IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA37/2021
[2024] NZCA 36

BETWEEN	ANDREW SHAUNT MALKHASIAN AND JEAN ANN MALKHASIAN Appellants
AND	NZ BRICK DISTRIBUTORS LIMITED PARTNERSHIP Respondent

Hearing: 8 September 2022

Court: Cooper P, Gilbert and Courtney JJ

Counsel: V A Whitfield and M J Meier for Appellants
J J K Spring for Respondent

Judgment: 1 March 2024 at 11.00 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The High Court judgment is set aside. The respondent must pay costs in the sum of $7,500 to the appellants in respect of their costs for the order for non-party discovery in the District Court.

C The respondent must pay the appellants' costs in this Court calculated for a standard appeal on a band A basis, together with usual disbursements.

D The respondent must pay the appellants' costs in the High Court calculated on a 2B basis, together with usual disbursements. Any disagreement as to amount may be determined by that Court.

REASONS OF THE COURT

(Given by Cooper P)

Introduction

[1] A non-party is entitled to its actual, reasonable costs incurred in complying with a non-party discovery order unless there exists good reason for it not to be awarded those costs.[1] The present appeal addresses the principles to be applied where a non-party, NZ Brick Distributors Limited Partnership (NZBD), has acted so as to significantly increase the costs of the discovery process.

Background

[2] The appellants, Mr and Mrs Malkhasian, brought a proceeding in the District Court arising out of a construction contract. The Malkhasians claimed there were defects in the construction works and that the builder provided incorrect invoices and overcharged them. NZBD had supplied roughly $16,000 worth of bricks for the construction project. On 19 December 2018, the Malkhasians obtained an order for non-party discovery against NZBD.[2]

[3] The non-party discovery order was granted by consent.[3] The order adopted the wording of the Malkhasians' application and required NZBD to discover:

> 1.4.1.1 Any quotations or estimates provided by [NZBD] in relation to the supply of materials at [a residential address] ([NZBD's] Works);
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> 1.4.1.2 Any contract entered into between the first defendant and [NZBD] in relation to the [NZBD's] Works;
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> 1.4.1.3 Any and all communications and correspondence, including file notes, between the first defendant and/or second defendant and [NZBD] in relation to [NZBD's] Works;
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> 1.4.1.4 Copies of all invoices and/or credit notes issued by [NZBD] in relation to [NZBD's] Works.

[4] The Malkhasians offered to pay $890 towards NZBD's costs of filing a memorandum in relation to the application and also agreed to pay NZBD's reasonable

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1 *Clear Communications Ltd v Telecom Corporation of NZ Ltd* (1994) 8 PRNZ 200 (HC) at 201-202.

2 *Malkhasian v Home Builders BOP Ltd* DC Tauranga CIV-2017-070-1030, 19 December 2018 [Minute of Judge Cameron].

3 *Malkhasian v Home Builders BOP Ltd* DC Tauranga CIV-2017-070-1030, 23 October 2019 (Ruling 2) [District Court decision] at [1].

costs in complying with the order, which NZDB estimated to be $1,192. The issue of costs was not settled prior to NZBD commencing the discovery process.

[5] NZBD provided seven documents on 19 January 2019. The Malkhasians considered, on the basis of documents already in their possession, there must be further documents falling within the scope of the discovery order that had not been provided. NZBD resisted providing further documents, asserting it had fully met its discovery obligations by providing all "relevant documents" returned from key word searches and that the documents the Malkhasians sought were outside the scope of the order.[4] No fewer than four case management conferences were convened between February and September 2019 to deal with these issues.[5]

[6] On 9 May 2019, Judge Mabey QC directed NZBD to refrain from subjectively assessing the relevance of the documents it was obliged to provide and to file an affidavit confirming no documents required by the order had been withheld.[6] NZBD filed an affidavit on 14 May confirming it had provided all documents returned from the key word searches. However, on 29 July it provided a further 27 documents.

[7] On 26 September, NZBD sought an order for its actual costs incurred in the sum of $26,459.60. Judge Mabey considered that NZBD had taken an "unnecessarily obstructive and adversarial approach" to what was a "straightforward issue"[7] and that its conduct disentitled it to costs.[8] Instead, the Judge awarded the Malkhasians costs of $7,500.[9]

[8] NZBD appealed. In the High Court, Brewer J described the approach taken by NZBD as "unreasonably pedantic" but considered it fell short of what would be necessary to make it in the interests of justice for NZBD to forfeit its right to costs and to contribute to the Malkhasians' costs instead.[10] He rejected NZBD's claim for its

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4 *Malkhasian v Home Buildings BOP Ltd* DC Tauranga CIV-2017-070-1030, 9 May 2019 [Minute of Judge Mabey QC] at [5].

5 These apparently took place on 18 February 2019, 9 May 2019, 30 July 2019 and 12 September 2019. See Minute of Judge Mabey QC, above n 4.

6 Minute of Judge Mabey QC, above n 4, at [9].

7 District Court decision, above n 3, at [2].

8 At [15]–[16].

9 At [21].

10 *NZ Brick Distributors Ltd Partnership v Malkhasian* [2020] NZHC 2147 [High Court judgment] at [27]–[28].

actual costs and instead assessed NZBD's reasonable costs at $10,000.[11] He quashed the District Court's decision and made an order for that amount in favour of NZBD.[12] Brewer J also awarded NZBD costs on that appeal on a 2B basis.[13]

[9] The Malkhasians now appeal. This Court granted them leave to do so on 8 June 2021.[14] The Malkhasians ask the Court to set aside the orders made by the High Court and to award them costs in the District Court, costs in the High Court which they calculate in the sum of $13,862, and costs in this Court amounting to $17,925, together with disbursements in each court.

Appellants' submissions

[10] The Malkhasians rely on the two-stage approach for determining costs on a non-party discovery application set out in *Clear Communications Ltd v Telecom Corporation of NZ Ltd*.[15] The first stage concerns costs in relation to the application itself, and the second stage concerns costs of compliance with the order. In terms of the second stage, the general rule is that a non-party is entitled to recover its actual, reasonable costs unless good reason exists for it not to be awarded that amount.[16] Ms Whitfield accepts that a non-party is entitled to its full reasonable costs of compliance but submits that a set-off may be applied where there is a good reason to do so. In this case, NZBD's conduct properly resulted in an adverse costs award by the District Court Judge who had been dealing with the case and was familiar with the relevant conduct of the parties.

[11] The Malkhasians submit the High Court erred in concluding that NZBD's "unreasonably pedantic" approach was not enough to disqualify it from receiving costs. They claim NZBD repeatedly failed to follow court orders and produced inaccurate affidavits to the Court, arguing this conduct demonstrated deliberate obstruction and/or bad faith. The Malkhasians say the High Court should not have

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11 At [30].
12 At [31].
13 At [32].
14 *Malkhasian v NZ Brick Distributors Ltd Partnership* [2021] NZCA 240.
15 *Clear Communications v Telecom Corporation*, above n 1.
16 At 202.

interfered with the District Court's finding that NZBD's conduct met the threshold to disqualify it from receiving costs.

[12] The Malkhasians also submit the High Court erred by conflating the two steps of the *Clear Communications* approach by awarding NZBD full costs and disbursements to the date when the discovery ought to have been completed. The Court should have instead separately assessed the reasonableness of NZBD's costs in relation to the application and compliance stages and considered the evidence available in relation to the actual costs at each step.

[13] As to the application, the Malkhasians note they offered to cover NZBD's costs in the amount of $890, which was calculated as twice the scale in category 2B for filing a memorandum ($445). However, despite consenting to the application and filing a memorandum to that effect, NZBD informed the Malkhasians its actual legal costs were $4,000 plus GST.

[14] As to compliance costs, the Malkhasians maintain NZBD's reasonable costs should be $1,192 — which they had agreed to pay as an amount that appeared reasonable given the scope of the discovery.[17] On this basis, the Malkhasians submit NZBD's total reasonable costs were $2,082.

[15] If NZBD was entitled to its actual costs of the application then its total reasonable costs would be, at most, a sum of $5,792, comprising actual costs relating to the application, $4,600 ($4,000 plus GST, rounded up), and the reasonable costs of compliance, $1,192.

[16] The Malkhasians further submit the High Court erred in not exercising its discretion to award them costs for steps they took in the proceeding after the discovery order was made. They claim NZBD's conduct caused them to incur considerable costs over a six-month period. The Malkhasians say this eclipsed any entitlement to costs

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[17] It seems that the figure of $1,192 referred to by the Malkhasians is the sum of the amounts of $800 for NZBD's solicitors reviewing documents and drafting an affidavit of documents, and $392 for internal costs of NZBD. These amounts were given as estimated costs in a letter of NZBD's solicitors dated 28 November 2018 quoted below at [30].

that NZBD may have had, and the High Court erred in adopting too high a threshold for when it is appropriate to reduce a non-party's costs.

[17] Finally, the Malkhasians challenge the costs award made on the appeal to the High Court. They seek an order that they are entitled to their costs in that Court on a 2B basis, in the amount of $13,862 and disbursements of $211.60 as set out in a schedule to their submissions.

Respondent's submissions

[18] NZBD submits the approach taken by the High Court regarding the assessment of non-party costs was entirely orthodox and correct. Costs have previously been awarded against a non-party where it has unsuccessfully opposed a non-party discovery application,[18] or where the non-party was so closely involved in the proceedings as to be effectively acting as a party.[19] Neither of these scenarios apply to NZBD. Rather, NZBD did comply with the discovery order by providing a further 27 documents to the Malkhasians, the majority of which related to the cleaning of the bricks at the Malkhasians' property. The issue of the cleaning of bricks was never a pleaded cause of action, and it is not correct for the Malkhasians to claim that such documents were relevant at the outset.

[19] NZBD further submits that the approach it took to the discovery order was reasonable; that while it did not consider further documents to be relevant, it agreed to provide them if the Malkhasians paid its reasonable costs. NZBD says several attempts were made to reach agreement with the Malkhasians on the issue of costs, to no avail. The most the Malkhasians were ever willing to offer was $890, as against successive cost estimates of $4,666, $7,000 and $10,000.

[20] Finally, NZBD submits the Malkhasians' conduct is also a relevant consideration. While NZBD incurred costs higher than what would typically be expected for a non-party complying with a discovery order, NZBD says this was due to the Malkhasians' conduct. The relevant conduct included failing to communicate

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18 Citing *Nelson v Dittmer* [1986] 2 NZLR 48 (HC) and *British Markitex Ltd v Johnston* (1987) 2 PRNZ 535 (HC).

19 Citing *Jordan v O'Sullivan* HC Wellington CIV-2004-485-2611, 12 July 2006 at [44].

with NZBD prior to filing the application for non-party discovery order, in circumstances where NZBD had already advised that its invoices were true and correct, and refusing to meet NZBD's actual reasonable costs at an early stage.

The law

[21] Rule 8.21(2) of the District Court Rules 2014 provides that a Judge may, on application, order a person who is not a party to a proceeding to give discovery of documents that they would have had to discover if they were a party to the proceeding. If the documents are in the control of the person, they must be made available for inspection.[20]

[22] Rule 8.22 of the District Court Rules provides:[21]

> **8.22 Costs of discovery**
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> (1) If it is manifestly unjust for a party to have to meet the costs of complying with an order made under this subpart, a Judge may order that another party meet those costs, either in whole or in part, in advance or after the party has complied.
>
> (2) Despite subclause (1), the court may subsequently discharge or vary an order made under that subclause if satisfied that a different allocation of those costs would be just.
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> (3) If an order is made under rule 8.20(2) or 8.21(2), the Judge may, if the Judge thinks it just, order the applicant to pay to the person from whom discovery is sought the whole or part of that person's expenses *(including solicitor and client costs)* incurred in relation to the application and in complying with any order made on the application.

[23] One discussion on r 8.22(3) gives this summary:[22]

> Traditionally a two staged approach is taken.
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> **(1) Stage 1 — costs of Application**
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> The first stage is the question of costs on the application for non-party discovery itself. At this first stage, relevant considerations include the reasonableness of any opposition by the non-party, particularly having regard

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[20] District Court Rules 2014, r 8.21(2)(c).

[21] Emphasis added.

[22] Roderick Joyce (ed) *Civil Procedure: District Courts & Tribunals* (online looseleaf ed, Thomson Reuters) at [DCR8.22.01], citing *Clear Communications v Telecom Corporation*, above n 1 and *Lindale Financial Services Ltd v Colonial Mutual Life Assurance Society Ltd* HC Wellington CP126/97, 4 May 1999.

> to the outcome, and the motivation for the opposition: *Clear Communications Ltd v Telecom Corporation of NZ Ltd…*
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> **(2) Stage 2 — costs of compliance**
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> The second stage is the question of costs of compliance with the order. These are quite distinct from the costs of any application, where a number of factors are relevant to the court's discretion. At this second stage, the non-party will normally be entitled to its full compliance costs. For example, in *Lindale Financial Services Ltd v Colonial Mutual Life Assurance Soc Ltd…*, Colonial Mutual Life sought discovery against non-parties intimately connected with the insurance scheme of Lindale. It argued that, given this close connection, the non-parties should bear the costs of compliance. However, Doogue J rejected this argument and held that, unless there is good reason to the contrary, an applicant should bear the full costs of non-party compliance.

[24] This two-stage approach contemplates an analysis of the first stage costs which takes into account the stance adopted by the parties in respect of the application for non-party discovery, the reasonableness of the application and opposition to it, and what the outcome was. As McGechan J observed in *Clear Communications*, a different approach is appropriate at the second stage:[23]

> The second category involves rather different principles. It is the question of costs of compliance. Once the order was made, whether or not justifiably resisted, it was the third parties' duty to comply … Costs involved in that operation should, in the absence of good reason to the contrary, be recoverable from the party requiring discovery. Third parties brought in as by a sidewind should not be left meeting their own expenses. Those costs are of course to be reasonable in the circumstances.

[25] We endorse that approach. But it does not provide a complete answer in cases where the non-party's actions significantly add to the costs of the exercise at the second stage. In some cases it is possible that the increased costs so caused will not only exceed what would be regarded as the reasonable costs of the non-party itself (and therefore should not be recompensed) but also add unnecessarily to the costs of the applicant so that, looked at in the round, the appropriate outcome is not an order in favour of the non-party but an order in favour of the applicant.

[26] Such a case is not obviously within the language used in r 8.22(3) which is about ordering the applicant for discovery to meet the non-party's costs where it is just

[23] *Clear Communications v Telecom Corporation*, above n 1, at 202.

to do so. However, the fact r 8.22 does not provide for a costs order against a non-party does not mean such an order cannot be made.

[27] All matters concerning costs are "at the discretion of the court".[24] Orders for the payment of costs have been made against non-parties in a number of cases, including *Nelson v Dittmer*, *British Markitex v Johnston*, and *Jordan v O'Sullivan*.[25] In the first two of those cases, the order for discovery was made against intended defendants and in *Jordan v O'Sullivan* the non-party was a creditor of a company in liquidation who had a close involvement in the proceeding. In none of those cases was the order made against a party to the proceeding at the time the order was made. The present case arises in different circumstances, but that does not mean that the power does not exist.

[28] We add that the fact that an order may be made under r 8.21 requiring the non-party to file and serve an affidavit must contemplate an ancillary power in respect of costs. As Heron J observed in *Nelson v Dittmer*:[26]

> It would be strange if the Court's power to order filing of an affidavit was not accompanied by power to award costs, where, for example, the person to whom the order was directed had been dilatory or contumacious.

[29] We accept NZDB's submission that the policy reason for awarding non-party costs is to protect innocent non-parties from being put to costs and inconvenience in a proceeding in which they are not substantively involved. However, that does not mean non-parties should be exempt from the consequences of conduct on their part that unnecessarily adds to the costs of securing compliance with the order for discovery. The fact that, eventually, NZBD did comply does not mean that there should be no consequence for conduct that has increased the costs of the process.

Discussion

[30] Despite agreeing on the terms of the order for discovery, the parties remained unable to agree on the issue of costs. The total costs likely to be incurred by NZBD

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[24] District Court Rules, r 14.1. See also High Court Rules 2016, r 14.1(1).

[25] *Nelson v Dittmer*, above n 18; *British Markitex v Johnston*, above n 18; and *Jordan v O'Sullivan,* above n 19.

[26] *Nelson v Dittmer*, above n 18, at 52.

were estimated by its solicitors on 28 November 2018 to be approximately $4,800 plus GST. Solicitors acting for the Malkhasians had made an offer on 26 November to pay a contribution of $500 plus GST to the cost of the application, but this was rejected by NZBD's solicitors in an email dated 28 November which included the following:

> We encourage your clients to agree to pay our client's reasonably incurred actual costs. This will avoid the need to litigate the issue further, thereby incurring more costs which your client will be obliged to pay. In addition, if agreement cannot be sought and our client is forced to incur the cost of counsel attending the hearing on the 19th of December, it will look to recover its travel costs and the cost of appearing.
>
> To assist with obtaining your clients' instructions, we provide a breakdown of estimated costs totalling $4,800 (exclusive of GST and our client's costs of $392):
>
> - $1,000 for reviewing the non-party discovery application and supporting affidavit, and advising client on nature and scope of application;
> - $1,400 for drafting and finalising letter of advice regarding discovery, teleconference calls and correspondence with our client regarding searching for and collating the documents;
> - $1,600 for drafting and finalising letter to the applicants and subsequent correspondence; and
> - $800 for reviewing documents and drafting the affidavit of documents.

[31] It seems from this that by the end of November 2018 NZBD's total costs were estimated at around $5,000 plus GST (including legal and in-house costs). Given the detail in the estimate it is reasonable to assume there had been a proper attempt to scope what was involved.

[32] The Malkhasians considered that the sum was too high. Their solicitors offered to meet NZBD's reasonable costs associated with the collation of the documents and the preparation of the affidavit (stage two in terms of the *Clear Communications* approach). But, since no formal steps had been necessary in relation to the application, the sum of $500 plus GST was offered simply as a contribution to the costs of responding to the application.

[33] Counsel for the Malkhasians suggested that NZBD provide its invoice and time records verifying the costs incurred, that the parties seek to reach agreement on the

costs issue and if that could not occur that costs be determined by the Court. This would avoid the need for parties to appear on the first call of the application for non-party discovery. This approach was not acceptable to NZBD. It filed a memorandum on 14 December seeking its actual costs, by then increased to $8,138.40, to reflect the fact that it had filed the memorandum with an accompanying affidavit. On 18 December, the Malkhasians filed a memorandum offering to pay NZBD $890 (a 100 per cent uplift on scale costs) to reflect the fact NZBD had now filed a memorandum in respect of the application.[27]

[34] When the matter came before the District Court on 19 December, as noted above, the order for discovery was made by consent. Judge Cameron ordered informal discovery by 19 January and said that NZBD was entitled to its "reasonable costs for compliance as to discovery."[28] He did not resolve the issue of costs in relation to the application itself.

[35] Various issues then arose during the compliance stage. NZBD initially discovered seven documents on 19 January. On 21 January, NZBD wrote to the Malkhasians informing them it had "carried out a search for discoverable documents falling within the categories you have requested" and asking the Malkhasians to pay its actual and reasonable costs. On 8 March, NZBD filed an affidavit with the Court confirming it had complied with its discovery obligations and provided all relevant documents.

[36] On 15 March, the Malkhasians queried whether NZBD had discovered all documents within the scope of the discovery order. NZBD replied on 19 March, asserting it had complied with its discovery obligations, claiming it had searched for and provided all relevant documents, and was not required to disclose irrelevant documents. NZBD considered it had responded in full to all the Malkhasians' concerns, citing previous advice, and stated that further requests by them were unnecessary. Correspondence between the parties continued about the adequacy of discovery provided.

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27 The Malkhasians also reaffirmed their commitment to paying NZBD's reasonable costs of compliance with the order, fixed at $1,192 in accordance with the estimate in NZBD's 28 November email.

28 Minute of Judge Cameron, above n 2.

[37] After NZBD filed its third affidavit on 14 May affirming it had not withheld any documents, the Malkhasians raised concerns that the scope of the affidavit did not provide the confirmation they required. Further emails were exchanged. When new solicitors were engaged for the Malkhasians, NZBD agreed to undertake further keyword searches, including looking for documents concerning the quality of the bricks supplied. NZBD claimed this was an "entirely new" request that it had not previously considered relevant, especially given that it had never been given a copy of the pleadings. The Malkhasians responded on 17 July stating a copy of the pleadings was not given to NZBD because it was not its place to assess relevance. On 29 July, NZBD discovered a further 27 documents.

[38] It is clear from the correspondence between the parties' solicitors that there was disagreement about whether it was right for NZBD to assess the relevance of documents it had been ordered to discover. In the High Court, Brewer J acknowledged that there are some cases where it will be appropriate for a non-party to apply a "secondary relevance filter", but the present case was not in that category:[29]

> [23] In this case, the appellant agreed to make discovery of categories of documents. All it had done was supply bricks for a building project. It had no interest in the law suit. It had, as might be expected, relatively few documents in the categories of discovery. There was no need to engage a "secondary relevance filter".

[39] That finding is important for present purposes. It is clear that NZBD's conduct in this respect is what lay behind what became an extremely costly exercise. Brewer J's conclusion, although expressed less strongly, is consistent with the view of Judge Mabey who found that NZBD had been obstructive, and after referring to the number of case management conferences it had been necessary to convene, said:[30]

> [13] All this could have been avoided if [NZBD] had complied with the scope of the consent order for discovery and accepted the practical and reasonable proposals put forward by the plaintiffs as to how it may go about seeking out documents from its files.

[40] We agree that in the present case, given the limited part NZBD played in the broader dispute, its resistance was unwarranted. It did not need to assess each

[29] High Court judgment, above n 10.
[30] District Court decision, above n 3.

document within its control for relevance to anything other than the agreed discovery categories. Indeed, it could not have — given it did not have a copy of the pleadings at the relevant times. As it transpired, a total of only 34 documents were discovered.

[41] Judge Mabey took the view that NZBD's claim for costs was "entirely disproportionate" to what was required to comply with the discovery order. NZBD's approach to what should have been a simple process had "escalated costs beyond what could ever be regarded as reasonable."[31] He considered the cost was unnecessary and attributable to NZBD's approach.[32]

[42] Mr Spring, for NZBD, claimed in this Court that the High Court judgment was properly characterised as having found that NZBD's approach to relevance had been "overscrupulous." We disagree. To the contrary, the High Court found that NZBD's approach was wrong; all it had to do was ascertain whether documents fell within the agreed categories of the documents to be discovered. It was NZBD's incorrect approach that led to the protracted process that required successive case management conferences and orders by the District Court.

[43] Mr Spring also repeated the submission that NZBD was entitled to raise issues of relevance and have its costs paid accordingly. That was not so in the circumstances of this case, as Brewer J held. NZBD has not appealed from that finding, and we have already expressed our agreement with it.

[44] The High Court agreed that NZBD's ultimately claimed costs of $26,459.60 were unjustified.[33] But it held that to deny a non-party its reasonable costs on discovery would require some action ranging from "deliberate obstruction for a partisan purpose to egregious failure to comply with Court orders".[34] The "unreasonably pedantic approach" of NZBD was not of that nature. This meant the District Court Judge erred in principle in deciding the appellant should receive no costs and should contribute to the Malkhasians' costs.[35]

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31 At [17].
32 At [2] and [18].
33 High Court judgment, above n 10, at [26].
34 At [27].
35 At [28].

[45] We accept that deliberate obstruction would be disentitling. At some point such conduct would also probably fall into the category of an egregious failure to comply with court orders: a party who engages in deliberately obstructive behaviour cannot claim to be complying with an order for discovery. We accept that what happened in this case probably does not merit either description. In the end however, it does not matter what label is used to describe the conduct. It is sufficient to emphasise that the non-party's entitlement is to reasonable costs, and it should not escape the consequences of conduct that increases its own or the other party's costs.

[46] A claim for costs in the sum of over $26,459.60 in respect of the discovery and production of 34 documents relating to the supply of bricks (with a value of $16,000) for a building project cannot possibly be described as reasonable. It is totally disproportionate to what was involved, and to the extent that is so it is attributable to NZBD's own conduct. The consequence was that the costs of the Malkhasians in relation to the discovery process were also increased far beyond what they should have incurred.

[47] The justifiable costs would in our view have been adequately met by an award in the amount of $4,800 plus GST as estimated by NZBD's solicitors in their email of 28 November 2018.[36] Even then the figure appears high, given the apparently confined scope of the application, the fact the order was made by consent and, in the end, only 34 documents needed to be discovered.

[48] What followed that estimate consisted of disputes as to the scope of the order and disputes about costs. Judge Mabey resolved the former dispute in favour of the Malkhasians. Brewer J concurred. We are satisfied both were correct. NZBD was responsible for the way costs escalated after the order for discovery was made and it was reasonable for the Malkhasians to reject NZBD's escalating claims for costs while it adopted an unreasonable stance in respect of the scope of the order for discovery.

[49] This conduct must be reflected in the costs award. NZBD's entitlement to costs is only to its reasonable costs. That does not mean NZBD has a right to be paid an

[36] The Malkhasians agreed to meet NZBD's in-house costs of $392 on 10 December 2018, prior to the non-party discovery order having been made.

amount for costs which ignores the fact unnecessary costs were incurred by the Malkhasians as a result of NZBD's conduct.

[50] Judge Mabey in the District Court concluded that the overall consequence of NZBD's conduct was that it should pay costs.[37] The Malkhasians' costs had already reached over $14,000 when the costs issue came before the Judge, and NZBD was claiming over $26,000. Judge Mabey awarded the Malkhasians the sum of $7,500,[38] a little over half of what they were claiming, and in expressing his reasons said this was a case in which the NZBD should be denied its costs entirely.[39]

[51] We agree with Brewer J that this approach was not correct. The proper approach we think was first to assess an appropriate sum to which NZBD should have been entitled for its costs (here, the sum of $4,800 plus GST on the basis explained above) and second to assess the extent by which that amount should be reduced because of NZBD's conduct. A starting point of $4,800 plus GST would have already been far below the over $26,000 claimed and needed to be further adjusted to reflect the increased costs incurred by the Malkhasians.

[52] The conclusion that it was reasonable for the Malkhasians to be paid $7,500 reflected the Judge's view that NZBD's approach had unnecessarily contributed to the costs the Malkhasians had incurred, but NZBD was not required to meet all of the Malkhasians' costs. For reasons already explained,[40] a party seeking non-party discovery cannot expect to have any of its costs met except in cases where the non-party's conduct warrants a costs order made against it. In the present case, the substantial part of the Malkhasians' costs was not attributable to the fact they were seeking non-party discovery, but to NZBD's conduct after the discovery order was made by consent.

[53] In our view, an obligation for NZBD to pay the Malkhasians $7,500 was a just outcome, having regard to the reasons the costs were incurred. The sum can

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[37] District Court decision, above n 3, at [20].
[38] At [21].
[39] At [16].
[40] Above at [25]–[29].

appropriately be seen as net of NZBD's own legitimate claim for costs in the sum of $4,800 plus GST.

[54] It follows that Judge Mabey in the District Court arrived at an appropriate result. This means that the appeal to this Court should be allowed, with appropriate consequential orders.

Result

[55] The appeal is allowed.

[56] The High Court judgment is set aside. The respondent must pay costs in the sum of $7,500 to the appellants in respect of their costs for the order for non-party discovery in the District Court.

[57] The respondent must pay the appellants' costs in this Court calculated for a standard appeal on a band A basis, together with usual disbursements.

[58] The respondent must pay the appellants' costs in the High Court calculated on a 2B basis, together with usual disbursements. Any disagreement as to amount may be determined by that Court.

Solicitors:
Gallie Miles, Te Awamutu for Appellants
MinterEllisonRuddWatts, Auckland for Respondent