

IN THE DISTRICT COURT
HELD AT AUCKLAND

N.P. No. 1474/93

BETWEEN MONICA ANNE WILSON

PLAINTIFF

AND DAVID WILLIAM OTTO

DEFENDANT

Date of Hearing: 2 November 1995
Date of Decision: *8 November 1995*
Counsel: E.F. Mills for plaintiff
 T.E. Heim for defendant

RESERVED DECISION OF JUDGE R.L. KERR

Background to Application:

This is a long-standing matter. It was commenced in 1993. A hearing had to be vacated in late 1993 because of illness. Since then, although another hearing date was given, the dispute remains unresolved. The most significant recent matter, is a pre-trial conference held before Judge F.W.M. McElrea on 27 June 1995 when a timetable order was made.

It seems that the defendant by counterclaim had sought damages for loss of trade or profit. A deal of the lack of progress, I understand, has arisen because details in support of that claim have not been provided.

The claim for loss of trade or loss of profit has now been abandoned by the defendant.

Application:

The plaintiff seeks costs against the defendant on the abandoned loss of trade or profit claim. However, no hearing of the dispute has taken place, and there still remains a counterclaim as far as the defendant is concerned resulting from alleged misbehaviour (for want of a better way of describing it) of the plaintiff's agent in relation to the defendant's occupation of the plaintiff's premises.

Conclusion:

Rule 45 of the District Court Rules 1992 provides:-

- "(1) Except as expressly provided in any Act, all matters relating to the costs of or incidental to any proceeding or any step therein shall be in the discretion of the Court.
- (2) Without limiting the generality of sub-clause (1), the Court may -
 - (a) Refuse costs to a successful party, or order a successful party to pay costs to an unsuccessful party:
 - (b) Direct by whom the costs of a successful defendant shall be paid as between the plaintiff and an unsuccessful defendant:
 - (c) Fix a sum as costs notwithstanding that the sum is greater or less than the sum named in the Second Schedule to these Rules.
- (3) Rules 46 to 53 shall apply subject to the discretion conferred by sub-clause (1)."

The award or non-award of costs is clearly in the discretion of the Court.

I note that Rule 46 provides that costs shall follow the event.

The application, in my view, is unusual, because at this stage there is no judgment in favour of either the plaintiff or defendant. The defendant has simply indicated an abandonment of part of his counterclaim. However, whether or not the plaintiff will be able to establish her claim, and whether or not the defendant will be able to establish the balance of his counterclaim at this stage is unknown.

To pre-empt, the discretion of the Judge who presides at the hearing of the claim and counterclaim, by making the substantial award of costs, sought by Mr Mills, I do not think is appropriate.

Mr Mills has referred to deficiencies in the way in which the defendant has proceeded with his counterclaim. Mr Heim, has referred to the deficiencies of the plaintiff as far as pursuing her claim is concerned. Who or who is not deficient it seems to me at this stage does not fall for me to determine.

What I think is important, is to emphasise that the parties should endeavour to set the proceeding down for a hearing as soon as possible so that the dispute, which one could describe as being aged, might be determined as soon as a fixture is available.

I return to the application for costs. Whether or not costs are or are not awarded, is a matter for my discretion. I do not really see, that there is an "event" from which costs should follow. Whilst the plaintiff alleges derelictions on the part of the defendant, there are cross-allegations to that allegation.

In my view, the overall consideration of costs, should remain unresolved until there is a final determination of the disputes between the parties, and I therefore decline to make an award of costs.

I also reserve, the question of costs on this particular application.



(R.L. Kerr)
District Court Judge

Reserved decision delivered pursuant

R530



Stewart

Deputy Registrar