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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

C.P. 139/89

BETWEEN	EFFEM FOODS PTY LIMITED
	First Plaintiff
AND	EFFEM FOODS LIMITED
	Second Plaintiff
AND	TRADE CONSULTANTS LIMITED
	First Defendant
AND	BEST FRIEND PET FOODS LIMITED
	Second Defendant

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Counsel: R.W. Worth for first and second plaintiffs
B.R. Latimour and G. Wilkin for first defendant
J.R.F. Fardell and M.N. Dunning for second defendant

Date of Judgment: 23 November 1989

JUDGMENT OF BARKER J ON COSTS

On 17 March 1989, I delivered a reserved decision in which I refused an interim injunction to the plaintiffs on the grounds that there was no serious question to be tried, or alternatively, that the balance of convenience did not favour an injunction. I reserved the question of costs.

Counsel for both successful defendants then applied for an award of costs and filed memoranda; counsel for the

plaintiff replied. Through some administrative oversight, the full memoranda were not referred to me until quite recently, hence the delay in issuing this decision.

I consider this is an appropriate case where costs should be awarded in favour of the successful defendants. Rule 47 indicates that the Court should make an order for the costs of any interlocutory application. The Rule reads -

> "If the Court makes an order as to the costs of any proceeding or of any issue therein or of any interlocutory application, the Court shall order that the costs shall follow the event of the proceeding, issue or interlocutory appocation, except where it appears to the Court that some other order should be made as to the whole or any part of the costs."

As the learned authors of McGechan point out in their commentary to the Rule, it differs from its predecessor; it applies to the costs of any interlocutory application and is mandatory in its terms, except that the force of that direction is often lost because of the Court's usual custom of making some other order in the circumstances.

Whilst it is not uncommon to reserve costs, even on an unsuccessful application for an interlocutory injunction, I think that costs should be awarded against the plaintiff here for the following reasons -

(a) There were objectionable hearsay statements from the plaintiff's deponents who were not able to

speak from personal knowledge. I found this evidence unacceptable and not within the contemplation of Rule 252;

(b) Copies only of many documents for which confidentiality was claimed were exhibited; there was a subjective selection of extracts by one of the deponents who had not been involved in any significant way with the first defendant;

(c) The plaintiff persisted in a global claim for protection of confidential information without specifying the precise nature of the information to be protected.

There is also the point, which should not be given undue emphasis, that this was a case of a plaintiff which occupied, on an urgent basis, two days of Court time. By the breadth of the relief sought, the plaintiff required the defendants to undertake an immense amount of work under conditions of urgency in order to rebut the applications. Such persons should bear the consequences of bringing applications for interim injunctions which ultimately do not succeed.

The real argument is over the quantum of costs to be awarded. Both defendants made separate claims for costs on a solicitor and-client basis. The first defendant's solicitor-and client-costs were no less than $33,000 plus

GST plus disbursements. The claim of the second defendant was slightly more modest at $29,500 costs plus GST plus disbursements.

There is no way in which the Court can award anything approaching those figures in a party-and-party costs award on an interlocutory application. The amounts sought ignore the following matters -

(a) The scale of party-and-party costs under the High Court Rules for defended interlocutory applications provides for a maxium of $460. To this figure would normally be added an allowance for a second day and some allowance for second counsel;

(b) There must be the possibility that the plaintiffs will succeed at the substantive hearing, after all the evidence has been heard. An unsuccessful interim injunction bid does not mean that a plaintiff must necessarily fail at the substantive hearing;

(c) Much of the evidence in the defendants' affidavits and annexures will be relevant at the substantive hearing. I imagine that, at any judicial conference, an order is likely to be made that evidence already filed by affidavits be used at trial, subject to supplementation and cross-examination;

(d) The authorities on costs to which counsel for the defendants referred, where various Judges had given awards in excess of the scale or in excess of the normal ceiling of $5750, were almost all in cases where there had been a lengthy substantive trial after interlocutory matters had been disposed of.

(e) There was a certain amount of duplication in the defendants' work. Much of the affidavit evidence was not, in my view, completely necessary for an interim injunction hearing. There was however justification for the separate representation of the defendants; the first defendant's professional integrity was under attack.

The approach which the Court should make to the scale of costs is conveniently set out in the judgment of Hardie Boys J in Morton v Douglas Homes Ltd (No 2) [1984] 2 NZLR 620 in the following passage at 624, 625 -

> "Rule 568 gives no guidance as to the criteria by which the discretion it confers is to be exercised. There appears to be little authority by way of reported cases. In Wilson v Dominion Portland Cement Company [1916] NZLR 792, where costs less than scale were fixed, Cooper J was content to observe that the discretion ought to be exercised on reasonable grounds. The matters upon which he relied all related to the nature and course of the proceedings. In Bevan Investments Ltd v Blackhall and Struthers (No 2) [1973] 2 NZLR 45, Beattie J fixed costs in excess of scale on the basis of the length of the trial,

its complexity, and the extent of the preparation involved. That case occupied 41 sitting days and clearly involved complex technical and legal issues. Costs were fixed at $11,500. At that time, Table C was that provided by the Supreme Court Amendment Rules 1966, and it would seem on a fairly rought totting up, that scale costs, assuming maximum certification, would have been in the vicinity of $7,000.

In Envirotech Australia Pty Ltd v Martin (Christchurch, A.282/75, 1 October 1975, noted in [1975] BCL para 1228) Casey J emphasised the complete discretion given by R.568, whilst also drawing attention to what Williams J said in Sargood v Corporation of Dunedin (1887) NZLR 5 SC 461 with reference to the rules then in force: "The intention was to cheapen litigation". Casey J allowed costs of $1200 in the face of what he accepted was a fully justifiable bill of $3150, saying -

> "...in fixing costs as between the parties the Court is not obliged to take into account the defendant's natural desire to have the bext representation possible, and must look at the position between them on what might be regarded as a normal solicitor-client basis, bearing in mind that the approach is not that of a full indemnity, but **a reasonable contribution to the other party's costs**" (my emphasis).

"The present case demonstrates yet another respect in which scales or rates of costs or fees fixed by statutory regulation have failed to keep in step with the effects of inflation. Where the scale in question is one which regulates the remuneration payable to counsel, such as that under the Offenders Legal Aid Regulations 1972, the Court has many times expressed, with its sympathy, its inability to legislate. If prescribed fees are inadequate, the solution lies in appropriate amendment, not in the Court disregarding the scale. The same consideration is applicable to Table C, but not I think to the same degree. Table C must be considered in the light of the purpose of an award of party and party costs. That purpose is not to fix solicitors' and counsel's remuneration, but to impose on the unsuccessful party an obligation to make a reasonable contribution towards the costs reasonably and properly incurred by the successful party. Table C is a legislative direction as to what is to be regarded as a resonable contribution in the ordinary kind of case. If in the circumstances of a particular

> case compliance with that direction will not achieve the purpose of an award of costs, in that it will not produce a reasonable contribution to the costs of the successful party, then the Court is entitled to award more (or less). The relevant circumstances justifying that course will normally be those relating to the nature and the course of the proceedings. But I cannot accept that purely financial or economic considerations are entirely irrelevant. In my view, whilst the nature and course of the proceedings must always be the dominant consideration, there is room for recognising the amount of solicitor and client costs actually and reasonably incurred in the particular case.
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> I do not know the actual amount of solicitor and client costs each plaintiff will have to pay. I do however know what has been charged to the first, second and third defendants together, for solicitor's costs and counsel's fees. For the relevant period up to completion of the trial it is about $4,000 more than Mr Maling and Mr Fogarty seek between them.
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> I could not attempt any assessment of whether, and if so to what extent, the combined solicitor and client costs of the four plaintiffs would exceed those of the first three defendants, but I regard the comparison as confirmation of counsel's disclaimer of an intention to obtain an indemnity, and as some indicator of what the plaitiffs' actual costs may in fact be."

I adopt that approach and propose to make an award of costs which is, in the words of Casey J (quoted by Hardie Boys J) "a reasonable contribution to the other party's costs". This contribution is in the context of an interlocutory application

I note that the plaintiffs complain that the defendants did not give undertakings until the hearing. It would have been difficult for them to have refused those undertakings. The 2 days of hearing were spent in discussing the matters covered by the judgment. I should

not have thought that in the context of defending the matters which proceeded to trial, the issues covered by the undertakings should have involved much preparation.

I note from the memorandum dated 18 September 1989, filed on behalf of the second defendant, that the plaintiff has taken no steps in relation to discovery or to the proceedings generally, other than to seek discovery from the defendants. Yet in its memorandum filed on 25 May 1989, the plaintiff said that the application to remove the proceedings to the Commercial List would be filed "in the next few days". There is now little chance of the matter going on to the Commercial List. The plaintiffs have not shown the despatch necessary. If the litigation is to proceed, it should now be actioned as soon as possible.

Having considered all the submissions of counsel and exercising my discretion, I award costs as to each defendant, payable by the plaintiff in any event, the sum of $3,500 plus GST, plus disbursements as fixed by the Registrar.

R. D. Barker J.

Solicitors: Simpson Grierson Butler White, Auckland, for plaintiffs
Bell Gully Buddle Weir, Auckland, for first defendant
Russell McVeagh McKenzie Bartleet & Co, Auckland, for second defendant