NZLR

IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

NOT RECOMMENDED

CP. 18/87

BETWEEN: CHARLES ROBERT HARRISON and LYNETTE HARRISON of Snodgrass Road, Tauranga, Orchardist and Teacher

Plaintiffs

AND: LESLIE CYRIL ELPHICK of Snodgrass Road, Tauranga, Orchardist

Defendant

Hearing & Judgment: 23 June 1988

Counsel: Ms F. Bolwell for Plaintiff
Ms B. Hunt for Defendant

ORAL JUDGMENT OF ANDERSON J.

On 6 November 1987 the plaintiffs issued proceedings against the defendant seeking to recover damages in consequence of the lighting of a fire by the defendant in his kiwifruit orchard which adjoined the plaintiffs' orchard in Tauranga. It was alleged that ash from the defendant's fire affected the development of the vines and their fruit leading to direct crop failure and indirectly deficiencies in the fruit resulting from the application of water by the plaintiffs to remove the ash that had settled. Damages for the direct consequential loss were sought in the sum of $31,843.55. and the further sum of $5000 nominated as special damages in the pleadings but more aptly considered as general damages was sought in respect of alleged inconvenience, worry and anxiety to the plaintiffs. The causes of action were Rylands v Fletcher [1986] L.R. 1 Ex. 265, negligence and inferentially nuisance.

The plaintiffs further relied upon the doctrine of

The plaintiffs sought summary judgment against the defendant and the matter was fully argued for, I am told, almost two hours before Master Gambrill on 28 April this year. In a reserved decision delivered on 31 May 1988, Master Gambrill declined to enter summary judgment and no issue is taken in the present proceeding which is an application to review a judgment with the conclusion that summary judgment should not be entered. The plaintiffs seek, however, to review that part of Master Gambrill's judgment which awarded costs of $1500 to the defendant.

The reasons for the award of costs are not indicated in the judgment and it is accepted by both counsel today that the issue of costs was not addressed at the hearing before Master Gambrill, the attention of the parties, of course, being directed to the more substantial issue of whether summary judgment should or should not be entered. In a situation where an award of costs has been made which does not conform to the usual practice in summary judgment applications and where the issue of costs was not addressed by counsel before the Master, I think it is appropriate that there should be recognised a jurisdiction to review.

The present case plainly comes within the scope of the principles elucidated by Barker J. in Arkley v Fraser Mill Properties Ltd, an unreported decision given in the High Court at Auckland on 22 March 1988, under CP. No. 1028/87. It was submitted on behalf of the defendant that I could properly consider removing the present application into the Court of Appeal in accordance with Rule 264(4) as had been done, for example, in Graebar Holdings Ltd v Taylor & Ors, C.A.165/87. I would not accede to that submission in this case. The amount involved is $1500 and the review procedure specified by Rule 264 must be considered particularly appropriate for situations where inexpensive and expeditious

review is indicated. It is a well known practice of the High Court in at least the Auckland/Waikato/Bay of Plenty area, that upon an unsuccessful application for summary judgment costs are fixed but the issue of liability therefor is reserved. Master Gambrill's judgment which fixed costs conforms with that practice but is unusual in directing costs to be paid by the unsuccessful plaintiff at this stage. Such an unusual course is always indicated where it is plain that the summary judgment procedure was wholly inappropriate. In this case, I am minded to think that it was wholly inappropriate. It is accepted on behalf of the plaintiffs that the issue of quantum was likely to require trial but it is submitted that the issue of liability could properly have been determined by way of summary judgment. I have difficulty accepting that proposition.

This is a case where issues of liability and quantum are inextricably woven together and I can perceive no relevant judgment on liability that could have advanced the plaintiff's position in any real way at all as a discrete judgment. However, Miss Bolwell submits, and I think correctly, that a distinction is to be drawn between the impressions that might be created at the hearing of the summary judgement compared with the impressions that might be conveyed within the more limited scope of an application for review. We do not have the advantage of Master Gambrill's reasons for the direction that costs be paid now, and I cannot take it from the terms of her judgment that she considered the application for summary judgment inappropriate ab inito.

Having regard to these factors, I think it just that the usual course followed by the Court should obtain here, namely that the costs be fixed but the issue of liability therefor be reserved to be determined at trial. The amount awarded is unexceptional. The fact that they were fixed at the interlocutory stage is unexceptional. I therefore review the award as to costs as follows: that the costs of the application for summary judgment be fixed in the

sum of $1500 but that the issue as to whom and by whom such costs are payable be reserved until the disposal of the substantive proceeding. As to the costs of this application for review, I fix the same in the sum of $500 together with all reasonable and proper disbursements that shall be approved by the Registrar. I similarly reserve the issue as to whom and by whom such costs and disbursements are payable pending the disposal of this substantive proceeding.

N. Anderson J.
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Solicitors for the Plaintiffs — Cooney Lees Morgan, Tauranga

Solicitors for the Defendant — B.J. Hunt, Auckland