose substantial burdens for judicial administration.

[14] The element of not discouraging access to the courts may be noted.

England

[15] In England there arose a presumption that the successful party should receive full taxed costs. It derived from statutes, beginning with the Statute of Gloucester of 1278, which replaced the common law which (unlike equity) did not permit costs.

[16] In his report this month on the first phase of the *Review of Civil Litigation Costs* Sir Rupert Jackson has compared the English and New Zealand systems at 468:

> It is … a feature of England and Wales that we have full cost shifting, i.e. a reasonable litigant can in principle expect to recover every penny which they have reasonably incurred in bringing or defending their case successfully. This is in contrast to many other jurisdictions where, although cost shifting exists, the amounts recoverable are strictly regulated such that one would normally expect costs recovered from the other side to be less than costs as between solicitor and own client. The New Zealand system… is a good example of such an approach. Such a policy of less than full cost recovery has as one of its aims making litigation unattractive for the parties so as to encourage early and reasonable settlement.

[17] In what remains the leading English case, *Garnett v Bradley* (1878) 3 AC 944, the House of Lords awarded indemnity costs to a plaintiff who had received from the jury a farthing for damages for slander. It applied the approach stated by Lord O'Hagan at 960:

> It presumes in favour of the verdict that the costs should follow, unless the Judge intervenes to regulate them…

It determined that the Judicature Acts had repealed a statute of James I limiting costs to a sum no greater than damages award. The result was summarised by Lord Blackburn at 962:

> I say the general rule established by all those numerous statutes (for there was no one statute which laid it down) was that the successful party got his ordinary taxed costs; in other words, that the costs followed the event, and that the party who was successful had them as a matter of right.

[18] In England that approach has survived Lord Woolf's reforms which radically altered the rules of civil procedure. In *Fourie v Le Roux* [2007] 1 WLR 320 (HL), Lord Scott observed that under current practice (at [39]):

> the difference between costs at the standard rate and costs on an indemnity basis is, according to the language of the relevant rules, not very great .

He was referring to and endorsing the Court of Appeal's rejection in *Reid Minty v Taylor* [2002] 2 All ER 150 at [9] (CA) of what the trial Judge had said:

> … indemnity costs should only be awarded on an indemnity basis if there has been some sort of moral lack of probity or conduct deserving of moral condemnation on the part of the paying party.

[19] The retention of the *Garnett v Bradley* approach to costs is the sole element of Lord Woolf's reforms with which the Master of the Rolls is unhappy. Lord Clarke MR, who is also Head of Civil Justice, recently remarked in an address to the British Academy ("The Woolf Reforms: A Singular Event or an Ongoing Process?" (2 December 2008)):

> 42 Cost is without doubt the Woolf reform's central failing. Litigation costs are still disproportionate. They are still excessive in a significant number of cases. While the Woolf reforms (at any rate in my opinion) have succeeded in other areas, they have not grappled effectively with the problems of litigation costs. To that end it seemed to me earlier this year that the time was ripe to grasp the nettle…

He referred to the review by Sir Rupert Jackson, who has recently visited New Zealand for that purpose. He concluded as to costs:

> 45 This review will leave no stone unturned. It will, for instance, address the issue [an earlier report] raised and left unanswered when its reforms failed. It will address the indemnity rule…

[20] We add that New Zealand for a time emulated the English approach of presumptively awarding the successful party his full taxed costs: *Cates v Glass* [1920] NZLR 37 at 54 (CA) per Chapman J:

> The general practice of the Court is to allow a successful party his costs, and in exercising a judicial discretion in such a way as to deprive such a party of his whole costs the Judge ought to act in accordance with some definite principle dependent on the conduct of the parties with reference to the dispute and to the conduct of the case.

Likewise Edwards J (at 59) cited Brett MR in *Jones v Curling* (1884) LR 13 QBD 262 at 267:

> …unless there is good cause shown, the learned Judge has no discretion as to costs, and that they must follow the event – that is, according to the ordinary mode of taxation…

That approach continued at least until 1952: *Voyce v Lawrie* [1952] NZLR 984 (SC). But since the Code of Civil Procedure was repealed it has not been applied in

New Zealand for a generation. It is unnecessary to rehearse the changes in approach prior to radical change in the costs provisions of the 1985 High Court Rules which took effect on 1 January 2000. Since judgment in this case those Rules have been overtaken by the High Court Rules 2009.

Australia

[21] The English practice still obtains to a degree in Australia. Dal Pont *Law of Costs* (2003) at [7.2] cites *Garnett v Bradley* as still authority for the proposition as to current practice that, generally speaking, the successful party is entitled to receive his or her costs from the unsuccessful party. For example, r 62.19 of the Federal Court Rules states:

> **Costs to be allowed on taxation**
>
> 19 On every taxation the taxing officer shall allow all such costs charges and expenses as appear to him to have been necessary or proper for the attainment of justice or for maintaining or defending the rights of a party, but, except as against the party who incurred them, costs shall not be allowed which appear to the taxing officer to have been incurred or increased-
>
> (a) through over-caution, negligence or misconduct;
>
> (b) by payment of special fees to counsel or special charges or expenses to witnesses or other persons; or
>
> (c) by other unusual expenses

[22] But in a helpful judgment of the Federal Court of Australia *Colgate-Palmolive Company v Cussons Pty Ltd* (1993) 46 FCR 225 Sheppard J has shown a different reality (at 226 - 227):

> 4. The costs for which rule… 19 provide[s] are costs on a party and party basis. [It does] not contemplate the award of costs on any other basis. It is a matter of notoriety that the indemnity for costs which one party recovers from another pursuant to the common order that one pay the costs of the other does not very often provide the party entitled to the benefit of the order with anything approaching a full indemnity for the costs which have in fact been incurred. … [I]t is clear that that divergence has existed at least until the last century and indeed before.
>
> 5. The divergence arises in relation to litigation in most, if not all, courts. The problem is by no means peculiar to the Federal Court. To a successful party to litigation, the practice must seem extraordinary. The provisions of

> the Court's Rules (which are not dissimilar from those of other courts) appear to intend a full indemnity, but this is not what is recovered. It is not profitable to explain the reason for the disparity. One would need to make an extensive study of the history of the matter before being satisfied that one understood the reasons why things have developed as they have. For present purposes it is enough to say that the position is as it is because members of the profession, both solicitors and counsel, and also professional witnesses, have refused to accept as a proper or sufficient guide to their costs and fees the provisions of scales of costs and charges provided for in schedules such as the Second Schedule to the Federal Court Rules. Taxing officers have been obliged to tax bills on the basis of the Rules and the Schedule. The fact that the scales themselves provide ranges of fees or charges for various items depending on degrees of difficulty, levels of responsibility and time involved, has not overcome the practical problem which exists.

Sheppard J cited *Cacchia v Hanes* (1991) 23 NSWLR 304 where Handley JA supported a norm of limited recovery (at 318):

> Litigation is already very expensive. The limited indemnity provided to a successful represented litigant for expense incurred and time lost reflects a compromise between the interests of successful and unsuccessful litigants. It is also an important spur to settlement. The rule that a litigant in person can only recover out of pocket expenses also represents a compromise between the interests of successful and unsuccessful litigants.

[23] Sheppard J then turned to consider when the Court may depart from the practice just discussed and order indemnity costs. He cited *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397 where Woodward J said (at 400 - 401):

> …Courts in both the United Kingdom and Australia have long accepted that solicitor and client costs can properly be awarded in appropriate cases where "there is some special or unusual feature in the case to justify the court exercising its discretion in that way" (*Preston v. Preston* [1982] 1 All ER 41 at 58). It is sometimes said that such costs can be awarded where charges of fraud have been made and not sustained; but in all the cases I have considered, there has been some further factor which has influenced the exercise of the court's discretion - for example, the allegations of fraud have been made knowing them to be false, or they have been irrelevant to the issues between the parties: see *Andrews v. Barnes* (1988) 39 Ch D 133; *Forester v. Read* (1870) 6 LR Ch App 40; *Christie v. Christie* (1873) 8 LR Ch App 499; *Degman Pty Ltd (in liq) v. Wright (No. 2)* (1983) 2 NSWLR 354.
>
> Another case cited in argument was *Australian Guarantee Corp Ltd v. De Jager* (1984) VR 483 where (at 502) Tadgell J allowed solicitor and client costs because he found the pursuit of the action to have been "a high-handed presumption".

> No doubt the expression 'high-handed presumption' was appropriate in the case Tadgell J had to decide, and he needed to go no further; but in order to establish a convenient principle in such cases it is necessary to be a little more prosaic. *I believe that it is appropriate to consider awarding 'solicitor and client' or 'indemnity' costs, whenever it appears that an action has been commenced or continued in circumstances where the applicant, properly advised, should have known that he had no chance of success. In such cases the action must be presumed to have been commenced or continued for some ulterior motive, or because of some wilful disregard of the known facts or the clearly established law. Such cases are, fortunately, rare. But when they occur, the court will need to consider how it should exercise its unfettered discretion.*
>
> (Emphasis added.)

Sheppard J then cited the opinion of French J (now Chief Justice of Australia) in *J Corp Pty Ltd v Australian Builders Labourers Federation Union of Workers (WÄ Branch) (No 2)* (1993) 46 IR 301 at 303:

> Although there is said to be a presumption in such cases that the action was commenced or continued for some ulterior motive or in wilful disregard of known facts or clearly established law, it is not a necessary condition of the power to award such costs that a collateral purpose or some species of fraud be established. *It is sufficient, in my opinion, to enliven the discretion to award such costs that, for whatever reason, a party persists in what should on proper consideration be seen to be a hopeless case.* The case against the BTA (a reference to one of the respondents) was paper thin. The BTA's name was invoked on a sign associated with the picket and appeared in a newspaper advertisement referred to in the evidence. Two of the union officials involved in the picket had BTA authorisations to inspect premises under the relevant award. But much more than that was necessary to justify proceedings for a contravention of s.45D. In my opinion the order sought by the BTA should be made.
>
> (Emphasis added.)

Assessment of test for indemnity costs

[24] The general international experience is increasingly to lean against indemnity costs. In England there have been such difficulties with (i) the *Garnett v Bradley* approach and (ii) the undue ease with which effective indemnity awards can be made, that a wholly new regime is being considered. In Australia, no doubt for the reasons given by Handley JA, a strict *Garnett v Bradley* approach has been overtaken by a practice of making lesser costs awards. But an indemnity award may be made where a party persists with what proper consideration would have shown was a hopeless case.

[25] This Court in *Holdfast NZ Ltd v Selleys Pty Ltd* (2005) 17 PRNZ 897 considered the topic of increased costs and at [40] – [42] emphasised the reasons for employing as their starting point the rates set by the Rules Committee rather than the costs charged by counsel for the successful party to their client. The considerations include the risk of disparate approaches due to different judicial experience and perceptions, which is a rule of law point: [11] above.

[26] Although r 48C(4)(a) (now r 14.6(4)(a), governing indemnity costs, employs the adverb "unnecessarily" of the same word "unnecessary" as is used in r 48C(3)(b)(ii) (r 14.6(3)(b)(ii)) dealing with increased costs, their respective contexts differ. The latter is an element of simple unreasonableness; the former of distinctly bad behaviour. As this Court held recently in *Saunders v Winton Stock Feed Ltd* [2009] NZCA 148, "unnecessarily" in r 48C(4)(a) takes its meaning and flavour from the adverbs which precede it: "vexatiously, frivolously, improperly".

[27] The distinction among our three broad approaches: standard scale costs; increased costs; and indemnity costs may be summarised broadly:

(a) standard scale applies by default where cause is not shown to depart from it;
(b) increased costs may be ordered where there is failure by the paying party to act reasonably; and
(c) indemnity costs may be ordered where that party has behaved either badly or very unreasonably.

[28] We acknowledge Sir Rupert Jackson's report that in practice New Zealand scale costs have been permitted to fall far short of that (at 603). That is however a matter for the Rules Committee. Subject to that, the starting point of our rules, which gives a one-third or thereabouts deduction from a set figure is comfortably in the modern main stream. It affords recognition of the access to justice factor that prevails in the United States and should not lightly be departed from. Clear cause must be shown to justify an increase. Our three stage classification, with a discretion in each class as to where the order should be pitched, accords with that approach. Indemnity costs, which depart from the predictability of the Rules Committee's

regime, are exceptional and require exceptionally bad behaviour. That is why to justify an order for such costs the misconduct must be "flagrant": *Prebble v Awatere Huata (No 2)* [2005] 2 NZLR 467 at [6] (SC).

[29] We therefore endorse Goddard J's adoption in *Hedley v Kiwi Co-operative Dairies Ltd* (2002) 16 PRNZ 694 at [11] (HC) of Sheppard J's summary in *Colgate v Cussons* at [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;

(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.

[30] Each of these concerns conduct which would fall within r 14.6(4). A sixth instance given by Sheppard J, imprudent refusal of an offer of compromise, does not fall under the indemnity costs rule but may justify increased costs under r 14.6(3)(b)(c).

Submissions

[31] Mr Gedye raised eight issues:

1. Was the Judge wrong to find that all five causes of action pleaded by the appellants were hopeless from inception?

2. Was the Judge wrong to impute to the appellants knowledge of hopelessness of their case from inception?

3. Was the Judge wrong to find that the appellants were guilty of misconduct sufficient to justify indemnity costs?

4. Was the Judge wrong in his assessment that indemnity costs of $996,712.00 were reasonable?

5. Did the Judge err in failing to assess indemnity costs on a staged basis for different parts of the case?

6. Did the Judge err in failing to give consideration to the respondents' claim for increased costs under rule 48C(3)?

7. Was the Judge wrong not to award scale costs?

8. Was the order for costs disproportionate or unjust?

Discussion

[32] The appeal is against the exercise of a judicial discretion. So the award will not be upset unless contrary to principle, as by adopting a wrong approach or disregarding a material factor, or wholly wrong: *Lewis v Cotton* [2001] 2 NZLR 21 (CA).

[33] The Judge applied the test of hopelessness and of misconduct, namely use of litigation for an improper ulterior purpose of trying to force a settlement from the bank. If sustained on the evidence each was a proper basis for indemnity costs.

(1) Was the case hopeless from its inception? (2) Should the firm have known?

[34] As we have said at [2] above, the principal claim against Westpac was that it was under a contractual obligation to retain Bradbury & Muir for so long as it continued to perform to Westpac's satisfaction and met certain obligations of loyalty. There were other claims based on estoppel, several intentional torts (unlawful interference with business and trade, unlawful interference with contractual relations and two conspiracy claims abandoned prior to trial) and defamation and malicious falsehood. These other claims were very much secondary, although all except the estoppel and defamation/malicious falsehood claims depended on the existence of the alleged contractual obligation. We consider that the principal claim infringed the basic rule of law and of professional ethics stated in the Rules of Professional

Conduct made pursuant to the Law Practitioners Act 1982 (now the Rules of Conduct and Client Care for Lawyers made pursuant to the Lawyers and Conveyancers Act 2006):

> 6.05 A client has an unequivocal right to change from one practitioner to another.

[35] The rule is stated in the standard New Zealand and relevant overseas texts (Australian, English and Canadian): Laws of New Zealand *Law Practitioners* (2008) 66; Webb *Ethics, Professional Responsibility and the Lawyer* (2ed 2006).

[36] Successive editions of the leading New Zealand legal ethics text refer to the "unfettered" right of clients to change practitioner: Webb (1ed 2000) at 166 and (2ed 2006) at 201.

United Kingdom

[37] As Harrison J noted at [50], in England contracts of retainer between a client and a solicitor are subject to an implied term allowing the client to terminate at will: *JH Milner & Son v Percy Bilton Ltd* [1966] 1 WLR 1582 (CA). Fenton Atkinson LJ, giving the judgment of the Court of Appeal, noted at 1587-1588 a potential exception in the case of an "entire contract" for work other than contentious litigation:

> It may well be the law that, if the client retains a solicitor to act for him on the sale of a particular house, or, as in one of the authorities, a gas-works, and later seeks to terminate that retainer before the work has been completed, the solicitor can sue for damages, just as the estate agent who has been employed to sell a particular house can sue for damages if his authority is withdrawn; or the architect, engaged to produce plans for the town hall, can sue for damages if his instructions are cancelled before the work is completed. But that does not seem to me to be this case.

Nor is it this case.

[38] The United Kingdom Law Society regularly publishes *The Guide to the Professional Conduct of Solicitors*. The latest edition (8ed 1999) sets out the relevant rule:

> 12.12 It is open to a client to terminate a solicitor's retainer for whatever reason.

[39] In *Court v Berlin* [1897] 2 QB 396 (CA), the Court held that "[i]t is no doubt open to a client whilst the action is pending to withdraw the solicitor's retainer". In *R v Woodward* [1944] KB 118 (CA), the accused refused to accept counsel on the ground counsel was unfamiliar with case, preferring instead to represent himself. The trial Judge ruled that the accused be represented by counsel. The Court of Appeal quashed the resulting conviction and held that the accused should have been given the right to choose to dismiss counsel and represent himself. This was so even though it was a serious criminal matter, and the accused's self-representation could have had a detrimental effect on his case.

Australia

[40] The leading text describes how the nature of the lawyer-client relationship resulted in the rule that a client can discharge a lawyer at any time without reason: Dal Pont *Lawyers' Professional Responsibility* (3ed 2006) at [3.160]. The substance is unchanged from the earlier editions in 1996 and 2001:

> In view of the lawyer's position of trust and confidence and consequent capacity to influence the client's legal position, clients should not be locked into a retainer with a lawyer in whom they lack that trust and confidence. Hence, subject to the satisfaction of any lien of the lawyer, implied into retainers is a term entitling the client to withdraw at any time without giving reason. Lawyers should therefore place no fetter upon or otherwise aim to discourage a client from changing her or his legal adviser.

Thus, the professional rules in most Australian jurisdictions provide that clients have what Dal Pont terms an "absolute right to change lawyers": 1ed 1996 at 53; 2ed 2001 at 63.

Canada

[41] The guiding principles to the Canadian Bar Association Code of Professional Conduct r A-65 provide:

> (1) The client has a right to terminate the lawyer-client relationship at will.

The leading text, MacKenzie *Lawyers and Ethics* (4ed 2006) states:

> The lawyer-client relationship is terminable at will by the client. The client does not need grounds and is not required to give notice.

It summarises the rule and the reasons behind it which have long prevailed in Canada.

[42] As long ago as 1919, in *Re Elliott v McLennan* (1916) 30 DLR 729 (Ont CA), Meredith CJPJ stated that (at 735):

> [T]he action is the action of the parties, not of the solicitor, and they may discharge, or repudiate, solicitors, and carry on, or end, the action as they see fit…

Similarly in 1957 Orkin *Legal Ethics* stated (at 92-93):

> Although there are certain impediments to a lawyer's withdrawing his services from his client, no such restrictions bind the client… The relationship between solicitor and client being one of confidence, the client may terminate it when he no longer has confidence in his adviser… There is no rule against a client changing his solicitor at will, whether for good cause or no cause at all…

[43] In *Vescio v R* [1949] SCR 139 the Supreme Court of Canada held (at 142):

> It is a fundamental principle of our criminal law that the choice of counsel is the choice of the accused himself, that no person charged with a criminal offence can have counsel forced upon him against his will, and that it is the paramount right of the accused to make his own case to the jury if he so wishes, instead of having it made for him by counsel..

[44] As Harrison J also noted, *McQuarrie, Hunter v Foote* (1982) 143 DLR 3d 354 at 356-359 (BCCA) applies the same principle as the English decision *JH Milner & Son v Percy Bilton Ltd*. At 359 the judgment of the Court delivered by Nemetz CJBC described:

> …the historic recognition of the solicitor-client relationship as a very special one. It is a relationship based on confidence and trust. The dignity and integrity of the legal profession demand that the interests of the client be fully protected. The relationship is such that the client is justified in seeking to dissolve it whenever he ceases to have absolute confidence in his solicitor.

United States

[45] The relevant rule of the American Bar Association Model Rules of Professional Conduct (ABA Center for Professional Responsibility, 2006) is of long standing. The commentary to r 1.16(a) states that "[a] client has a right to discharge a lawyer at any time, with or without cause, subject to payment for the lawyer's services" (at 64).

[46] The rule is reflected in the texts and case law. One commentator states that "[i]t is now uniformly recognised that the client-lawyer contract is terminable at will by the client": Wolfram *Modern Legal Ethics* (1986) at [9.5.2]. Another text states "the client retains the absolute power to discharge the lawyer": Sutton and Dzienkowski *Cases and Materials on the Professional Responsibility of Lawyers* (1989) at 731.

[47] The Supreme Court adopted a similar position in *Faretta v California* 422 US 806 (1975). It accepted the accused's argument that the Sixth Amendment right to representation by counsel extended to the right to dismiss counsel and represent himself.

[48] The courts in the United States have gone as far as to bar in-house lawyers from bringing against their employers an action in tort for retaliatory discharge. In *Herbster v North American Company for Life and Health Insurance* 150 Ill App 3d 21 (1986), the plaintiff in-house lawyer was dismissed for refusing to destroy documents which had been requested in law suits against the defendant employer. The Appellate Court of Illinois held that a tort claim for wrongful dismissal was not available because of the nature of the lawyer-client relationship. It reasoned:

> Attorneys occupy a special position in our society. In representing clients in civil and criminal matters their authority is extremely broad… The attorney is placed in the unique position of maintaining a close relationship with a client where the attorney receives secrets, disclosures and information that otherwise would not be divulged to intimate friends…
>
> Accordingly, the law places special obligations upon an attorney by virtue of this close relationship… The general rule is that a client may terminate the relationship between himself and his attorney with or without cause. This right is implied in every contract of employment and is deemed necessary

> because of the deeply embedded concept of the confidential nature of the relationship between the attorney and the client and the evil that would be engendered by any friction or distrust.

Conclusion as to the authorities

[49] The rule is of such universality and long standing that it should have been familiar to any practitioner. *A fortiori* it should have been located and acted upon by a practitioner contemplating and then running a case which was fundamentally inconsistent with it.

The alleged contract

[50] The firm sought to rely upon an oral agreement and a written retainer said to be to different effect from the rule. According to Mr Gedye the basis for the appellant's claim in contract was that there was an implied term of good faith which was breached by someone else in Westpac interfering in the relationship between Bradbury & Muir and the Asset Management Group (AMG) at Westpac from which Bradbury & Muir took its instructions. This long-term or enduring relationship meant that the normal implied term concerning a client's ability to cancel a contract of retainer did not apply. But we are satisfied that, since the rule is of public policy, that affords no answer. We return to the point at [73(a)].

[51] In any event the briefs of evidence of the witnesses presented by the firm as justifying the oral agreement failed to do so.

Mr Bradbury's brief

[52] Mr Bradbury's brief asserted that Westpac had a continuing obligation to provide work to Bradbury & Muir. It is clear that the alleged obligation did not arise before Mr Bradbury left Simpson Grierson to start his own firm, Bradbury & Muir, in 1995. He stated that he was encouraged by Mr Peebles, head of AMG, to begin practice on his own account, that:

> 37 …Mr Peebles had obviously put considerable prior thought into how he saw our relationship going forward…

and that he wanted him to be available to handle work on a preferential basis. He said:

> 38 We discussed how this would "lock me into Westpac" and make it difficult for me to work for any other bank. *While he did not actually say that he would look after me in terms of work flows, I got the impression that this was where he was coming from …*
>
> (emphasis added)
>
> 39 He said he wanted me to become "an integral part of the Westpac team" and that he wanted me to establish an "enduring relationship" [with] my firm … He said words to the effect that it was a relationship that would last as long as the two of us continued together to produce "skyrockets" for the bank
>
> …
>
> 41 These discussions with Mr Peebles were a key turning point in my life. I would not have made the decision to stay in the law had Mr Peebles not given me the assurances he did …
>
> …
>
> 44 I gave notice to Simpson Grierson …
>
> 45 In taking this step … I was very aware that I was throwing my lot in with Westpac/AMG… I was content to do this because I had complete faith in Mr Peebles' assurances.

[53] This was the highest Mr Bradbury was able to pitch the appellants' case. We accept the respondents' submission that it falls well short of establishing a contractual undertaking.

[54] Mr Peebles continued to instruct Bradbury & Muir on high-level work, and in 1998 began to give instructions for low-level work in response to Mr Bradbury's stated concern that he would have to look for work elsewhere following the drop off in high-level instructions. These events were subsequently overtaken by new terms and conditions imposed by Westpac in 2000 and 2003.

[55] In late 1999, Mr Peebles told Mr Bradbury that Westpac was moving to a legal services panel system in order to align the bank in New Zealand with the way it operated in Australia, and that Bradbury & Muir would receive a Request for Proposal (RFP). Mr Bradbury noted the terms of the RFP, in particular clause 6.3 which provided that Westpac reserved the right to terminate the relationship at its

absolute discretion on one month's notice. He expressed concern to Mr Peebles, who told him to ignore it. Bradbury & Muir responded to the RFP and in July 2000 were notified of its appointment as a panel member by Westpac's General Counsel, Mr Jensen. Mr Jensen said that he hoped shortly to finalise a Service Level Understanding with Bradbury & Muir. This was never done.

[56] In 2001-2002, Mr Bradbury learned that Mr Willcock, Westpac's Group General Counsel, was reviewing the panel system in order to synchronise it with that in Australia. He received in July 2002 a copy of the Australian Standard Terms and Conditions (STCs). The STCs also contained a term which gave Westpac the power to remove a firm from the panel at any time and without cause. Mr Willcock subsequently told him that the existing panel would be extended until March 2003. The panel was extended again for another two years in parallel with a similar Australian extension. During this time, Mr Bradbury completed on behalf of Bradbury & Muir quarterly compliance certificates as required by the STCs.

[57] On 23 November 2004, Westpac notified Mr Bradbury that it was suspending instructions to Bradbury & Muir pending an investigation into the firm's involvement with the Trinity investment scheme. That was a scheme later held by the Supreme Court to infringe the tax avoidance provisions of the income tax legislation: *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2009] NZSC 40. After that date, Mr Bradbury refused to cooperate with Westpac unless it lifted Bradbury & Muir's suspension from the panel. Westpac advised in February 2005 that Bradbury & Muir would cease to be a panel member when the panel terminated on 31 March 2005, and that it would not invite Bradbury & Muir to participate in the next panel.

Mr Peebles

[58] We accept the respondents' submission that, since Messrs Bradbury and Peebles were close friends there is no reason to doubt that Mr Bradbury would have known before issuing the proceedings what Mr Peebles would say about the terms of any alleged oral contract. Mr Peebles' brief was provided to Mr Bradbury's counsel less than six weeks after the proceedings were issued. It was not read at trial because

much of it was inadmissible. Because of an evident conflict of loyalties, the Judge called Mr Peebles who was available to both sides to cross-examine.

[59] Mr Peebles' brief is silent as to whether he encouraged Mr Bradbury to start up Bradbury & Muir. It stated that after Mr Bradbury left Simpson Grierson, he and Mr Bradbury understood Mr Bradbury was to have a close relationship with the AMG, which Mr Peebles headed. We reproduce two paragraphs:

> 44 When Mr Bradbury asked whether he would continue to receive these instructions I said yes. I told Mr Bradbury I wanted a relationship where Bradbury and Muir would be part of my team. As I have done on many occasions since, both through actions and words, I have indicated he could *expect* the relationship to continue for so long as we (ie., myself/Asset Management/Mr Bradbury/Bradbury and Muir) kept producing excellent results for the Bank as that was my expectation. I also said I *expected* Mr Bradbury to be a member of the Asset Management team giving the Bank unconflicted loyalty, making himself available 24/7 (as it is now known) looking more at contingency fees and having Bradbury and Muir and its partners continue to bank Westpac. None of this was recorded in writing but I don't dispute the "loyalty commitments" in the statement of claim, other than to say I would express them in slightly stronger terms. But the general thrust is correct.
>
> …
>
> 48 The reason Mr Bradbury wasn't concerned about the vulnerability or being taken advantage of by the Bank was that I had given him comfort over the years that for as long as he continued to meet his side of the deal and we continued to perform he would continue to be part of the team and continue to receive the higher end instructions. *It was my expectation* that Asset Management would continue to instruct him on higher end work. Any change in his role would be for good reason/changed circumstances and be conducted in a fair and reasonable process befitting the length and nature of his relationship with the Bank.

We have emphasised the reference in three places to *expectation* which experienced lawyers must have known very well is very different from commitment.

[60] Mr Peebles was certainly aware of the distinction. We reproduce an email from Mr Peebles appended to an interlocutory affidavit:

> [Mr Bradbury] spoke to me before setting up back in 1995 to see whether he could still get the bank's work. I said yes subject to continuing the understanding we had at the time, eg, my work was to take priority, he was available at all times and there were to be no conflicts…

> If I were asked whether B&M could/would demand the work I would reply not in my view. If I were asked whether B&M could/would expect work I would reply yes.

[61] In oral evidence Mr Peebles asserted that he had authority from the deputy general manager to tell Mr Bradbury that the notice provision in the RFP would not affect Bradbury & Muir's existing relationship with Westpac. This authority stemmed, he said, from his appointment in 1989 as head of AMG. Mr Peebles stated that he only agreed to the appointment on the condition that he could instruct lawyers and accountants of his choice.

[62] But as the email makes quite clear, Mr Peebles did not think that there was a commitment. It is not conceivable that he told Mr Bradbury otherwise.

[63] In *Securities Register Ltd v Gomes* [2008] NZCA 567 this Court cited *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278 (CA) in which Diplock LJ stated at 294:

> … the law is concerned with legal obligations only … not with the expectations, however reasonable, of one [party] that the other will do something that he has assumed no obligation to do.

He added:

> Legal obligation and thus liability … depends on what the defendant has actually undertaken, whether expressly or by implication, and whether the undertaking has been honoured.

[64] Mr Peebles' evidence was plainly not enough to establish the existence of a contract. His statement in cross-examination by Westpac as to whether he thought there had been a contract in existence was to similar effect to the email at [60]. But that position had been made clear long before.

Mr Price's brief

[65] Mr Price was the CEO of Westpac in New Zealand from 1992 to 1999. His brief does not bear on the applicability to Bradbury & Muir of the RFP and STCs which came after he left Westpac. It concluded however, having regard to the arrangements in place during his tenure, that:

> "[i]t was never my understanding… that Clive [Bradbury] or his firm [Bradbury & Muir] had any right to demand or require that Westpac provide him or his firm work from [the Asset Management Group".

Mr Carter's brief

[66] Mr Carter was General Manager, Risk Credit, of Westpac in New Zealand from 2000 to 2005. His brief shed little light on the alleged obligation on Westpac to continue to supply work to Bradbury & Muir. The only material passage is where he said that, historically, Bradbury & Muir was accountable to AMG, which in turn was accountable to Westpac's CEO in New Zealand. He said that he was not aware of any change to that position.

[67] We accept the respondents' submission that this merely relates to Mr Peebles' freedom to instruct the firm. It does not suggest that Bradbury & Muir had a right to demand work from Westpac. His evidence adds nothing to that of Messrs Bradbury, Peebles and Price.

[68] We also accept the respondents' submission that, while the firm had every expectation of continuing to receive work, the evidence relied upon clearly failed to establish any contractual right to do so. We consider that Harrison J's finding of fact at [32] was properly made:

> Mr Bradbury knew when issuing this proceeding in March 2006 and continually thereafter what he would be able to say on the subject. And he knew or must have known, as an experienced lawyer, and acting with the benefit of independent advice, that his own account of events did not approach the factual threshold necessary to establish the existence of a contract. His evidence, objectively construed, fell well short. His version of what passed between him and Mr Peebles could not possibly constitute an agreement entered into on clear, binding and enforceable terms.

[69] We accept as well the bank's submission that, even if there had been some oral agreement in 1995, it was clearly overtaken by successive written documents, the RFP in 2000 and the STCs in 2003. On 4 May 2000, Mr Jensen, wrote to Mr Bradbury attaching a RFP, and asking that Mr Bradbury submit a proposal on behalf of Bradbury & Muir. Clause 6.3 provided that:

> It is WestpacTrust's intention that the appointment will be for at least two years (refer clause 5.1). However, WestpacTrust reserves the right to

> terminate the relationship at any time at its absolute discretion on one month's notice. If the legal services provider ceases to be a customer of WestpacTrust, commits a serious breach of the arrangements it enters into with WestpacTrust, or a key relationship partner leaves the firm, WestpacTrust may terminate the relationships (in whole or in part) without notice.

[70] Mr Bradbury completed a Response to RFP and sent this to Westpac on 15 May 2000. He made no objection to clause 6.3 to anyone other than Mr Peebles. Nor did Mr Peebles object. Bradbury & Muir was duly appointed to Westpac's legal services panel expiring 31 March 2002 by Mr Jensen's letter of 3 July 2000. The term was subsequently extended until 31 March 2003.

[71] During this time the panel arrangements were modified progressively so as to bring the panel under the control of Westpac in Australia, synchronise the term of the Australian and New Zealand panels, and introduce the Australian STCs to New Zealand. On 19 March 2003, Mr Willcock wrote to Mr Bradbury to this effect. He enclosed the STCs (which he had earlier sent to Mr Bradbury for feedback) and stated Westpac's intention to use the next 24 months "as a review and refinement period to test the success of the new arrangements".

[72] The STCs relevantly provided:

> 5. Certificate of Compliance
>
> 5.1 Your Firm must provide Westpac with a quarterly Certificate of Compliance. The Certificate of Compliance must be in written form and provide positive assurance in relation to your Firm's past and ongoing compliance with the following matters:
>
> - these Service Terms and Conditions
>
> …
>
> 6. Termination
>
> 6.1 Subject to these Services Terms and Conditions, the Panel arrangements will continue for the Term [1 April 2003 – 31 March 2005].
>
> 6.2 Westpac reserves the right:

- to remove your Firm from the Panel at any time and without cause on reasonable notice (which in usual circumstances will not be less than 6 months' notice),

- to terminate its Panel arrangements (in whole or in part) at any time on reasonable notice, and

- to withdraw and/or redirect any current instructions.

7. Westpac's Panel Arrangements are Non-Binding

7.1 Westpac reserves the right to instruct any individual or Firm in relation to any type of matter. You acknowledge that Westpac's Panel compromises non-binding arrangements pertaining to Westpac's anticipated legal services needs over the Term which may change.

8. No Representation

8.1 Westpac makes no representation about the level of instructions which will be issued to your Firm.

Mr Bradbury completed and provided to Westpac quarterly certificates of compliance commencing on 15 June 2003.

[73] We are satisfied that the appellants' case was hopeless from inception. The appellants knew or should have known from the outset:

(a) The fundamental point that, even if there were evidence of a contract as claimed by Mr Bradbury in his brief of evidence, it would be subject to the rule of professional conduct that a client may dismiss a solicitor at any time, without cause. Any contract would be subject to the term implied into every contract of retainer that the contract is terminable at will by the client. Mr Bradbury and the firm were subject to this rule. Their case was fundamentally inconsistent with this rule, rendering the case hopeless.

(b) There was in any event insufficient evidence to establish a contract on the terms pleaded by the appellants. Mr Bradbury was by all accounts an effective and extremely astute commercial lawyer. We endorse Harrison J's finding at [32] that Mr Bradbury knew what evidence he would be able to place before the Court, and his judgment as a lawyer

must have told him that it was insufficient to found a contract that could not be terminated by Westpac at any time. We have considered the submission that the appellants relied upon the advice of a Queen's Counsel who conducted the proceedings until final argument. But the distinction in *Lavarack v Woods* between expectation and right is fundamental to all legal advice. Mr Bradbury cannot insulate himself from responsibility for what any competent practitioner should have known: that it was wholly unrealistic to infer obligation from unwritten, vague assurances given by a Westpac employee whose authority to make them was not clear.

(c) Any contract in the terms pleaded by the appellants was varied by the RFP which gave Westpac the right to terminate at any time, without cause. Again, the appellants were experienced lawyers who must have appreciated the legal effect of responding to the RFP and accepting its terms.

(d) The contract as at the RFP was varied again by the STCs, which also contained a term allowing Westpac to terminate at will. Mr Bradbury completed regular certificates that certified Bradbury & Muir's compliance with the STCs. Mr Bradbury gave as his reason for complying with the STC quarterly compliance certificate that he did not want Westpac to think that he took the reporting aspects of the relationship lightly. That Mr Bradbury complied with the requirement suggests that he knew Westpac was not prepared to continue the relationship on terms other than the STCs. The conclusion is inescapable that the appellants knew they were bound to those terms.

The other causes of action

[74] We are satisfied that the remaining causes of action in estoppel, unlawful interference with business and trade, unlawful interference with contractual relations, conspiracy to injure by unlawful means and conspiracy to injure (neither pursued at trial), defamation, and malicious falsehood were also hopeless from the outset.

[75] We accept the respondents' submission that the representation which the appellants argued gave rise to an estoppel (ie Mr Peebles' representation that the work would continue as long as he and Mr Bradbury continued to achieve excellent results) occurred prior to the RFP and STCs. In responding to both the RFP and STCs, the appellants confirmed that they were bound to those terms. Further, the alleged estoppel is inconsistent with the client's unfettered right to terminate the retainer.

[76] The pleas of unlawful interference with business and trade, unlawful interference with contractual relations, conspiracy to injure by unlawful means and conspiracy to injure were all based on the claimed right of the appellants to be retained and fall with the direct contract cause of action.

[77] The defamation and malicious falsehood claims arose from a letter prepared by a media relations manager and signed by the New Zealand Group Executive sent to the board of the respondent. The letter referred to the Trinity Investment Scheme, with which the appellants were involved, and said "[t]he High Court has recently ruled that a complex forestry investment scheme, Trinity, was established specifically to evade tax." This reference was the basis of the claims. But later in the letter the writer referred to Westpac's potential exposure as including speculation whether Westpac would continue to employ Mr Peebles given his involvement to a scheme "that the High Court has decided represents tax avoidance". Reading the letter as a whole, it is evident that the author is not using "evasion" as lawyers do to connote criminal offending but, like the Oxford Dictionary, as a synonym for avoidance": "The action of avoiding". Further, there is no evidence of malice and the defence of qualified privilege would have applied. Again the claim is hopeless.

[78] Mr Gedye submitted that the Judge was wrong to infer that the appellants' progressive abandonment of all of the causes of action during the course of the trial meant that they had realised their case was hopeless. He further submitted that if the defamation proceeding were hopeless, Westpac should have applied to strike it out. Mr Gedye said that the appellants abandoned their last cause of action after Harrison J intimated that should they continue with it, he would make a finding

adverse to them. It did not necessarily follow that their reason for abandoning the case was that they knew their case was hopeless.

[79] We accept that abandonment of a cause of action of itself is not a pointer to increased or indemnity costs. Harrison J's decision does not however turn on that consideration but on the lack of underlying substance. It was not incumbent on Westpac, in order to receive indemnity costs, to apply to strike out. Such procedure, entails assuming the accuracy of the pleaded facts. A defendant is entitled to challenge a claim on the merits and to secure indemnity costs if in the end it is shown to have been hopeless from the outset.

(3) Were the appellants guilty of misconduct sufficient to justify indemnity costs?

[80] The award of indemnity costs against the appellants is justified on two distinct grounds. The first is, as we found above, that the appellants' case was hopeless. By pursuing it their misconduct was flagrant.

[81] The second ground is that the evidence supports Harrison J's finding the appellants commenced and continued the proceedings for an improper motive. The Judge said that Mr Bradbury's actions pointed to a sustained pattern of misconduct, which the Judge considered signalled Mr Bradbury's intention to extract a financial windfall from the bank by abusing the process of the Court. The Judge referred specifically to Mr Bradbury's letter of 5 March 2005, threatening legal proceedings:

> [169] Mr Bradbury's letter was carefully structured. It opened with allegations of serious wrongdoing by Mr Willcock and others, and advised of an intention to sue them for conspiracy. The damages claimed 'will be substantial', based on breaches of contractual and equitable duties arising from a special relationship. He made no mention of a binding contract allegedly entered into in 1995. To prove the relationship's nature and scope, Mr Bradbury said he would have to 'produce evidence of a myriad of transactions and affairs' which he had handled for Westpac. He would also have 'to call a long list of former and current Westpac officers as witnesses'.
>
> [170] The letter then said:
>
> > Facets of the case will no doubt be extremely embarrassing for the bank and some of its officers. I would expect that it will draw a lot of media attention and be a PR nightmare for the bank in New Zealand. I have yet to sit down and compile a comprehensive description of my involvement with Westpac over the last two

> decades, but I thought I would briefly mention a few episodes at this stage so that you may have some appreciation of where matters might go. They are in no particular order…

[82] The appellants submitted that the letter was protected by the without prejudice privilege now embodied in s 57 of the Evidence Act 2006. The section, like the prior common law, confers privilege for a communication by one party to a dispute to the other which was intended to be confidential and was made in connection with an attempt to settle it. They also argued that it was sent before action and is therefore not relevant to a costs award: *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] 3 NZLR 169 at [41] (SC):

> Conduct prior to the commencement of a proceeding is not misconduct in defending the proceeding or a step in the proceeding.

[83] The Judge held that the privilege does not afford protection to a threat contained in a letter marked "without prejudice". He was right to do so. A letter containing a threat will be characterised not as making an offer the law will protect but as unlawful conduct in respect of which it will grant relief: *Unilever plc v Proctor & Gamble Co* [2001] 1 All ER 783 at 792 (CA) per Robert Walker LJ:

> …one party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for … 'unambiguous impropriety' (the expression used by Hoffmann LJ in *Forster v Friedland* [1992] CA Transcript 1052)…the exception should be applied only in the clearest cases of abuse of a privileged occasion.

The terms of the letter are such as to bring it within the exception and make it admissible.

[84] The Judge went on to give other examples of misconduct, such as joinder of individual Westpac officers as defendants, and the threat to join yet further employees. Mr Bradbury referred to a "PR nightmare" for Westpac.

[85] We agree with the Judge that the veiled threat in Mr Bradbury's letter of 5 March 2005 to use confidential information gained in his capacity as Westpac's lawyer in proceedings and the further misconduct were powerful evidence in support of the claim to indemnity costs. The significance of conduct preceding the issue of

proceedings is not itself to justify increased costs. Rather it afforded powerful evidence of the motivation for the subsequent litigation.

(5) Should the Judge have assessed indemnity costs on a staged basis for different parts of the case?

[86] Since the whole case was, from inception, both hopeless and pursued for an improper motive there was no reason for Harrison J to exercise discretion to distinguish among its different phases and award less than indemnity costs for part.

(6) Should the Judge have confined the award to increased costs under rule 48C(3)? (7) Should he have confined the award to scale costs?

[87] Both contentions are disposed of by the foregoing analysis.

(8) Were indemnity costs of $996,712.00 reasonable? Was the order for costs disproportionate or unjust?

[88] 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.

The application to admit new evidence

[89] The foregoing analysis does not rely on the exchanges between counsel and the Judge, as to which the appellants sought to adduce an affidavit by their junior

counsel at trial. Our conclusion results from our own review of the primary material and we have not relied on the Judge's findings in reaching our own. The points sought to be advanced were:

(a) senior counsel had been retained for a substantial part of the litigation's history;

(b) while the Judge had indicated the plaintiffs should consider dropping all but the contract cause of action, as to that he expressed a view that it "appeared to be sound" and issued a minute recording that Mr Peebles would be a critical witness at trial; while the Judge's observation was treated as tentative and informal it indicated a view that the case was at least arguable;

(c) on the final day of the trial, when junior counsel was closing for the plaintiffs in the absence of his leader, the Judge made plain that he was firmly against the plaintiffs and indicated that he would be making findings that would not be welcome to a professional person; as a result the claim was withdrawn and the Judge did not receive submissions from the plaintiffs.

[90] The solicitor for Westpac denied that the Judge expressed a view that the contract claim appeared to be sound.

[91] Even if we were to accept everything stated by counsel, none of these points could alter our conclusion. We have rejected at [73(b)] the suggestion that the involvement of senior counsel relieves his client from indemnity costs for running a hopeless case. Nothing said by the Judge in trying to clear the deck of meritless arguments can afford any assurance that there is substance in what is left. While withdrawal of a case of itself says nothing as to costs, where the case is hopeless its ultimate withdrawal has the advantage to the withdrawing party of stopping indemnity costs from running further. But it cannot reduce such costs already incurred. In the circumstances the Judge was fully justified in letting the parties know what was in his mind, as will be plain from our own analysis.

[92] It follows that admission of their counsel's affidavit could be of no benefit to the appellants. It is therefore irrelevant and we dismiss the application for its admission.

Result

[93] The appeal is dismissed.

Costs on appeal

[94] The conduct of appeal provides a sharp contrast with the conduct of the case at first instance. It related to an unusually large costs award. The appeal, including the argument to adduce new evidence, was argued concisely and competently. While we have dismissed both the application to admit new evidence and the appeal, their failure is no pointer against a conventional costs order. On the contrary, costs orders should allow a litigant with a real argument presented responsibly to approach the court without apprehension that the predictable costs regime may be departed from if the case fails.

[95] The order against the appellants in favour of the respondents will be for a standard appeal on a band A basis and usual disbursements.

Solicitors:
Wynyard Wood, Auckland for Appellants
Chapman Tripp, Wellington for Respondents