

**IN THE DISTRICT COURT  
AT AUCKLAND**

**I TE KŌTI-Ā-ROHE  
KI TĀMAKI MAKĀURAU**

**CIV-2021-006-000026  
[2022] NZDC 6207**

BETWEEN

SUNGJA KIM  
Plaintiff

AND

JAEYEAN KIM and SHIN HOE LEE  
Defendants

Appearances: A Ho for the Plaintiff  
A Kang for the Defendants

Judgment: 13 April 2022  
(On the papers)

---

**COSTS JUDGMENT OF JUDGE D J CLARK**

---

**Introduction**

[1] The plaintiff seeks costs following the settlement of these proceedings. Counsel agree the matter is to be determined on the papers. No steps have been taken by the defendants to oppose the costs application.

**Background**

[2] The first and second named defendants were guarantors under a deed of lease dated 1 June 2017. The deed of lease is in the ADLS form (6<sup>th</sup> ed. 2012) (the Lease). The lessee of the Lease was a company known as Diamond Hostel Limited (“Diamond”).

[3] Between 5 October 2018 and 30 November 2019 Diamond failed to pay rent and outgoings under the Lease. An arbitration was held and pursuant to an award

dated 9 July 2019, Diamond was found to be liable for all of rent and outgoings then outstanding.

[4] On 4 October 2019 notice terminating the lease was served on Diamond and the defendants for continued non-payment of the rent and outgoings. On 30 November 2019 the plaintiff terminated the lease and re-entered the building.

[5] On 18 February 2021 Diamond was placed into liquidation by order of the High Court at Blenheim.

[6] These proceedings were issued by the plaintiff in March 2021. Limited steps have been taken by the defendants throughout the proceedings. An application for an order striking out the proceedings was filed, together with a supporting affidavit. A notice of opposition to that application was filed by the plaintiffs. The strike out application did not proceed to a hearing.

[7] The plaintiff also filed a without notice application for a freezing order. That order was granted on 29 July 2021 by His Honour Judge P Recordon.

### **Settlement Reached**

[8] The parties then entered into settlement discussions and reached a settlement on 30 November 2021. The freezing order was discharged on 9 December 2021.

[9] Pursuant to the settlement the defendants agreed to pay the plaintiff \$150,000 in full and final settlement. The issue of costs however was not determined. The settlement deed records:

The parties agree that this deed precludes and does not settle Ms Kim's claim for costs pursuant to clause 6.1 of the lease and Part 14 of the District Court Rules 2014.

Notwithstanding Clause 5, Ms Kim acknowledges that Mr Kim's liability for costs are subject to ss 45 and 46 of the Legal Services Act 2011 as Mr Kim is the recipient of legal aid and that Mr Kim is not pursuing local costs pursuant to s 45(1) of the Legal Services Act 2011 and no exceptional circumstances apply under s 45(2). Mr Kim agrees not to oppose Ms Kim's costs application under s45(5) and shall not be responsible for the Court or the Commissioner's rejection of it.

## **The Plaintiff's Application for Costs**

[10] The plaintiff seeks an order against the first named defendant for costs pursuant to s 45(5) of the Legal Services Act 2011 (the Act). The plaintiff also seeks costs against Ms Lee's estate which is not protected by s 45(2).

[11] The plaintiff seeks indemnity costs in the sum of \$34,224.01, together with disbursements in the sum of \$695.50. If indemnity costs are not granted by the Court the plaintiff seeks costs on a 2B basis, together with the disbursements. The 2B costs amount to the sum of \$6,112 based on the steps the plaintiff has undertaken in respect of this proceeding.

## **Indemnity Costs**

[12] The grounds relied upon by the plaintiff to seek indemnity costs is based on the wording of the Lease. Clause 6.1 of the Lease provides:

Each party will pay their own costs of the negotiation and preparation of this lease and any deed recording a rent review or renewal. The tenant shall pay the landlord's reasonable costs incurred in considering any request by the tenant for the landlord's consent to any matter contemplated by this lease, and the landlord's legal costs (as between your own client) of and incidental to the enforcement of the landlord's rights, remedies and powers under this lease.

[13] As noted, the defendants have not opposed the application for costs.

## **Analysis and Discussion**

[14] The starting point in any determination of costs is governed by Rule 14.2 of the District Court Rules (DCR). That rule states:

### **14.2 Principles applying to determination of costs**

- (1) The following general principles apply to the determination of costs:
  - (a) the party who fails with respect to a proceeding or an interlocutory application should pay costs to the party who succeeds:
  - (b) an award of costs should reflect the complexity and significance of the proceeding:

- (c) costs should be assessed by applying the appropriate daily recovery rate to the time considered reasonable for each step reasonably required in relation to the proceeding or interlocutory application:
  - (d) an appropriate daily recovery rate should normally be two-thirds of the daily rate considered reasonable in relation to the proceeding or interlocutory application:
  - (e) what is an appropriate daily recovery rate and what is a reasonable time should not depend on the skill or experience of the solicitor or counsel involved or on the time actually spent by the solicitor or counsel involved or on the costs actually incurred by the party claiming costs:
  - (f) an award of costs should not exceed the costs incurred by the party claiming costs:
  - (g) so far as possible the determination of costs should be predictable and expeditious.
- (2) Despite subclause (1)(f), costs for legal professional services provided in relation to a proceeding may be awarded to a party under this Part even though the services are provided under a conditional fee agreement.
- (3) In subclause (2), **conditional fee agreement** means an agreement under which a party to a proceeding and a person who provides legal professional services agree that, in relation to the liability of the party to the proceeding for some or all of the person's fees and expenses, these are payable depending on the outcome of the proceeding.

[15] Although this matter was not ultimately determined by the Court, Mr Ho submits the terms of the settlement deed reflect a settlement which where the plaintiff should be seen as the successful party. It has recovered all outstanding rental and outgoings totalling \$84,836.40 with the balance (being the balance paid up to \$150,000) reflecting the plaintiff's claim for ongoing loss of rental. Accordingly, the plaintiff submits, for the purposes of Rule 14.2(1)(a), the defendants should pay costs. Those costs should be on an indemnity basis.

[16] A claim for an indemnity costs award is not unusual in civil litigation. The principles are settled. The parties can enter into a binding agreement to pay full solicitor/client costs, but those costs are still be "reasonably incurred".<sup>1</sup>

---

<sup>1</sup> See *ANZ Banking Group (NZ) Limited v Gibson* [1986] 1 NZLR 556 (CA), followed by *Diamond Hostel Limited v Khan* [2020] NZHC 1639 at 15.

[17] Whether indemnity costs are reasonably incurred requires an assessment of the tasks which were undertaken and to ensure those tasks fall within the scope of the terms of the indemnity. In this instance the scope is defined as costs which are "... of and incidental to the enforcement of the landlord's rights, remedies and powers under this lease".

[18] Mr Ho relies on the authority of *N J G Holdings Limited v Oliphant*<sup>2</sup> where the issue of what constitutes "incidental" in respect of the enforcement of the landlord's rights was considered. "Incidental to the enforcement" contemplates attendances which go beyond the scale steps provided by the DCR and would cover all (reasonable) steps taken to recover any outstanding sums.

[19] Mr Ho also notes indemnity costs have been granted by the High Court in matters already involving Diamond and the plaintiff. Following the arbitration an appeal was filed in the High Court seeking to review the decision of the arbitrator.<sup>3</sup> In two decisions, relying on Clause 6.1 of the Lease, the High Court had little difficulty in granting indemnity costs. Not surprisingly, Mr Ho says that given the same clause is relied on in this application, indemnity costs should also be awarded in this Court.

[20] There is however the issue of the first named defendant, Jaeyean Kim, being granted legal aid in respect of these proceedings. As such, Mr Kim does not have any personal liability in respect of any costs award<sup>4</sup> although an order may be made specifying what an order for costs would have been but for s 45 affecting the aided persons liability.

[21] If such an order was to be made s 46 of the Act states that the plaintiff may be entitled to apply to the Commissioner for some or all of the difference between the costs actually awarded to the plaintiff and those costs which would have been entitled if s 45 had not affected the aided persons liability.<sup>5</sup>

---

<sup>2</sup> *N J G Holdings Limited v Oliphant* HC Auckland CIV-2006-404-4749, 18 March at 14; and *Rosa Red Limited v Board of Administration of the Methodist Church of New Zealand* [2009] NZCA 237 at [40].

<sup>3</sup> See *Diamond Hostel Limited v Kim* [2020] NZHC 1639; and *Kim v Diamond Hostel Limited* [2020] NZHC 15551.

<sup>4</sup> Section 45(2) of the Act.

<sup>5</sup> Section 46(2).

[22] As stated, the plaintiff seeks an order for costs pursuant to s 45(5) of the Act and also seeks full indemnity costs against Ms Lee's estate.

[23] I turn now to the level of costs sought. The amount of costs is \$34,224.01 plus disbursements. Copies of the invoices totalling these amounts have been annexed to the memorandum filed by Mr Ho dated 8 March 2022. Each of those invoices provide a full narration of the attendances undertaken by Crimson Legal Limited, the lawyers acting on behalf of the plaintiff. All attendances have been undertaken by Mr Ho, who has an hourly rate of \$350 (excl GST).

[24] I do not consider the hourly rate claimed to be unreasonable. I also do not consider the attendances which have been described to be outside of what could be defined as "of and incidental" to the enforcement of the plaintiff's rights. The attendances cover the period from February 2021 to March 2022.

[25] The attendances can be broken down into the following categories:

- (a) Steps required in respect of drafting the Statement of Claim;
- (b) All steps required in terms of the filing and obtaining the freezing order;
- (c) All steps undertaken in respect of enforcement action other than the charging order;
- (d) Receiving the application to strike out the claim and filing the notice of opposition and affidavit;
- (e) All attendances in respect of case management conferences, and filing memorandum;
- (f) All attendances in respect of the negotiation and reaching a settlement including attendances on completion and execution of the settlement deed.

[26] I am conscious the scale costs in respect of actual steps taken for the Court proceedings only amount to the sum of \$6,012. However, these do not reflect the attendances which have been undertaken and described in the various bills of costs. It is clear further attendances beyond the Court proceedings were necessary in order to bring this matter to a close. Relying on Clause 6.1 of the Lease the plaintiff is rightly entitled to claim the attendances that have been “of and incidental” to the enforcement of the landlord’s rights under the Deed of Lease and therefore the plaintiff is entitled to indemnity costs.

### **Result**

[27] In the circumstances but for s 45 of the Act I would have ordered indemnity costs against the first-named defendant. I do order indemnity costs against the second-named defendant (or the estate) as the case may be. Disbursements are also included and are awarded in addition to the indemnity sum.

[28] I do note that notwithstanding my order, no costs should be payable in respect of this costs order on behalf of the first named defendant by the Commissioner if the plaintiff receives costs from the second named defendant’s estate or, before all steps are exhausted in attempting to recover the costs from the second-named defendant’s estate.

Signed at Auckland this 13<sup>th</sup> day of April 2022 at 3.15 pm

---

Judge D J Clark  
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe  
Date of authentication | Rā motuhēhēnga: 13/04/2022