IN THE HIGH COURT OF NEW ZEALAND NZLR

WELLINGTON REGISTRY 24/7 A. 390/77

No Special Consideration

BETWEEN SOUTH WEST HELICOPTERS LIMITED a duly incorporated company having its registered office at Taupo and carrying on business there and elsewhere as Venison Dealers

Plaintiff

A N D MOBIL OIL NEW ZEALAND LIMITED a duly incorporated company having its registered office at Aurora House, 48-64 The Terrace, Wellington, and carrying on business there and elsewhere as Oil Merchants

Defendant

Hearing: 21 July 1980

Judgment: 22 July 1980

Counsel: J.O. Upton for Plaintiff
R.D. Burnard for Defendant

JUDGMENT OF JEFFRIES J

This case is concerned with the proper allowance for costs after the plaintiff had filed a discontinuance in a contract action. On the 23rd day of September 1975 a helicopter owned by the plaintiff crashed and was totally destroyed. The defendant supplied to the plaintiff company an anti icing additive for aviation fuel. In August 1977 the plaintiff issued a writ and statement of claim alleging breaches of contract in terms of the Sale of Goods Act 1908 against the defendant, which is a large multi national company distributing oil fuel.

The defendant at all times steadfastly maintained a denial of the allegations and indicated firmly there was no possibility of settlement, and that the case would be disputed in court. The information now available by way of affidavit indicates that the defendant spared no expense or effort in preparation of the defence of this case, which it regarded as of particular and general importance to its

commercial activities. I need not detail the extent of those investigations other than to say they were carried out worldwide and the affidavit of the defendant's general counsel (a lawyer employed in the company) indicates that actual expenses exceeded $29,000. I am informed the case was set down for hearing commencing on 21 July 1980, and the hearing time was expected to be about two weeks. Needless to say, there had been extensive interlocutory procedures prior to the fixing of a hearing date. The evidence of the defendant is that on 9 July 1980 the first indication was given by the plaintiff of the possibility of the case not proceeding, and the notice of discontinuance was filed on 15 July. Those facts justify a finding of full preparation for hearing.

Rule 240 provides that a plaintiff discontinuing shall pay to the defendant the costs of the action and of all incidental proceedings up to and inclusive of such discontinuance. I set out Rule 240A(a):-

> " In any case where a plaintiff discontinues his action the Court or a Judge may, at its or his discretion, allow to the defendant, in addition to the costs allowed under Table C of the Third Schedule hereto, such further costs of preparing his statement of defence and preparing for trial as the Court or Judge thinks proper, provided that such further costs shall not exceed those allowed in the said table for the trial or hearing of the action. "

The defendant has filed a motion for an order that it be allowed additional costs pursuant to the above Rule. Table C, which is part of the Third Schedule to the Code in paragraph 37 states that the total cost of an action exclusive of disbursements shall not exceed $2500 unless the court certifies for the whole costs of the action. The defendant placed a calculation of scale costs in the action before the court. The claim for

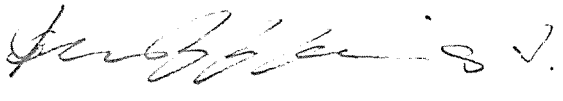
general damages was $153,891 and for special damages $92,566. The calculation reached the figure of $18,772. The ingredients of the calculation appear to me to be reasonable, although there was a questionable claim for interest which if disallowed would have reduced the total costs by nearly $4000. That calculation was placed before the court to guide it in view of the last few words of Rule 240A(a).

The plaintiff, I thought wisely, did not oppose some order under Rule 240A for additional costs. The argument of the plaintiff was first centred about a justificatcn for the original issue of proceedings so as to indicate they were not frivolous and were in fact grounded in what was thought to be an accurate basis of fact, but which events proved otherwise. I am satisfied those submissions are correct. There were two other submissions made on behalf of the plaintiff that do have a bearing on calculation of costs. The first one is that the preparations carried out by the defendant are not entirely wasted and could benefit the company should such similar litigation re-appear. Defendant's counsel assured me there is no pending or known claim. I do not think this was a strong point. The second submission of plaintiff's counsel I think has much more substance. It was, briefly, the defendant company expended a great deal more money and effort in the defence of this claim than was precisely required because it had possibly wider commercial consequences for the defendant. Put another way, the defendant elected to investigate and prepare to the depth it did not exclusively for the purposes of meeting and defending the plaintiff's allegations. In such circumstances the plaintiff should not be called upon to pay costs for that part of the preparation that did not relate directly to defence of the action. Mr Burnard, for the defendant, did not deny this point,

but, of course, the great difficulty of line drawing was emphasised when faced with such a situation.

There is little authority on the subject of additional costs, and Nelson v Wilson and Horton [1930] NZLR 281, now fifty years old, is of little assistance. This was a very large claim and the impression I obtained from the file is that the plaintiff vigorously pursued it from the issue of the writ to the filing of the notice of discontinuance. There were two separate hearings before the Chief Justice concerning interrogatories filed on behalf of the defendant. One hearing resulted in a reserved judgment. There was discovery, and production and inspection. A firm fixture for a hearing to last two weeks was obtained within three years from the date of issue of the writ, and in view of the size, complexity and international investigations required that could not be characterised as dilatory on the part of the plaintiff. After this overt display of determined pursuit the discontinuance was filed six days before the case was due to be heard, with the first indication given six days prior to that. In such circumstances I think it is clear the defendant is entitled to an order for additional costs. On the plaintiff's behalf I accept that the issue of the original proceedings was no more than adventurous, and that the defendant did expend money and time in excess of the strict requirements of the plaintiff's case but for its own independent benefit.

I therefore allow $7500 costs as an additional allowance under Rule 240A to that normally payable under Rule 240.



Solicitors for Plaintiff: Wynn Williams & Co. (Christchurch)
Solicitors for Defendant: Bell Gully & Co. (Wellington)