

NZLR

IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY

20/9

M.2109/90

**LOW  
PRIORITY**

UNDER the Copyright Act and the  
Fair Trading Act 1986

BETWEEN: FISCAL TECHNOLOGY  
COMPANY LIMITED  
Plaintiff

18/6

A N D: NOEL GORDON JOHNSON  
of Auckland, Financial  
Consultant  
First Defendant

AND: HURSTMERE FINANCIAL  
SERVICES LIMITED  
Second Defendant

AND HURSTMERE FINANCIAL  
SERVICES (AUCKLAND)  
LIMITED  
Third Defendant

AND MONETARY SYSTEMS  
LIMITED  
Fourth Defendant

AND JOHN C SCOTT of Auckland  
Company Director  
Fifth Defendant

AND MICHAEL HODGKINSON  
of Mt. Maunganui  
Company Director  
Sixth Defendant

AND CHARLES WALTER GORBEY  
of Auckland, Financial  
Consultant  
Seventh Defendant

Supplementary Judgment:

1/6

September 1991

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**SUPPLEMENTARY JUDGMENT OF HENRY J  
AS TO COSTS**

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I have considered counsel's memoranda. The first defendant is legally aided, the grant exempting him from any contribution. Accordingly, no order for costs can be made against him (s.17 (2) (e) Legal Aid Act 1969). Mr Chambers seeks an order under the proviso to that subsection specifying what order would have been made if there had not been an exclusion under the legislation. I think it is an appropriate case to make such an order. For the third to sixth defendants, Mr Rooney submitted that the question of costs should not be settled until there was a resolution of the issue as between the plaintiff and the first defendant concerning the latter's entitlement to a royalty payment for the use of the Fiscaltech technology. I can see no reason for postponing the fixing of costs on the substantive hearing, which has been largely if not wholly determined so far as this Court is concerned.

**First Defendant:**

Mr Chambers has submitted a schedule based on the second schedule to the High Court Rules. I propose to cover the items which are in dispute as between the parties.

Item 8 - preparing and filing statement of defence to counterclaim. The counterclaim was unsuccessful other than in a limited respect under one of the pleaded causes of action. The scale of \$350.00 is appropriate.

Item 9 - preparing for trial. Mr Chambers seeks the maximum of \$3450.00. Having regard to all relevant factors I fix the sum of \$2300.00 under this head, which is twice the basic scale.

Item 12

There is no reason why the maximum scale allowance should not be awarded for the extra hearing days.

Item 16 (a) - interim injunction. The application was part-heard and resolved by the giving of undertakings by the defendants. The plaintiff's entitlement to restraining the use of *Moneysys* was established at trial and it is entitled to costs on the application. The acceptance of a limited undertaking does not militate against this. I certify for \$1000.00.

Item 16 (b)

This concerns a judicial conference at which pre-trial orders were made. It is proper to make some allowance for costs, which in the circumstances I fix at \$300.00.

Item 16 (c) - application for further discovery. The application was made in the course of an adjournment during trial, was also directed to an alleged contempt, and

was not pursued to finality. No allowance is made under this head.

Items 28 and 29

The scale allowance for discovery and inspection are entirely appropriate.

Disbursements:

All hearing fees are properly claimed. There is no warrant to apportion because of the first defendant's limited success on his counterclaim, for reasons which are referred to in respect of the first defendant's application for costs.

Witnesses' Expenses:

There is no proper basis for disallowing any of the claimed expenses. All witnesses were called in respect of matters in issue on the pleadings, and the fees and travelling expenses involved are not specifically challenged. Again apportionment is not appropriate.

On the above basis the costs can be summarised as follows:

Preparing statement of claim	\$400.00
Additional defendants	360.00
Preparing statement of defence to counterclaim	350.00
Preparing for trial	2300.00

Trial	2650.00
Extra days	3450.00
Interlocutory injunction application	1,000.00
Judicial conference	300.00
List of documents	170.00
Production and inspection	170.00
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	<b>\$11,150.00</b>
Disbursements	<b>2,753.55</b>
Witnesses Expenses	<b>2,314.25</b>
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	<b>\$16,217.80</b>
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Mr Carden has applied for an order for costs in favour of the first defendant on the counterclaim. In my judgment it is not appropriate to make any award in that regard. The first defendant was very largely unsuccessful, two causes of action failing entirely and one succeeding only in part. The matters relating to the successful part were very much intermingled with the plaintiff's basic claim, they entailed minimal if any additional time, and they were not the subject of substantial legal argument. The effect of the Legal Aid Act 1969 would also make an award unjust because of the apparent unavailability of the right of set-off. If anything, the balance would probably favour some award for the plaintiff on the counterclaim, but overall justice is I think achieved if no allowance either way is made.

Third to Sixth Defendants:

Rule 50 provides that each of several unsuccessful defendants shall be liable for the costs allowed to a plaintiff unless the Court otherwise directs. I can see no good reason for departing from the general rule and instead making some sort of apportionment as amongst all defendants. These defendants aligned themselves with the first defendant and relied on evidence adduced through him. They were found to have infringed the plaintiff's copyright, to be liable in damages, and were enjoined. The relief granted as against them was identical to that granted as against the first defendant, and with one exception I can see no cause for differentiating between the two groups of defendants either generally or in respect of any of the items under challenge. Most of the matters traversed at trial had direct relevance to the position of these defendants by reason of their dependence on the position taken by the first defendant. The exception is under item 8 which relates only to the first defendant. Mr Rooney also queried the allowance under item 2 for additional defendants. Although there may be circumstances in which it would be unfair to visit on one defendant the extra costs incurred in proceeding against other defendants as well, I can see no injustice arising in this case. All defendants were involved in the activities brought into question, and their respective actions and responsibilities were much intermingled and did not stand alone.

I therefore specify pursuant to s.17 (2) (e) of the Legal Aid Act 1969 that the costs recoverable by the plaintiff against the

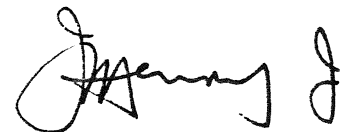
first defendant would have been in the following sums, for which I would have certified pursuant to item 36 of the Second Schedule to the High Court Rules :

Party and Party Costs	11,150.00
Disbursements	2,753.55
Witnesses expenses	<u>2,314.25</u>
	<u>\$16,217.80</u>

There will be a further order in favour of the plaintiff fixing costs as against the third to sixth defendants jointly in the following sums:

Party and party costs	\$10,800.00
Disbursements	2,753.55
Witnesses Expenses	2.314.25
	<u>\$15,867.80</u>

The whole of those costs are certified pursuant to item 36.



**Solicitors:**

Sinclair, Takapuna, for Plaintiff

C M Howcroft Esq., Panmure, for First Defendant

Callaghan Kernahan Town, Auckland, for Third, Fourth, Fifth and Sixth Defendants