

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

**CIV 2013-404-003712
[2013] NZHC 2946**

BETWEEN	GRACE HADEN Appellant
AND	NEIL EDWARD WELLS First Respondent
AND	WINIFRED NORIEN HOADLEY Second Respondent
AND	GRAEME JOHN COUTTS Third Respondent

On the papers

Judgment: 7 November 2013

JUDGMENT OF GILBERT J

*This judgment was delivered by me on 8 November 2013 at 12.00 pm
Pursuant to Rule 11.5 of the High Court Rules*

Registrar/Deputy Registrar

Date:

Introduction

[1] Ms Haden appeals against a costs judgment given by Judge B A Gibson in the District Court at Auckland on 24 June 2013.¹ The Judge awarded indemnity costs against her, having struck out her claim against the respondents on the basis that it was vexatious, an abuse of the process of the Court and amounted to a collateral attack on an earlier judgment of the Court.² The total costs awarded amounted to \$15,468.65 plus disbursements of \$603.

[2] Ms Haden appealed against Judge Gibson's substantive judgment striking out her claim. That appeal was dismissed by Brewer J in a judgment delivered on 22 October 2013.³ At the conclusion of the hearing of that appeal, Brewer J made directions for the disposal of the present costs appeal on the basis that it would be dealt with on the papers following the filing and service of submissions. These submissions have now been filed. The file has been referred to me to deal with as Duty Judge.

Grounds of appeal

[3] Ms Haden raises the following grounds in support of her appeal. She claims that the Judge erred by:

- (a) ordering her to pay indemnity costs;
- (b) directing her to pay costs that were invoiced by the respondents' solicitors to Animal Welfare Institute of New Zealand (AWINZ) rather than to the respondents;
- (c) directing her to pay costs for attendances unrelated to the proceeding; and
- (d) directing her to pay amounts shown on invoices that were not correct.

¹ *Haden & Anor v Wells & Ors* DC Auckland CIV-2012-004-000696, 24 June 2013.

² *Haden & Anor v Wells & Ors* DC Auckland CIV-2012-004-000696, 10 May 2013.

³ *Haden v Wells & Ors* [2013] NZHC 2753.

Approach on appeal

[4] An award of costs involves the exercise of a discretion. To successfully appeal such a decision an appellant must show that the Judge made an error of law or principle, took into account irrelevant considerations, failed to take into account relevant considerations or was plainly wrong.

Did the Judge err in awarding indemnity costs?

[5] The Judge relied on r 4.6.4(a) of the District Courts Rules 2009 which empowers the Court to award indemnity costs if:

- (a) the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing... a proceeding...

[6] Having found that Ms Haden's claim was vexatious and an abuse of the process of the Court, the Judge considered that r 4.6.4(a) applied. That was correct.

[7] Ms Haden acknowledges in her submissions that an indemnity costs award can be made if the Court determines that the action was "hopeless". If Judge Gibson was correct in finding that her claim was vexatious and an abuse of process, it would necessarily follow that it was hopeless. This ground of Ms Haden's appeal could only have succeeded if her appeal from Judge Gibson's substantive decision had also succeeded, which it did not. This ground of the appeal must therefore fail.

Did the Judge err in directing payment of costs invoiced to AWINZ?

[8] The invoices sent by the respondents' solicitors were addressed to AWINZ, care of Mr Wells, rather than to the respondents. Ms Haden submits that it is pure speculation as to who the client was and what the purpose of the work was.

[9] I do not accept this submission. Each of the invoices is headed "Grace Haden". A schedule itemising the attendances was sent with each invoice. One does not need to speculate who the client was or what the purpose of the work was because these matters are clearly set out in the billing records and invoices provided by the solicitors.

[10] There is nothing in Ms Haden's point that the invoices were addressed to AWINZ rather than to the respondents. The respondents were jointly and severally liable for any costs incurred by the solicitors in representing them in the proceedings at their request. In any event, at all relevant times the respondents were trustees of AWINZ and were therefore personally liable, jointly and severally, for any costs incurred by the Trust.

[11] For these reasons, I am not persuaded that the Judge made any error in finding that the respondents incurred the costs invoiced to AWINZ and which he ordered Ms Haden to pay.

Was Ms Haden directed to pay costs for attendances unrelated to the proceeding?

[12] Ms Haden's next point is that the invoices cover attendances relating to other proceedings, including bankruptcy and liquidation proceedings in the High Court. This is not correct. The solicitors extracted from their time records those attendances that related to Ms Haden's claim in the District Court for which indemnity costs were sought.

[13] The costs claimed from Ms Haden were included within the attendances covered by four invoices. These were invoices dated 28 June 2012, 31 July 2012, 31 August 2012 and 28 September 2012. The total fees and disbursements charged to the respondents in these invoices amounted to \$94,860.48. This compares to the total amount which Ms Haden was ordered to pay of \$16,071.65.

[14] I refer to two of these invoices to demonstrate that the solicitors extracted from the overall attendances charged in these invoices only those that related to their work in defending Ms Haden's claim in the District Court. The amount claimed from Ms Haden in relation to the invoice dated 28 June 2012 was \$1,784 plus GST whereas the total fees incurred in that period based on time and attendance amounted to \$36,229.16 plus GST. Similarly, the amount claimed from Ms Haden in relation to the invoice dated 31 July 2012 was \$369 plus GST whereas the total fees incurred in that period based on time and attendance amounted to \$12,964 plus GST. The

same approach was followed in relation to the other two invoices. In each case only the relevant proportion of the fee was claimed from Ms Haden.

[15] Not only did the solicitors extract the relevant attendances from the overall billing records, they also detailed the particular attendances claimed from Ms Haden. It is clear from this summary that the relevant attendances related solely to her claim in the District Court. Contrary to her submission, there is no reference in this summary to work undertaken in relation to the proceedings in the High Court.

[16] Ms Haden complains that she has been charged in relation to the 28 June 2012 invoice for attendances with Peter McCutcheon. She says that Mr McCutcheon was not involved in the District Court proceedings and she should not have been required to pay for this attendance.

[17] The billing records supporting the invoice dated 28 June 2012 refer to various attendances involving Mr McCutcheon. These were on 18 May 2012 and 15, 18, 19, 20, 21 and 22 June 2012. However, the summary of the attendances detailing the claim made against Ms Haden in relation to this invoice shows that the relevant attendance was on 18 May 2012. I say this because the attendance details on the summary correlate exactly to those in the billing records for the attendance on 18 May 2012. The total charge for this attendance was \$78.00 plus GST.

[18] I am not persuaded that the Judge made any error on this issue. In my view, he was entitled to rely on the respondents' solicitors' assurance that these attendances related to their work in defending the claim.

[19] Ms Haden's next complaint is that the billing records supporting the 31 July 2012 invoice provide dates and details of the attendances but do not show the solicitor involved, the hours spent or the time charged. Ms Haden says that in these circumstances, no value can be attributed to these attendances. I do not know why this information was not provided with this invoice. However, the total amount claimed from Ms Haden in relation to this invoice is the sum of \$369 out of a total of \$10,516 (plus GST in each case). I am not persuaded that the Judge made any error in accepting the respondents' claim, supported by their solicitors' assurance, that

\$369 was the amount the solicitors charged for their attendances relating to the defence of her claim during that month.

[20] Ms Haden's next complaint is that the 31 August 2012 invoice contains reference to a telephone call and email from Translegal. Ms Haden says that Translegal was not involved in the proceedings. Translegal Services NZ Ltd provides various services to the legal profession and others including service of Court documents. The solicitors charged, as a disbursement, service fees for serving the strike out application on Ms Haden. I infer that the solicitors engaged Translegal to carry out this task and the attendances relate to this. On that basis, they are recoverable from Ms Haden.

[21] Ms Haden also complains that she was charged \$390 for attendances on 29 August 2012 which she says included attendances on other matters for other parties. This is not correct. The billing records supporting the charge of \$390 for attendances on 29 August 2012 describe these as "attendance on you regarding offer from Grace Haden; calculating balance owing; email to Grace Haden; attendance on file regarding strike out application". Contrary to Ms Haden's submission, these attendances self-evidently relate to her claim.

[22] Ms Haden's next point is that she has been overcharged by \$1,035 in relation to the 28 September 2012 invoice. She arrived at this conclusion by calculating the costs for each attendance included in the summary by comparing these to the billing records. Ms Haden assumed that the attendances described in the summary as "Reviewing, amending and finalising submissions on strike out" refer to the attendances by one solicitor on 4 September 2012 for which a charge of \$400 was made. She overlooked that the respondents were also charged \$1,035 for the time spent by another solicitor on the same day for attendances described as "Amending and finalising submissions". There is no basis for this part of Ms Haden's complaint.

[23] The final point made by Ms Haden in this part of her submissions is that the subtotals in the summary do not add up to the amount claimed of \$13,451. Ms Haden is correct about this. The correct total is \$13,448 and she has therefore been overcharged by \$3.00 plus GST. This amount is inconsequential.

Was Ms Haden required to pay amounts shown on invoices that were not correct?

[24] In her submissions in support of this ground of appeal, Ms Haden makes three points.

[25] First, she argues that “the costs were not for the parties to the proceeding, no invoices made out to them have been produced”. This is simply a repetition of the second ground of Ms Haden’s appeal relating to her complaint that the invoices were addressed to AWINZ. I have already dealt with this issue.

[26] Second, Ms Haden argues that the indemnity costs “should be zero” as the respondents did not incur any costs as no invoices were made out to them. This is the same issue expressed another way. It does not require any further consideration.

[27] Third, she argues that the invoices cover a number of transactions unrelated to the proceedings. I have already addressed this issue when dealing with her third ground of appeal.

Conclusion

[28] For the reasons I have given, Ms Haden has failed to demonstrate that the Judge made any appealable error that would justify this Court interfering with his exercise of discretion in making his costs order.

Result

[29] The appeal is dismissed.

[30] The respondents are entitled to costs on a Category 2, Band A basis.

M.A. Gilbert J

M A Gilbert