IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2016-404-002748
[2017] NZHC 1298

BETWEEN	GREENFIELD GLOBAL LIMITED First Applicant
	CASSANDRA GREENFIELD Second Applicant
	REBOUND LIMITED Third Applicant
	BRIGHT FIVE LIMITED Fourth Applicant
AND	MKAH LIMITED Respondent

Hearing: (On the papers)

Counsel: Jack Rafiei for the Applicants
Rick Phillips and Margaret Hickton-Burnett for the Respondent

Judgment: 16 June 2017

[COSTS] JUDGMENT OF MOORE J

This judgment was delivered by me on 16 June 2017 at 3:00 pm
pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

Date:

Introduction

[1] This is a costs judgment following an application for an interim injunction.

[2] The underlying dispute related to a loan made by the respondent to a corporate trustee and guaranteed by the applicants. The amount at issue was modest, some $13,000. The respondent claimed that an early repayment fee was payable under the loan agreement. The applicants demurred. Their position was that the loan agreement did not include an early repayment penalty provision and that all payable interest had been repaid.

[3] The applicants say the respondent threatened to have a receiver appointed over all of the applicant companies and to bankrupt Ms Greenfield, the second applicant. In response to the perceived threat, the applicants filed a without notice application seeking to restrain the respondent from exercising its rights as a secured creditor against three companies and from issuing proceedings against their director, Ms Greenfield. As it transpired, the application was never determined because, following judicial encouragement, the parties managed to resolve the interlocutory application and the substantive dispute was referred to the Disputes Tribunal by agreement.

[4] The parties were unable to agree as to costs. On that issue, they remain diametrically opposed. The applicants contend that indemnity costs, or alternatively increased costs, should be awarded against the respondent because it pursued a wholly unreasonable course leaving the applicants no choice but to file their application. The respondent, on the other hand, claims that the applicants did not put all relevant material before the Court and mischaracterised the nature of the perceived threat. The respondent seeks indemnity costs against the applicants and against their solicitor, Mr Norling.

Factual background

[5] It is necessary to set out the factual background to this dispute in some detail in order to properly understand and resolve the competing contentions of the parties.

As the dispute underlying the application was never ventilated in this Court, I rely on the affidavit evidence provided by the parties.

[6] The first applicant is a company called Greenfield Global Limited ("Greenfield Global"). Its sole director is Ms Greenfield, the second applicant. Ms Greenfield is also the sole director of Rebound Limited ("Rebound") and Bright Five Limited ("Bright Five"), the third and fourth applicants respectively.

[7] In early July 2014 Ms Greenfield sought funding for Greenfield Global and Rebound in order to purchase a debtor's ledger. Ms Greenfield instructed Mr Pope, a consultant to Greenfield Global, to research funding options. As a result, negotiations were entered into with Mr Gilbert, the sole director of the respondent, MKAH Limited ("MKAH"). Negotiations were facilitated by a mutual business contact, Mr McKee Wright.

[8] On or around 18 July 2014, MKAH agreed to provide the desired finance through a loan to a corporate trustee, LS Holdings Limited ("LS Holdings"). The agreement was formalised into a loan document entered into by LS Holdings and MKAH on 21 July 2014. The agreement provided for a loan facility of $140,000 plus interest, fees and legal costs. The loan was to be repaid over an 18 week period at a flat rate of $9,978.48. Repayments were to start in September 2014 and the final repayment would be made on 26 January 2015. Security for the loan was provided under a general security agreement signed by MKAH and LS Holdings.

[9] A few weeks later, on 5 August 2014, Greenfield Global guaranteed the obligations of LS Holdings under the agreement. Ms Greenfield also guaranteed LS Holdings' obligations in her personal capacity.

[10] Subsequently, Mr Gilbert discovered that Ms Greenfield had incorporated two other companies, Rebound and Bright Five. He required those companies to enter into a deed of interlocking/cross guarantee and indemnity with MKAH. By this document, signed on 7 August 2014, Rebound and Bright Five agreed to guarantee all obligations of LS Holdings to MKAH.

[11] In November 2014 the applicants entered into negotiations with the respondent to provide additional funds. In December 2014 the facility agreement was varied to increase the facility limit from $140,000 to $200,000. Ms Greenfield guaranteed the deed in her capacity as director of Greenfield Global and also in her personal capacity.

[12] According to Mr Pope, after the loan was varied, Mr McKee Wright made contact with him by telephone to discuss the facility agreement. Mr McKee Wright advised that he and Mr Gilbert had anticipated the outstanding balance on the original loan would be $100,000 and because the applicants had made an additional payment they owed much less. Mr McKee Wright also advised that there were insufficient funds to allow Greenfield Global to drawdown the full $200,000 and requested that only $90,000 be advanced at this time. On behalf of the applicants, Mr Pope accepted the reduced amount. On 8 December 2014 MKAH advanced the $90,000.

[13] Mr Pope then says he made numerous telephone requests to Mr McKee Wright during December 2014 asking him to confirm the repayment figure given the reduced drawdown. Mr Pope says he did not receive an adequate response.

[14] On 23 December 2014, Mr Gilbert emailed Mr Pope to express a concern that the applicants had ceased making repayments. Mr Gilbert advised that, on his calculations, there were to be 104 payments of $2,966.89. Mr Pope did not accept this figure. He replied advising that he was trying to establish the correct rates of repayment. At this point, the Christmas holiday period intervened and the matter remained unresolved.

[15] On 5 January 2015 Ms Greenfield commenced weekly automatic repayments of $2,966.89, the figure claimed by Mr Gilbert, to ensure the applicants were meeting their obligations under the loan agreement.

[16] Nothing of relevance appears to have occurred until April 2015 when Mr Pope says he telephoned Mr Gilbert requesting disclosure on the settlement

figure on the original loan and disclosure on the balance of the second loan. After receiving no response, he sent the following email to Mr Gilbert on 12 May 2015:

> "Hi John,
>
> How did you get on … My records show balance at 9/12/14 $89,906.32 (excluding any interest rebate)
>
> Original due date 26/1/15 – repaid via refinance .."

[17] Mr Gilbert did not reply and so Mr Pope sent follow-up emails on 5 June and 24 June 2015 requesting the same information. Mr Gilbert replied on 24 June 2015. His email reads:

> "Laurence,
>
> I am struggling to find the detail with the lawyer who handled this now based in Cambodia and the records not as tidy as [they] should be.
>
> I always thought the number was around $90,000 so your number below is probably correct."

[18] Discussions seemed to have stalled at this point. Indeed, the next relevant development appears to have occurred over a year later in July 2016 when Mr Pope asked Mr Murphy, the financial controller of the applicant companies, to conduct a review to ascertain when the loan would be repaid. Mr Murphy calculated the repayment values as being materially lower than the amounts claimed by Mr Gilbert and being paid by Ms Greenfield. Mr Murphy calculated the actual balance as $84,958.90.[1]

[19] During July and August 2016 Mr Pope says he tried to make contact with Mr Gilbert by telephone to discuss the discrepancies in their figures but was unable to reach him.

[20] On 15 August 2016 Mr Gilbert emailed Mr Pope confirming the correctness of the repayment figures as earlier calculated by MKAH. Later that day, Mr Pope says he called Mr Gilbert in an attempt to resolve the matter. Mr Pope says

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[1] On Mr Pope's calculations, the loan was repaid in full on 19 September 2016. However, the applicants continued to make payments until 17 October 2016. Accordingly, on Mr Murphy's calculations, the applicants have paid $11,108.25 beyond what was required by the terms of the agreement.

Mr Gilbert confirmed once more the correctness of MKAH's figures and, according to Mr Pope, stated he would "get the money one way or another".

[21] Following this telephone call, Mr Pope sent Mr Gilbert an email attaching a copy of Mr Murphy's calculations. Mr Gilbert replied a short while later attaching a copy of the signed variation agreement. Mr Pope responded the next day on 16 August 2016. His email concisely summarised the applicants' position and the apparent source of the disagreement between the parties:

> "Thanks John,
>
> The issue is that the variation assumed that the existing loan balance would be $100k – it was actually $84k by the time this new facility was drawn down.
>
> The other is that only $90k was paid … making a total advance of $174k not $200k."

[22] Mr Pope says he spoke again with Mr Gilbert in an attempt to resolve the situation. According to Mr Pope, Mr Gilbert was not interested in discussing the matter and remained adamant that $200,000 had been advanced as that was what was signed for. Both sides maintained their position with discussions failing to conclude in an agreement. As a result, the parties convened a meeting on 23 September 2016.

[23] The meeting was attended by Mr Gilbert, Mr McKee Wright, Mr Murphy and Mr Pope. According to Mr Pope, Mr Gilbert:

(a) stated the figures prepared by Mr Murphy were inaccurate due to the delayed start of the repayments;

(b) stated he would not make any concessions as he had a fixed sum to repay to Asset Finance Limited from whom he borrowed the funds to advance to LS Holdings;

(c) was asked to provide a schedule of repayments to support his position but refused to do so;

(d) said the only concession he would make would be to ask Asset Finance Limited for its terms regarding early repayment; and

(e) advised that if repayments ceased he would appoint a receiver to the applicant companies and seek to bankrupt Ms Greenfield under her personal guarantee for the money loaned.

[24] The meeting prompted the applicants to engage Mr Norling of Norling Law Ltd to assist in their negotiations with Mr Gilbert. Mr Norling knew Mr Gilbert through his professional dealings in the insolvency industry and so his first step was to attempt to resolve the matter by telephone. He says he called Mr Gilbert the day he was instructed, 26 September 2016.

[25] According to Mr Norling, Mr Gilbert made it clear throughout this telephone call that he planned to put the applicants into receivership and to bankrupt Ms Greenfield. Mr Norling deposes that Mr Gilbert told him he had already spoken to his proposed receivers at Waterstone Insolvency Ltd and that he should speak with Damien Grant who had already agreed to take appointment. Mr Norling deposes to then calling Mr Grant who confirmed that he had been approached by Mr Gilbert to act as a receiver of the applicant companies.

[26] Mr Gilbert has a different view of his interactions with Mr Grant. He deposes that he told Mr Grant over coffee that he would be happy for Mr Pope to hear from Mr Grant that Mr Gilbert had approached him to be a receiver of the applicant companies. He explained to Mr Grant that he had no intention of appointing a receiver but "wanted the payments to keep coming" and "wanted a little pressure on Mr Pope".

[27] Mr Gilbert further deposes that when he met with Mr Norling on 26 September 2016 he told him that unless the outstanding payments were made under the loan agreement he would "consider" putting Greenfield Global into receivership. According to Mr Gilbert, he told Mr Norling that if he was going to appoint a receiver it would be Mr Grant and he would need to accept the appointment. Mr Gilbert deposes that, given their close working relationship,

Mr Norling would have been able to confirm with Mr Grant whether any further approach was taken in relation to any receivership.

[28] Returning to the chronology, on 28 September 2016 Mr Norling sent Mr Gilbert a lengthy email in which he set out the applicants' position. He explained that the applicants had recalculated and finalised payment schedules which he attached to the email. Those schedules claimed that the debt had been repaid save for a nominal amount which would be paid the following week. Mr Norling advised that the applicants' figures had been reviewed by a chartered accountant. The remainder of the email is central to the applicants' claim for indemnity or increased costs. It reads:

> "My client's position is quite reasonable. If there is a debt owed, they are able and willing to pay it. They do not seek any discount from what was agreed and simply want to pay what is due and owing, which they believe is nothing.
>
> I am instructed that my clients are prepared to put funds as they fall due on your calculation into a solicitors trust account pending resolution. They are prepared to do this on the basis that you will not exercise any default or security rights you may have and on the basis that once the amount due is determined accurately, it can be released to you (if any).
>
> This is a reasonable position for my clients to take and gives you the comfort that the funds are available if you can prove that funds are due. For that to occur, please provide disclosure of the amount you say is due and how you have calculated this.
>
> Any receiver would need to verify the debt and in any case you should have this information to hand and MKAH has disclosure obligations regarding the loan which it needs to comply with.
>
> Further, my clients propose that Waterstone Insolvency Ltd independently reviews the documents and the alleged debt and to write to both parties to advise their conclusions as to what is due under the agreement. My client instructs that they will pay by such third party determination.
>
> Further, I have approached Damien Grant to ascertain whether he would be willing to do this, and he has advised that he is willing to do so if both parties agree to it.
>
> As you are aware, if you do appoint Waterstone Insolvency Ltd as receivers, I would likely cease acting for my clients due to a potential conflict that would arise upon the appointment. My clients have been advised of this and understand this risk.
>
> …

Please be on notice that any receivership would be commercially devastating for my clients and would cause substantial damage to their businesses which would result in loss of future business and may result in many employees losing their jobs. Accordingly, be on notice that if you place the companies into receivership, my clients will be looking to you to compensate them for such irreparable damage.

We hope that this is unnecessary and that the information sought will be forthcoming so that if monies are owed, they can be paid or, this dispute can cease on the basis that payment in full has occurred.

Given the urgency of this situation we look forward to receipt of the information sought which you rely on to say a greater amount is due and payable. We understand that you were to be in a position to disclose your calculations to us today.

We also look forward to confirmation that if my clients overpay, MKAH can, and will repay this as soon as it is established that there is an overpayment.

Our client does not seek either party to entrench in their positions but would like to reach an amicable and agreed outcome whereby MKAH receives everything that is due to it. We trust that you appreciate this pragmatic approach."

[29] On 30 September 2016 Mr Gilbert sent Mr Norling a repayment schedule. The schedule recorded the sum transferred from the original loan to the December loan as being $98,829.44 which included an early repayment fee of $13,870.54.

[30] Mr Norling replied later that day seeking clarity as the basis upon which an early repayment fee could be claimed. Mr Gilbert did not reply, prompting Mr Norling to send a follow-up email on 3 October 2016 requesting an urgent response. Mr Gilbert replied later that day citing two clauses in the original loan agreement which he said provided a basis for the early repayment fee.

[31] Later in the day of 3 October 2016 Mr Norling sent the following email to Mr Gilbert:

"Hi John,

Thank you.

I am instructed that:

1. The loan was to be repaid via 18 instalments of $9978.48 or $179,612.64

2. Our client made nine payments of $9978.48 or $89,806.32 before the loan was restructured

3. Even if you were able to take the position that there would be no interest credit on the loan restructured with you, the balance owing at the time of restructure was nine payments of $9978.47 or $89,806.32.

4. Using that number MKAH still have two full payments left and one smaller payment the week of the 17/10.

That seems logical. Please confirm whether you accept that position."

[32] Mr Gilbert's reply was brusque. It simply reads:

> "For clarity I do not accept that position.
>
> Please ensure that your client meets the payment arrangements."

[33] Mr Norling replied asking for confirmation as to how Mr Gilbert's payment arrangements had been calculated. Mr Norling repeated the applicants' offer to have either Waterstone Insolvency Ltd or a third party review the account and provide a determination as to quantum.

[34] On 6 October 2016, having received no response, Mr Norling emailed Mr Gilbert asking him to reply so the parties could resolve the issue before the next deadline under the payment arrangements prepared by MKAH.

[35] There is no documented evidence of a response. However, Mr Gilbert and Mr Norling did attend a meeting together on 13 October 2016. According to Mr Gilbert, at this meeting he undertook not to exercise any of his rights under the security, including receivership. Mr Norling has a different recollection. He deposes that Mr Gilbert said something to the effect of:

> "What I can do is give you an undertaking that I will not exercise any rights regarding our security, including receivership next week while you are in Melbourne".

[36] Mr Norling rejects the suggestion made by Mr Gilbert that the undertaking went any further.

[37] After the meeting, Mr Norling sent the following email to Mr Gilbert in which he sought to confirm their discussion in writing:

> "Hi John,

> Thank you for briefly discussing this with me today.
>
> I just want to confirm our discussion in writing.
>
> I repeated our client's position that it is willing to pay you the amount owed to you in full. It believes that it has done this. However, if calculated against them and in their worst case scenario, there is one further (smaller) amount to be paid next week.
>
> I advised that our client does not want to be placed into receivership but also does not want to keep paying money that is not owned. Accordingly, our client is seriously considering seeking a declaration from the Court that the amount is paid in full and to seek an injunction any security powers are restrained. Obviously, that is their last resort, and they don't want to undertake that path if it can be avoided.
>
> I did fail to mention, but I should now if that course of action is pursued, our client will be seeking orders regarding the amount paid and seeking orders that these be reduced. As you will be aware, the courts have previously intervened in contractual terms and scaled down interest rates and "establishment fees" etc. that are unreasonable. Our client may well have good ground to succeed on such orders.
>
> Again, I repeat that this is not what our client wants to do, rather it is what they feel they are being forced to do.
>
> In any case, I confirm your representation that you will not exercise any rights regarding your security, including receivership next week as I am out of New Zealand.
>
> Please do provide immediate confirmation of the basis of your calculation and more detail on your calculation so this matter can be resolved."

[38] Mr Gilbert did not reply.

[39] Mr Norling sent another email a week later on 20 October 2016. Mr Norling noted that Mr Gilbert had not responded despite numerous requests and reiterated the position of his clients that the debt had been paid in full. Mr Norling referred to the loan agreement and expressed his view that there was "absolutely no basis" upon which to claim an early repayment fee. The email continued:

> "Our client has reasonably offered to have a third party review it and that both parties agree to be bound by. You have failed to respond to these many requests.
>
> If you do not agree to provide disclosure, have it independently reviewed, or simply accept our client's position, we anticipate instruction to file proceedings at the High Court early next week. These proceedings will be seeking a declaration that no amounts are owing to MKAH and any amounts overpaid are to be refunded by MKAH. This will be sought under the

Declaratory Judgments Act 1908. As previously advised, we will also be seeking an injunction to prevent MKAH utilizing its powers incorrectly.

...

On the information available we believe our clients have good chances of obtaining an injunction and the declaration. If proceedings are initiated, costs will be sought for both the claim for declaration and the injunction. In the circumstances, our clients would seek indemnity costs.

Again, this is not the course of action our client wants to take. However, you have left them with no choice but to take this course of action.

Please confirm your position, by 3 pm tomorrow."

[40] In the absence of a reply, Mr Norling sent a further email on 25 October 2016. It reads:

> "Good morning John,
>
> We repeat our request for a response.
>
> Please note, our emails below are repeated on an open basis and will be provided to Court in the anticipated application."

[41] Later that day, Mr Gilbert replied with the following email which, he says, confirmed his general undertaking that the respondent would not enforce its security:

> "Brent,
>
> As I undertook to take no action last week, I will respond to your email this week."

[42] Mr Gilbert deposes that at no point following this email did he receive any communication from Mr Norling or any of the applicants. Consistent with this statement, the next documented piece of correspondence between the parties appears to be an email sent by Mr Gilbert to Mr Norling on 31 October 2016. The email, sent at 12:10 pm, reads:

> "Good morning Brent,
>
> I note that the last payment made by your client was on 17 October 2016 ($2966.89)
>
> If I am to accept the argument being put forward by you then there is still another $97.15 due.

> I do not accept that your logic and calculations are correct, but in order to bring this to a conclusion payment of $1,000 will be treated as full and final settlement."

[43] Mr Norling did not immediately reply. Instead, later the same day at 4:50 pm he filed the without notice application for an interim injunction on behalf of the applicants.

[44] The application came before me on 1 November 2016. I was not satisfied the risks identified were so immediate that injunctive relief was appropriate on a without notice basis. Accordingly, I directed the application to be served in the ordinary way or, alternatively, on a Pickwick basis. I did, however, make interim orders to prevent the respondent from exercising its rights to security until 5:00 pm on 8 November 2016.

[45] Mr Norling emailed Mr Gilbert at 7.47 pm on 1 November 2016 attaching my Minute of the same day. The first tranche of the email reads:

> "Good evening John,
>
> Our clients appreciate your approach, but your change in stance has occurred too late.
>
> As we had not heard from you, despite our numerous requests, we received instructions to obtain an injunction from the High Court restraining MKAH Ltd from exercising its secured powers.
>
> Yesterday we filed that application.
>
> Tonight we received orders from the High Court as sought. Please see attached the orders restraining MKAH Ltd from exercising any rights it currently enjoys.
>
> ..."

[46] Mr Norling's email then advised compliance with the interim orders and suggested that the parties "engage on a meaningful basis to resolve" the matter.

[47] The application came before Toogood J on 7 November 2016. The Judge extended the interim orders to enable the respondent to file a notice of opposition and affidavits in support, including an undertaking by Mr Gilbert that the respondent

would not seek to have the applicants put into receivership on the basis of the dispute.

[48] The matter came before Toogood J again two days later on 9 November 2016. His Honour adjourned the matter to the Duty Judge List to be heard on 5 December 2016. The Judge requested counsel to encourage the parties to resolve all matters including costs.

[49] The parties filed a joint memorandum on 2 December 2016 in which they agreed to resolve the interlocutory application save for the costs issue. As I observed earlier, the substantive dispute was referred to the Disputes Tribunal by agreement.

Submissions

[50] Against this rather convoluted background, I turn to summarise the submissions of the parties.

Applicants' submissions

[51] The nub of the applicants' argument is that had Mr Gilbert acted reasonably, the applicants would not have had to make their application. They claim Mr Gilbert continuously failed to admit that he had calculated the "debt" incorrectly and that the applicants were not indebted to the respondent company. The applicants further submit that Mr Gilbert failed to accept reasonable offers of settlement, including offers to:

(a) put all amounts Mr Gilbert claimed were owing into a solicitor's trust account pending resolution;

(b) instruct a third party chartered accountant to review the loan and quantify the liability; and

(c) instruct Waterstone Insolvency to review the loan and quantify the liability.

[52] The applicants submit that Mr Gilbert's conduct was such that it left the applicants with little choice but to capitulate to his unreasonable demands or to commence the proceedings. For these reasons, the applicants submit that increased or indemnity costs are appropriate under the High Court Rules ("the Rules") because the respondent:

(a) acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding;[2]

(b) failed, without reasonable justification, to admit facts, evidence, documents or accept a legal argument;[3] or

(c) failed, without reasonable justification, to accept an offer of settlement to settle or dispose of the proceeding.[4]

[53] In the event the Court is not minded to award increased or indemnity costs, the applicants seek costs on a 2B basis.

Respondent's submissions

[54] The respondent submits that the applicants are not entitled to costs against the respondent. The respondent's first contention is that the without notice application was not properly made because the applicant did not put all relevant material before the Court and misled the Court in characterising the approach of the respondent, particularly the nature of the perceived threat. The respondent appeals to the well-established principle that a party making a without notice application has a duty to disclose to the Court any defence to the action if known.[5] In particular, the respondent submits that the applicants failed to provide the Court with Mr Gilbert's email of 31 October 2016 which contains an offer of full and final settlement. In the respondent's submission, the applicants were motivated to file their application on

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2 High Court Rules, r 14.6(4)(a).
3 High Court Rules, r 14.6(3)(b)(iii).
4 High Court Rules, r 14.6(3)(b)(v).
5 *United Peoples' Organisation (World Wide) Inc v Rakino Farms Limited (No 1)* [1964] NZLR 737.

the day of receipt of the offer of settlement so that they could seek costs on the application.

[55] The respondent addresses a potential issue as to privilege. The respondent notes that Mr Gilbert's email of 31 October 2016 has a subject line which includes the words "without privilege" but submits that the email should have been disclosed anyway. The respondent refers to a line of authority citing back to *McFadden v Snow* in which the Supreme Court of New South Wales held that "the privilege that may arise from the cloak of 'without privilege' must not be abused for the purpose of misleading the court".[6]

[56] Next, the respondent addresses the merits of the application. It submits that the filing of the substantive claim under the Declaratory Judgments Act 1908 was misconceived. In the respondent's submission, the dispute fell squarely within the jurisdiction of the Disputes Tribunal. The respondent also submits that the balance of convenience and overall justice would have militated against granting the injunction because the applicants overstated the nature of the perceived threat. The respondent contends that Mr Gilbert had already given an undertaking not to put the applicants into receivership and had shown a clear intention to settle the dispute with a realistic settlement offer. In the respondent's submission, the application was unnecessary and only filed as a means of recovering the costs of its preparation.

[57] For these reasons, the respondent seeks indemnity costs against the applicants as well as their solicitor, Mr Norling.

The issues

[58] The present costs dispute raises the following questions which I propose to answer sequentially:

(a) Should costs be awarded at all and, if so, to which party?

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6 *McFadden v Snow* (1951) 69 W.N. (NSW) 8 at 10 cited in *Cedenco Foods Ltd v State Insurance Ltd* [1996] 3 NZLR 205.

(b) If a party is entitled to costs, should that party be awarded indemnity, increased or reduced costs? When considering whether reduced costs are appropriate I will consider the arguments advanced by the unsuccessful party for an award of indemnity costs to be made in its favour.

(c) If a party is entitled to costs other than indemnity costs, are the steps claimed by that party properly claimable?

(a) Should costs be awarded and, if so, to which party?

[59] The starting point is that costs are at the discretion of the Court under r 14.1 of the Rules. Nevertheless, Part 14 of the Rules establishes a costs regime designed to be predictable and expeditious. In accordance with this regime, the ordinary rule is that costs follow the event. In other words, the party who fails with respect to a proceeding or an interlocutory application should pay costs to the party who succeeds.[7]

[60] In the present case, the application was never judicially determined and therefore the principle that the successful party is presumptively entitled to costs is not readily applicable. Rather, at first glance, the present case engages the general principle in civil proceedings that when an application is abandoned or discontinued then unless the parties have resolved costs as between themselves, the party who brought the abandoned application pays costs. This principle has been held to apply equally to an interlocutory application.[8]

[61] However, there are situations in which a party may be entitled to the costs of preparing an application notwithstanding it was never judicially determined. Mr Rafei, for the applicants, refers in this connection to the case of *Grant v Stinson* where Abbott AJ held at [35]:[9]

> "[35] Although the application was not determined substantively by the Court, I consider that as a consequence of it the liquidators received

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7 High Court Rules, r 14.2(a).
8 *Commissioner of Police v Burgess* [2016] NZHC 267 at [14].
9 *Grant v Stinson* [2013] NZHC 325.

> documents and explanations from Mr Stinson which enabled them to conduct their investigations appropriately. On this basis the liquidators can be considered to have been successful."

[62] Mr Rafei also refers to the case of *Grant v McCullagh* in which Abbott AJ articulated some principles relevant to the present case.[10] I reproduce the relevant paragraphs in full:

> "[29] It is a fundamental aspect of the High Court Rules that the party who fails with a proceeding on an interlocutory application should pay the costs of the successful party. In particular, where a proceeding is withdrawn (discontinued) before it is determined, the rules provide expressly that the discontinuing party pay costs unless the parties agree or the Court orders otherwise.
>
> [30] The principles that the Court applies when determining costs following discontinuance of a proceeding are:
>
> (a) The presumption may be displaced if the Court finds that there are circumstances which make it just and equitable that it should not apply.
>
> (b) The Court is not limited in the factors that can be taken into account when considering whether the presumption is displaced, but the following are matters which are taken into consideration:
>
> (i) As the general rule the Court will not consider the merits of the respective cases (unless they are so obvious that they should influence the costs issue).
>
> (ii) The Court will consider the reasonableness of the stance of both parties in the proceeding (whether it was reasonable for the plaintiff to bring and continue the proceeding, and for the defendant to oppose and continue to oppose it, up to the point of discontinuance).
>
> (iii) Conduct prior to the commencement of the proceeding may be relevant (for example, if any conduct by a defendant has precipitated the litigation), as may be the reason for discontinuing (for example, where a change of circumstances has made the proceedings unnecessary).
>
> (c) The Court's general discretion in relation to costs can also override the general principles in relation to discontinuance.
>
> [31] Although those principles were stated in relation to discontinuance of a proceeding, there is no reason not to apply them also to withdrawal of an interlocutory application (with any appropriate modification).
>
> [32] It follows from these principles that where an application is discontinued because the party applying has achieved what was being sought

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10 *Grant v McCullagh* [2013] NZHC 2210.

> in the application, prior to hearing, the Court has discretion to treat it as a successful application.
>
> ...
>
> [36] I see the critical question in this case as whether it can be said that the application was reasonably necessary and, if so, whether it achieved its purpose. If so, the liquidators are to be considered successful in terms of the rules as to costs."

[63] Adopting Abbott AJ's formulation of the critical question, I turn to consider whether the applicants' application was reasonably necessary and whether it achieved its purpose.

[64] Whether the application was necessary turns largely on the nature of the perceived threat. I have set out the facts in full detail so that my conclusions on this issue can be stated relatively briefly. In short, I am satisfied that Mr Gilbert's conduct rendered the filing of the application necessary. My reasons follow.

[65] I first analyse the situation as it stood before Mr Gilbert's email on 31 October 2016 containing an offer of full and final settlement. On my view of the evidence, Mr Gilbert deliberately engineered a situation in which the applicants and their solicitor, Mr Norling, would believe his threats to put the applicant companies in receivership were genuine and capable of execution. On Mr Gilbert's own evidence, he wanted to put pressure on Mr Pope to ensure that the applicants continued to keep making payments. Moreover, Mr Gilbert expressly wanted Mr Pope to form the impression that Mr Gilbert had approached Mr Grant to be a receiver of the applicant companies.

[66] I do not accept Mr Gilbert's assumption that given Mr Norling's close working relationship with Mr Grant, Mr Norling would be able to ascertain with Mr Grant whether Mr Gilbert had taken further steps towards receivership. Depending on the circumstances, it may have been wholly inappropriate for Mr Grant to discuss any instructions he had received from Mr Gilbert given Mr Norling was the solicitor acting for the other side.

[67] I do not accept Mr Gilbert's claim that he provided an undertaking not to exercise MKAH's rights as secured creditor beyond the week Mr Norling was out of

New Zealand. That claim is inconsistent with the email Mr Norling sent immediately following the meeting on 13 October 2016 and with circumstances more generally.

[68] Mr Norling deposes that after he returned to New Zealand, he continued to seek information and assurances regarding the perceived threat. As part of those discussions, he says he highlighted the need for an injunction. Mr Gilbert, on the other hand, denies there was any correspondence of this kind. Consistent with Mr Gilbert's position, the next piece of documented evidence following Mr Norling's return to New Zealand is the settlement offer he communicated to Mr Norling on 31 October 2016.

[69] However, on balance, I accept Mr Norling's evidence that he did communicate with Mr Gilbert following his return to New Zealand. Mr Norling was clearly desperate to protect the applicants from any exercise of the respondent's secured powers. He had managed to obtain an undertaking that Mr Gilbert would not exercise these powers while Mr Norling was in Australia but would have been anxious to ascertain the position following his return. I consider it highly likely Mr Norling would have made contact via some medium, documented or not, with Mr Gilbert upon returning to New Zealand.

[70] Having accepted the discussions took place, I accept Mr Norling's argument that had Mr Gilbert given a genuine undertaking extending beyond the week Mr Norling was out of the country, it could be expected he would assure Mr Norling there was no reason to seek curial intervention.

[71] Finally, as I observed in my Minute of 1 November 2016, if MKAH had carried out its threats, the jobs of more than 50 staff employed across New Zealand by the three applicant companies would likely be imperilled and the companies would be at risk of failing. The application was a proportionate response to the threat as the applicants' reasonably apprehended it.

[72] I am therefore satisfied that, in the circumstances as they stood before 31 October 2016, the application was reasonably necessary.

[73] The next question is whether it remained necessary to make the application following Mr Gilbert's email on 31 October 2016 in which he offered to settle the matter if the applicants made a final payment of $1,000. In my view, while this offer evinced some willingness to work towards resolution, when viewed against the backdrop of the parties' relationship, the offer did not eliminate the threat of receivership. The critical point is that the email did not provide any assurance that MKAH would not exercise its secured powers.

[74] My conclusion therefore remains the same. It was reasonably necessary to make the application. However, Mr Gilbert's change in stance may still be relevant when considering downstream issues such as whether increased or indemnity costs are appropriate.

[75] I also deal briefly under this heading with the respondent's submission that the substantive claim was misconceived. The respondent's argument is that even if all relevant material was before the Court and the defences had been made known, the Court would not have made the interlocutory orders. The respondent submits that the application for a declaration under the Declaratory Judgments Act was misconceived. It submits the dispute was a factual one centring on whether the applicants were owed the sum of $11,108.25 by way of overpayments made pursuant to a loan agreement. In the respondent's submission, this dispute fell squarely within the jurisdiction of the Disputes Tribunal. Moreover, the respondent submits that the applicants have taken no steps to prosecute their substantive claim, did not provide initial disclosure as required by r 8.4 of the Rules, and have taken no steps against the respondent to pursue their claim in the Disputes Tribunal.

[76] Mr Hickton-Burnett refers to *New Zealand Insurance Co Ltd v Prudential Assurance Co Ltd* in which the Court of Appeal noted that the Declaratory Judgments Act is fundamentally designed to provide a quick and inexpensive means of obtaining judicial interpretation where the matter in dispute cannot be conveniently determined in its ordinary jurisdiction, and where a declaratory

judgment would be appropriate relief.[11] Litigation with difficult questions of mixed fact and law was said to be unsuitable for declaratory judgment procedure.

[77] My starting point is the general rule that in discontinued proceedings the Court will not consider the merits of the respective cases unless they are so obvious that they should influence the costs issue. I approach the submission with this rule in mind.

[78] In my view, the dispute between the parties did not raise "difficult" questions of mixed fact and law such as to render the declaratory judgment procedure unavailable. The dispute engaged an accounting exercise and the interpretation of the relevant loan documentation. Resolution of the substantive dispute would likely have been relatively straightforward. In any event, in the case of *Carrington v Carrington* Katz J held that the existence of a factual dispute does not go to jurisdiction but to the discretion to grant relief.[12] Given the Court would have had jurisdiction to hear the matter and bearing in mind the rule against considering the merits of the case, I am not persuaded that the application for declaratory relief was misconceived such that it should bear on the issues of costs on the discontinued interlocutory application.

[79] I turn now to consider whether the application achieved its purpose. The underlying concern motivating the application was that Mr Gilbert would appoint a receiver over the applicant companies and issue bankruptcy proceedings against Ms Greenfield. The clear purpose of the application was to remove these concerns.

[80] Once seized of the application, I made interim orders protecting the applicants' position. Those orders were extended by Toogood J. And ultimately the applicants were able to elicit an undertaking to similar effect out of Mr Gilbert. In those circumstances, I am satisfied the application did achieve its purpose and that the applicants should be seen as the successful party in terms of the principle codified in r 14.2(a).

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11 *New Zealand Insurance Co Ltd v Prudential Assurance Co Ltd* [1976] 1 NZLR 84 (CA).
12 *Carrington v Carrington* [2014] NZHC 869, (2014) 22 PRNZ 43.

(b) *Should increased, indemnity or reduced costs be awarded in this case?*

Indemnity costs

[81] The circumstances in which the Court may order a party to pay indemnity costs are provided in r 14.6(4):

> "(4) The court may order a party to pay indemnity costs if—
>
> (a) the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding; or
>
> (b) the party has ignored or disobeyed an order or direction of the court or breached an undertaking given to the court or another party; or
>
> (c) costs are payable from a fund, the party claiming costs is a necessary party to the proceeding affecting the fund, and the party claiming costs has acted reasonably in the proceeding; or
>
> (d) the person in whose favour the order of costs is made was not a party to the proceeding 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."

[82] There must be good reason to justify making an order for indemnity costs because such an order departs from the predictability of the costs regime provided in the Rules. The threshold is a high one; "exceptionally bad behaviour" is required.[13] The misconduct must be "flagrant".[14]

[83] The applicants cite r 14.6(4)(a) claiming the respondent acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding. As it was the applicants who initiated proceedings, the argument must be that the respondent acted vexatiously, frivolously, improperly or unnecessarily in defending the proceeding. The difficulty the

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13 *Bradbury v Westpac Banking Corporation* [2009] NZCA 234, [2009] 3 NZLR 400 at [28].

14 *Prebble v Huata* [2005] 2 NZLR 467, (2005) 17 PRNZ 581 (SC) at [6].

applicants face is that they initiated the proceedings on a without notice basis. The respondent was only notified of the proceedings after I required the application to be served in the ordinary way or on a Pickwick basis. The application was settled not long after. In those circumstances, I cannot see how r 14.6(4)(a) applies. In the words of the Supreme Court, "conduct prior to the commencement of a proceeding is not misconduct in defending the proceeding or a step in the proceeding".[15] The applicants' remaining arguments appear directed at r 14.6(3) which deals with increased costs.

Increased costs

[84] Increased costs may be awarded where a party has failed to act reasonably, which is a lower standard.[16] A percentage uplift will be justified to the extent that this failure reasonably contributed to the time or expense of the proceedings in question.[17] The percentage increase given is unlikely to exceed 50 per cent of scale costs given the daily recovery rate is two-thirds of the daily rate considered reasonable for the particular proceeding.[18]

[85] However, there is a fundamental difficulty standing in the way of the applicants' claim for increased costs. Increased costs are generally appropriate where there has been unreasonable conduct in relation to the proceeding itself, not in terms of the behaviour prior to the commencement of litigation.[19] As the Courts have previously observed, the circumstances in which the Court may order increased costs under r 14.6(3)(b) are predicated on actions of a party which increased the time or cost of a proceeding once it has been issued.[20]

[86] In the present case, the applicants claim the respondent failed, without reasonable justification, to admit facts, evidence, documents or accept a legal

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15 *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] NZSC 26, [2007] 3 NZLR 169 at [41].
16 *Bradbury v Westpac Banking Corp* [2009] NZCA 234, [2009] 3 NZLR 400 at [27].
17 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2010] NZCA 400, (2010) 24 NZTC 24,500 at [165].
18 Andrew Beck and others *McGechan on Procedure* (looseleaf ed, Brookers) at [HR14.6.02].
19 *Re Estate of Keast* [2015] NZHC 1505 at [7]; citing *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] 3 NZLR 188 (CA) at [160]. See also Andrew Beck and others *McGechan on Procedure*, above n 18, at [HR14.6.02].
20 See for example *Hong Kong and Shanghai Bank Corporation Ltd v Rick Dees Ltd* HC Auckland CIV-2006-404-6278, 21 September 2006 at [18].

argument under r 14.6(3)(b)(iii). That may well be true. Mr Gilbert exhibited prolonged intransigence in the face of the applicants' calculations, which were reviewed by a chartered accountant. But this conduct, taking place before the commencement of proceedings, is not caught by the relevant rule.

[87] For the same reason, I am not persuaded increased costs should be awarded on the basis that Mr Gilbert failed to take up the applicants' suggestions to settle the dispute without recourse to litigation. Rule 14.6(3)(b)(v) refers to offers "to settle or dispose *of the proceeding*" and there is something of a logical difficulty with disposing of something yet to exist.

[88] In any event, there is further difficulty with the applicants' argument. While eminently sensible, the relevant correspondence did not contain an offer of settlement which could later be vindicated by the quantum of damages following trial. I refer to the case of *Nandro Homes Ltd v Datt* in which Asher J said:[21]

> "[13] The letter that was sent on behalf of Nandro by its lawyers, seeking to persuade the Datts to drop the second proceedings, was a detailed and intelligent letter, sent for the justifiable purpose of trying to stop the litigation at that point and save further costs. However, it was not a *Calderbank* letter. No offer was made which was later vindicated by the quantum of damages, as occurs when orders are made on the basis of a *Calderbank* letter. Rather, one party stated, as parties often do at the outset of proceedings, that it considered the other side's case to be hopeless. I do not consider that the sending of such a letter is a circumstance warranting a departure from the usual rule as to costs. It does not constitute a failure to accept an offer of settlement under r 14.6(3)(b)(v)."

[89] In my view, similar reasoning applies here. The letter provided a mechanism by which to achieve settlement but the letter itself did not constitute an offer of settlement. As a result, it does not appear r 14.6(3)(b)(v) is engaged and I am not persuaded increased costs should be awarded on this basis.

[90] In summary, I am not satisfied it would be consistent with the principles underlying the costs regime to award increased or indemnity costs in this case. While Mr Gilbert's intransigence made the application necessary in the first place, the impugned conduct, however objectionable, did not occur after proceedings were initiated and I am only prepared to award scale costs on the application.

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21 *Nandro Homes Ltd v Datt* HC Auckland CIV-2008-404-6676, 13 July 2009.

Reduced costs

[91] Having determined that the applicants are entitled to costs I approach the respondent's arguments for indemnity costs in the context of whether those costs should be reduced or refused.

[92] The respondent submits that the applicants failed to put before the Court Mr Gilbert's emails of 25 October 2016 and 31 October 2016 and misled the Court when describing the respondent's attempts to resolve the issues as "limited".

[93] These submissions invoke an issue as to privilege because the subject line of the email sent by Mr Gilbert on 31 October 2016 includes the words "without prejudice". However, the respondent says this was typical of emails sent between the parties as few emails are not marked "without prejudice". The respondent says the applicants' own position was that the email communications did not attract privilege. Ms Hickton-Burnett refers to a passage in the applicants' memorandum to the Court seeking the without notice injunction:

> "It is accepted that some of the correspondence is headed without prejudice. However, this was inserted by MKAH part way through open correspondence and in counsel's submission, these emails do not attract privilege despite the heading as MKAH has not attempted to settle or mediate the dispute in those emails pursuant to s 57 of the Evidence Act 2006. On that basis, counsel submits that these emails can be considered by the Court."

[94] I agree that the email of 25 October 2016 should have been disclosed to the Court. Privilege did not apply because the email did not disclose an attempt to settle or mediate the dispute pursuant to s 57 of the Evidence Act 2006 and the email was relevant to assessing the nature of the perceived threat. However, given the email did not advise what Mr Gilbert's position would be following Mr Norling's return to New Zealand, the failure to disclose it cannot be seen as sufficiently material to justify a reduction or refusal of costs.

[95] As for the email of 31 October 2016, I do not accept the respondent's submission that it should have been disclosed to the Court. The email contained a settlement offer. Unlike the previous emails, the heading without prejudice properly

operated to prevent the applicants putting it before the Court until the question of costs arose.

[96] I deal finally with the respondent's submission that the application was unnecessary and only filed as a means of recovering the costs of its preparation. For reasons already given, I consider the application remained reasonably necessary following 31 October 2016. It follows I am not persuaded the application amounted to an abuse of process or that costs should be reduced or refused on this basis. For the same reasons, indemnity costs should not be awarded against Mr Norling.

(c) Are the steps claimed by the applicants properly claimable?

[97] The applicants calculates costs on the following basis:

Item	Description	Daily rate	No. of days	Total
22	Filing interlocutory application	$2,230	0.6	$1,338.00
24	Preparation of written submissions for injunction	$2,230	1.5	$3,345.00
25	Preparation by applicant of bundle for the hearing	$2,230	0.6	$1,338.00
12	Appearance at mentions on 7 November 2016	$2,230	0.2	$446.00
12	Appearance at mentions on 9 November 2016	$2,230	0.2	$446.00
12	Appearance at mentions on 5 December 2016	$2,230	0.2	$446.00
11	Filing memorandum of counsel dated 2 December 2016	$2,230	0.4	$892.00
30	Plaintiff's preparation of affidavit for costs	$2,230	2.5	$5,575.00
24	Preparation of written submissions for costs	$2,230	1.5	$3,345.00
29	Sealing order	$2,230	0.2	$446.00
			7.9	**$17,617.00**

[98] The applicants also seek disbursements totalling $292 for service and filing fees.

[99] Three aspects of the applicants' calculations require comment:

(a) First, the applicants have sought to claim costs for the hearings on both 7 and 9 November 2016. That is inappropriate. The 9 November hearing was only required because the applicants inappropriately filed the application without notice. I only allow scaled costs in relation to the 9 November hearing.

(b) Secondly, the applicants claim the costs of the costs application. While provisions for the order of costs for filing costs memoranda are not specifically provided for under the Rules, there is authority for the proposition that costs for costs applications are available in some contexts. While the Court is typically reluctant to award costs on costs matters,[22] I am satisfied this is an appropriate case for costs. Because the application was never substantively determined, extensive submissions and evidence was filed in support of the costs applications. I am prepared to allow the costs claimed by the applicants for its costs application.

(c) Thirdly, item 25 was not completed. Mr Rafei claims this item on the basis the parties completed significantly more affidavit evidence than is anticipated by item 22 which contemplates only 0.6 of a day to file the application. Mr Rafei submits that the affidavits were paginated to give the Court and the parties ease of reference and is, in that respect, substantially similar to a bundle. I do not accept this claim. No bundle was prepared. Items 22 and 24, totalling 2.1 days, are sufficient to reflect the preparation of the application for the interim injunction. I do not allow costs for item 25.

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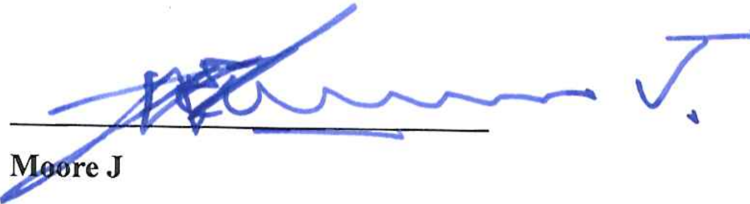
22 *Jeffreys v Morgenstern* [2013] NZHC 1361 at [40].

Result

[100] Accordingly, after reviewing the steps claimed for by the applicants, I allow scale costs in the sum of $15,833 and disbursements totalling $292 for service and filing fees.



Moore J

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