

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA640/2018  
[2019] NZCA 664**

BETWEEN CAMERON JOHN SLATER  
First Appellant

SOCIAL MEDIA CONSULTANTS  
LIMITED (IN LIQUIDATION)  
Second Appellant

AND MATTHEW JOHN BLOMFIELD  
Respondent

Court: French, Miller and Stevens JJ

Counsel: G S Caro for the Official Assignee for First Appellant  
F E Geiringer for Respondent

Judgment: 19 December 2019 at 10.30 am  
(On the papers)

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**JUDGMENT OF THE COURT**

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- A The respondent's application for indemnity costs is declined.**
- B The appellants are jointly and severally liable to pay costs and disbursements to the respondent as follows:**
- (a) the sum of \$10,000 by way of increased costs;**
  - (b) disbursements (if any) as approved by the Registrar; and**
  - (c) the sum of \$1,737.49 in respect of the costs and disbursements of and incidental to the briefing of medical experts.**
- C The Registrar is directed to pay out the sum held by the Registry for security for costs on the basis agreed between the respondent and the Official Assignee in the joint memorandum dated 17 September 2019.**

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## REASONS OF THE COURT

(Given by Stevens J)

### Introduction

[1] This is an application by the respondent, Mr Blomfield, for indemnity costs and disbursements following the abandonment of an appeal by Mr Slater and Social Media Consultants Ltd (in liq).

[2] The appeal followed judgments given by Davison J in the High Court in relation to interlocutory applications made by Mr Slater. These judgments:

- (a) declined Mr Slater's application for security for costs and declined an application for an order permitting Mr Slater to file a fourth amended affirmative statement of defence;<sup>1</sup> and
- (b) declined Mr Slater's application to file a fifth amended affirmative statement of defence and ruled that Mr Slater was not permitted to give evidence in support nor cross-examine on the defences of truth, honest opinion or bad character of Mr Blomfield.<sup>2</sup>

[3] Mr Slater applied to adjudicate himself bankrupt in late February 2019. The Official Assignee formally abandoned the appeal in respect of the first appellant on 14 March 2019.

[4] Mr Blomfield then sought to clarify the status of the appeal by the second appellant.<sup>3</sup> Cooper J confirmed that "[t]he appeal by the second appellant is deemed to be abandoned".<sup>4</sup> Subsequently the shareholders of the second appellant appointed a liquidator who has not participated in the costs application.

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<sup>1</sup> *Blomfield v Slater* [2018] NZHC 2538.

<sup>2</sup> *Blomfield v Slater* [2018] NZHC 2679.

<sup>3</sup> By memorandum dated 14 March 2019.

<sup>4</sup> *Slater v Blomfield* CA640/2018, 18 March 2019 (Minute of Cooper J).

[5] The only participation by the Official Assignee in this matter is in a joint memorandum which states that the Official Assignee “neither consents to nor opposes the order for costs sought”. The parties have come to an agreement on how to deal with a costs order if one is made.<sup>5</sup>

[6] No agreement has been reached as to the amount of costs and disbursements to which Mr Blomfield might be entitled following the abandonment of the appeal.

### **Grounds**

[7] Mr Blomfield’s grounds for indemnity costs include that the behaviour of Mr Slater in commencing and continuing the appeal merits such a sanction. Counsel for Mr Blomfield also says Mr Slater was responsible for delays, misled the Court as to the extent of his invalidity and the appeal lacked merit. Although no substantive appeal hearing ever took place, a large amount of unnecessary work was occasioned by Mr Slater’s conduct.

### **Rules concerning awards of costs**

[8] Even though an appeal has been abandoned, this Court may still make an award of costs.<sup>6</sup> Under pt 4A of the Court of Appeal (Civil) Rules 2005 (the Rules) the power to award costs is discretionary.<sup>7</sup>

[9] The Court has power under the Rules, in appropriate circumstances, to award indemnity costs or increased costs.<sup>8</sup> The principles governing an award of indemnity costs are as follows:

#### **53E Increased costs and indemnity costs**

(1) Despite rules 53A to 53D, the Court may make an order—

...

(b) that the costs payable are the actual costs and disbursements reasonably incurred by a party (**indemnity costs**).

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<sup>5</sup> By joint memorandum dated 17 September 2019.

<sup>6</sup> Court of Appeal (Civil) Rules 2005, r 44(3).

<sup>7</sup> Rule 53.

<sup>8</sup> Rule 53E.

...

- (3) 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 an appeal or a step in an appeal; 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
  - (c) costs are payable from a fund, the party claiming costs is a necessary party to the appeal affecting the fund, and the party claiming costs has acted reasonably in the appeal; or
  - (d) the person in whose favour the order of costs is made was not a party to the appeal and has acted reasonably in relation to it; or
  - (e) the party claiming costs is entitled to indemnity costs under a contract or deed; 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.
- (4) If the Court makes an order that a party pay indemnity costs, it may order that the costs be subject to taxation (a **taxation order**).
- (5) If the Court makes a taxation order, the taxation must be carried out by the Registrar.
- (6) Rules 14.18 to 14.23 of the High Court Rules 2016 apply to any such taxation, with all necessary modifications.

### **Submissions for Mr Blomfield**

[10] Mr Blomfield sought costs and disbursements totalling \$24,337.49 (excluding GST). These comprised of:

- (a) \$22,600 of legal fees;
- (b) \$1,500 of expert fees; and
- (c) \$237.49 in postage fees and notary fees for the taking of an affidavit of an expert in San Diego.

[11] The detailed grounds advanced by Mr Blomfield in support of his claim for indemnity costs may be summarised as follows:

- (a) While there has not been a substantive appeal hearing, there has been a significant amount of work for the respondent in the procedural matters:
  - (i) four teleconferences; and
  - (ii) two applications (for a stay and under r 43 of the Rules) which required four affidavits, two of them from an expert neurologist and associated fees;
- (b) There is evidence to suggest that Mr Slater was misleading the Court as to the extent of his invalidity;
- (c) The delay of four years in these proceedings (both in this Court and in the High Court) caused by non-compliance with timetabling; and
- (d) The appeal was without merit, belatedly articulated and could not have succeeded, even if the relevant facts were established.

### **Our analysis**

[12] A party who abandons an appeal can expect to have costs awarded against them, unless they can justify that there should not be a costs burden placed upon them.<sup>9</sup> Mr Blomfield recognises that an order of indemnity costs is a “rarely exercis[ed]” power but argues that the circumstances here justify such an order being made.

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<sup>9</sup> *Chapman v Badon Ltd* [2010] NZCA 613, (2010) 20 PRNZ 83 at [14]. The Court is usually reluctant to examine the reasons for the discontinuance except in a clear case, as explained in *Powell v Hally Labels Ltd* [2014] NZCA 572 at [19]–[24].

### *Indemnity costs*

[13] In *Bradbury v Westpac Banking Corp* this Court adopted Goddard J's approach to indemnity costs in *Hedley v Kiwi Co-operative Dairies Ltd*.<sup>10</sup> It accepted that the categories in which the discretion may be exercised are not closed, but the following are examples of circumstances in which indemnity costs may be awarded:

- (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.<sup>11</sup>

[14] We are not satisfied that the case for indemnity costs has been made out. Our focus when considering the possible award of indemnity costs must be on conduct by the relevant party in the course of the appeal in question.

[15] This appeal has had a chequered history marked by some delays on the part of Mr Slater. The key events are:

- (a) The notice of appeal was filed on 19 October 2018. It was insufficiently particularised because at that point only results judgments had been issued.
- (b) At a teleconference on the 25 October 2018 Asher J directed that particularised grounds needed to be filed. The Judge noted that

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<sup>10</sup> *Bradbury v Westpac Banking Corp* [2009] NZCA 234, [2009] 3 NZLR 400 at [29] citing *Hedley v Kiwi Co-operative Dairies Ltd* (2002) 16 PRNZ 694 (HC) at [11]. This adopted the categories of Sheppard J in *Colgate-Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225.

<sup>11</sup> In *J-Corp Pty Ltd v Australian Builders Labourers Federation Union of Workers (WA Branch) (No 2)* (1993) 46 IR 301 at 303.

“the time designated for the taking of steps must be observed, and that the Court will expect there to be no slippage”.

- (c) The reasons decisions were released on 26 October 2018,<sup>12</sup> but particularised grounds of appeal were not filed by 16 November 2018.
- (d) Mr Slater had a stroke in late October 2018.
- (e) On 30 November 2018 there was a teleconference where Asher J declined an application for a stay for two months while Mr Slater recovered. He also set the 14 December 2018 as the deadline for the filing of amended grounds of appeal on the basis of the stroke alone.
- (f) The amended notice of appeal was filed on 14 December 2018. However, neither a case on appeal nor an application for a hearing date was sought by 11 February 2019. On that day the appellants applied for an extension under r 43 of the Rules.
- (g) At a teleconference on 13 February 2019, Asher J allowed the appellants to file affidavits in reply to support the application. They were due on 22 February 2019.
- (h) On 22 February 2019, Mr Slater adjudicated himself bankrupt.

[16] It is clear Mr Slater suffered a stroke and this would have inevitably had an effect on his ability to instruct counsel in relation to the taking of the required steps under the appeal. It is difficult to assess how great an impact the stroke had, but it certainly led to some of the delays outlined above. But such delays alone are not sufficient to warrant indemnity costs in respect of the abandoned appeal.

[17] In the circumstances of this case Mr Blomfield’s claim for indemnity costs would require a finding that Mr Slater had acted “vexatiously, frivolously, improperly,

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<sup>12</sup> *Blomfield v Slater* [2018] NZHC 2781.

or unnecessarily in commencing, [and] continuing” the appeal.<sup>13</sup> Such findings are rare and we do not consider they are warranted here.

*Increased costs*

[18] Instead of indemnity costs, we consider an award of increased costs is justified. When determining the nature of an award of increased costs, the actual costs and scale costs involved both need to be considered.

[19] To assist with quantum, we asked counsel for Mr Blomfield to provide copies of the bills for legal costs and disbursements. We have reviewed these.

[20] We also asked counsel to provide a calculation of scale costs. This resulted in an assessment of \$16,730 if classed as a standard appeal, and \$24,710 if classed as a complex appeal (both excluding disbursements).

[21] We accept that the determination of time allocations for different steps is not straightforward. Neither is it entirely clear under the Rules what steps are properly allowed for and at what rate. In such circumstances reference to the High Court Rules 2016 and related Costs Schedules is permissible.

[22] We consider the assessment by counsel for Mr Blomfield of the scale costs under the Rules is too high. In summary, the allowances for the stay application and the r 43 application are too great and ought not be treated as complex matters. Also the rates applicable prior to 1 August 2019 ought to have been used.<sup>14</sup>

[23] We consider a more conservative figure of scale costs would be \$6,770. This is arrived at by more appropriate time allocations for the steps involved and by applying a daily recovery rate of \$2,230.

[24] Having determined the appropriate figure for scale costs, we accept that an uplift is warranted to reflect increased costs. The figure we fix is \$10,000.

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<sup>13</sup> Court of Appeal (Civil) Rules, r 53E(3)(a).

<sup>14</sup> High Court Amendment Rules 2019, r 2 and sch 1.



## **Result**

[25] The respondent's application for increased costs is declined.

[26] Instead there is an order that the appellants are jointly and severally liable to pay costs and disbursements to the respondent as follows:

- (a) the sum of \$10,000 by way of increased costs;
- (b) disbursements (if any) as approved by the Registrar; and
- (c) the sum of \$1,737.49 in respect of the costs and disbursements of and incidental to the briefing of medical experts.

[27] The Registrar is directed to pay out the sum held by the Registry for security for costs on the basis agreed between the respondent and the Official Assignee in the joint memorandum dated 17 September 2019.

Solicitors:  
Bytalus Legal, Auckland for Respondent