Recovering Litigation Legal Fees in Solicitors' Negligence Cases

The High Court has recently confirmed the legal basis for the recovery of litigation legal fees as damages in solicitors' negligence cases. Until now, there has not been any authority other than in the District Court in *Mirams v Buddle Findlay*[1] to confirm what to many seems to follow naturally – if a client has incurred litigation legal fees owing to solicitors' negligence, then these wasted fees ought to be recoverable from the solicitors as damages. The new judgment, *Peters v Peters* [2013] NZHC 1061, considers the legal basis for the award, whereas *Mirams* simply awarded the costs as damages following naturally from the breach. Neither case provides detailed guidance as to how quantum is to be assessed.

The general rule is that if litigation legal fees are recoverable, they are only recoverable as costs (see L Merrett, *Costs as Damages* (2009) 125 LQR 468). The policy reason for this is to avoid undermining the costs regime, which regime encourages parties to litigation not to incur excessive costs, as they will not be able to recover them.[2] Any exceptions to the rule must avoid undermining the policy.

Peters confirms two exceptions to the rule apply in New Zealand, with litigation fees being recoverable as damages where:

1. The costs were incurred in proceedings between third parties; or

2. The claim is between the same parties but the plaintiff is relying on an independent cause of action.

Peters involved a claim by Angela Peters and the trustees of the Chamberlain Trust (Angela's parents) against the Peters Family Trust for money provided by Angela for the purchase of a property in the name of the trustees of the Peters Family Trust. The Chamberlain Trust had provided $800,000 to Angela (borrowed from a bank). The money was used by the Peters Family Trust to purchase a house in Auckland for Angela and her (now former) husband Scott to live in. The house cost $950,000, with the remaining $150,000 being provided by the Peters Family Trust – of which Scott was a beneficiary; Angela was not. One law firm acted for Angela and the Peters Family Trust at the time of the transaction. The law firm did not (among other things) put in place any documentation to explain the nature of the $800,000 transfer from Angela.

After the breakdown of Angela and Scott's marriage, Angela's interests brought a claim to recover the $800,000 (the "main claim"). Angela's interests said the money was a loan; the Peters Family Trust said it was a gift (an advance of Angela's inheritance). The main claim was settled on the basis that the $800,000 was a loan. The question of costs was left to be determined by the Court.

Before settlement of the main claim, the Peters Family Trust brought a third party claim against the law firm. This claim was brought on the basis that if the nature of the $800,000 transfer had been documented, then there would never have been a dispute about whether the money had to be paid back. This claim went to trial.

The Peters Family Trust claimed for the Trust's actual legal costs incurred in defending the proceedings brought by Angela's interests, as well as for any costs award made against the Peters Family Trust in the main claim (costs were eventually awarded in favour of Angela's interests on a 2B basis). The trustees (Scott and his parents) also claimed damages for the distress suffered by them. The Trust did not claim for any other damages (for example, Mr and Mrs Peters senior did not make any damages claim for financial loss from the sale of their house, which had to be sold to satisfy the settlement with Angela's interests).

Heath J found this case to fall within both exceptions proposed by Merrett:

1. The costs claimed were for the costs of the proceedings between Angela's interests and the Peters Family Trust; and

[1] unreported, DC Wellington, NP 1695/93, 1 December 1995

[2] Merrett at 474 to 475

2. The main proceedings concerned proof of the nature of the advance, while the Peters Family Trust's claims against the law firm were for breaches of contract or tort. The solicitors' duties arose independently of any obligations owed by the Peters Family Trust to Angela's interests.

It is clear that awarding costs as damages in the first category does not undermine the policy behind the costs regime. As the Peters Family Trust lost the main claim, it could not have recovered its costs in that case.[3]

Heath J's formulation of the second category is much broader than that suggested by Merrett. Merrett suggests that the second category only applies when the earlier legal fees were not subject to the civil costs regime, i.e. the earlier case was decided in a foreign jurisdiction where costs were not available or the earlier case was a criminal case (the second case might be a claim for malicious prosecution).[4] *Peters* does not fall within either of these classes.

The *Peters* formulation of the second category might undermine the policies behind the costs regime. It risks the plaintiff in the second case using an excessive legal team in the main claim, and then looking to recover those costs from the negligent solicitor when s/he would not have been able to recover all of those costs from the plaintiff in the first case (even if s/he was successful).[5]

It is, however, suggested that the second category does not need to be as narrowly confined as suggested by Merrett. It would be very risky for the defendant in the first case to spend excessively on legal fees in reliance on recovering damages from the negligent solicitor in the second proceedings. Accordingly the risk of the policy being undermined seems low. Unfortunately Heath J does not explain his reasons for broadening category 2 beyond that suggested by the English case law.

When considering quantum, Heath J simply noted that he would follow the principles laid down by Cooke P in *Fleming v Securities Commission*[6], stating that *"within the broadest of conceptual frameworks, whether damage and fault are sufficiently connected for liability is a question of fact and degree."*

The Court awarded $55,000 as damages, as against a claim of $65,860. It noted simply that of the claimed sum, $1,109.75 would have been incurred in Family Court relationship property proceedings in any event, and the law firm accepted that $45,868 related solely to the High Court proceedings. It also considered that the 2B costs awarded to Angela's interests and payable by the Peters Family Trust were also "sufficiently linked" as to be recoverable from the law firm as damages.

The judgment does not undertake any analysis as to the difference between what the award to the Peters Family Trust of its costs in the main claim on an indemnity basis might have been, as compared to having the same legal fees awarded in the second case as damages.

Once the cause of action is established, an award of damages follows (subject to the standard damages assessment). Costs, however, are subject to the civil procedure rules. It is possible that even an award of indemnity costs may not be the same as an award of damages.

On a costs award, all matters are at the discretion of the Court.[7] Accordingly even if there was a possibility of an indemnity costs award, the Court will assess the reasonableness of each element of the costs claim. It calculates indemnity costs from a *"reasonable allocation of actual costs"*, based on the appropriate time taken, the significance and complexity of the category of work, and a median hourly rate reasonably applicable.[8] Indemnity costs may therefore be less than actual costs.

Damages are assessed based on standard considerations of causation, remoteness and mitigation.[9] For example, if the steps taken to defend the claim by Angela's interests were not a reasonable attempt to mitigate the Peters' Family Trust's losses, then the damages claim might have failed on mitigation.[10] Merrett considers that across the three principles, reasonableness of the costs incurred seems to be the key factor in determining quantum.[11]

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[3] Merrett at 477
[4] Merrett at 480
[5] Merrett at 470
[6] *Fleming v Securities Commission* [1995] 2 NZLR 514 (CA) at 523
[7] Rule 14.1, High Court Rules; Rule 53, Court of Appeal (Civil) Rules; Rule 44, Supreme Court Rules
[8] *Bradbury v Westpac Banking Corporation* (2008) 18 PRNZ 859 (HC)
[9] Merrett at 482
[10] Merrett at 482
[11] Merrett at 483

Both *Mirams* and *Peters* seem to follow this, without explicitly addressing the point. It might be that the size of the legal team used or the taking of an interlocutory step might be assessed as unreasonable, and the damages award might be reduced. This makes it likely that the damages award recoverable is similar to that of an indemnity costs award.

Lastly, the Court ordered that Mr and Mrs Peters senior each be paid general damages of $25,000 for distress suffered. They sold their home to meet the settlement (because, as there was no loan documentation, there was no limitation of liability to the assets of the trust), which adversely affected their retirement. Their circumstances were similar to those of the well-known Mrs Mouat[12], who was awarded $25,000 for "severe" distress and inconvenience in 1991. In *Mirams*, $10,000 was awarded. Mr Mirams was not in danger of losing his own home.

This case no doubt confirms the basis on which many solicitors' negligence cases have been settled in the past, and gives claimants clearer guidance on when they will be able to recover litigation legal fees expended. It also indicates that the correct level of recovery is similar to the indemnity level. General damages also seem likely to follow in most cases.

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[12] *Mouat v Clark Boyce (No 2)* [1992] 2 NZLR 559 (CA)