IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

30/8

CP No. 297/87

1589

BETWEEN GREGORY ERIC HOBBS of Palmerston North Insurance Agent

Plaintiff

AND VANCE GORDON CROZIER of Palmerston North, Occupation Unknown and MANDY JANET CROZIER, his wife

Defendants

NOT RECOMMENDED

Date of Judgment: 26th August 91

Counsel: G.A. Paine for Plaintiff
J.C.A. Thomson for Defendants

JUDGMENT OF NEAZOR J AS TO COSTS

In my reasons for judgment on this matter I dealt with costs in these terms:

> "In my view the plaintiff's claim fails under all heads and there will be judgment for the defendants. The defendants, however, by not making sure that they completed every part of the bargain into which they had entered with the plaintiff, brought the litigation on themselves, and it is my present view that their judgment should not carry with it any order as to costs. If counsel wish the costs issue to be considered further leave is given to submit memoranda on that point."

Counsel for plaintiff and defendants subsequently filed memoranda, and referred to reported judgments on questions of costs.

Mr Thomson for the defendants submitted that, whilst acknowledging that it is subject to R 46, R 47 is expressed in mandatory language and confirmed the traditional approach that costs should follow the event, on which basis the defendants in this case would be awarded costs. Mr Thomson further submitted that the aspect of the defendants' conduct to which I had referred as warranting not awarding costs to them was not conduct of the kind which would warrant that course. Reference was made to Cates v Glass [1920] NZLR 37 as indicating that conduct which was in some way oppressive, misleading or unfair was required to justify departure from the usual rule.

It was submitted there was no such conduct here, and in any event that on my finding the plaintiff was as responsible as the defendants for the failure to complete the share transfer. I do not think that accurately reflects the view I expressed, but it is correct that I did not exonerate the plaintiff from a share in responsibility for that aspect of the dealings between the parties not being properly attended to.

Mr Paine referred particularly to Gemmell v Gemmell [1924] NZLR 248 as authority for the proposition that a successful plaintiff may not obtain costs where the object of the suit has been to correct a mistake made by him, and sought to apply that to the proposition in my reasons that the plaintiff had brought the action as the defendants had not completed every part of the bargain into which they had entered with the plaintiff.

Mr Paine based his argument in support of the refusal of costs on the propositions that:

(a) the defendants brought about the litigation by conducting themselves in a manner which led the plaintiff to believe he had a good cause of action (although acknowledging that to be significant the defendants' conduct must be unreasonable or improper);

(b) the defendants had influenced the commencement or conduct of the proceeding in such a way as to cause unnecessary litigation and expense - that if they had ensured the completion of share transfers there would have been no litigation.

Cates v Glass (supra) is a firm authority for the proposition that costs should be awarded to the successful party unless there is good cause for depriving that party of costs, and that good cause will only exist if on a proper assessment it would be more fair as between the parties (to use the words of Edwards J at page 68 of that report) that some exception should be made to the general rule. That good cause may be established if the successful party is responsible for anything connected with the institution or conduct of the suit calculated to occasion unnecessary litigation and expense appears from decisions referred to by Edwards J. Chapman J looked at the issue as whether the party's conduct "led to the litigation or to great prolongation of it."

Failure by the successful party on a material issue may justify awarding less than full costs - per Sim J in Cates v Glass at page 55.

Gemmell v Gemmell is not a helpful decision in the present case. The action was for rectification of a contract on grounds of mutual mistake. Whilst it was recognised that if proceedings have to be commenced

for rectification of a mistake made by the plaintiff, that party will generally have to pay costs, costs in that case were awarded against the defendant because the Judge found that he had attempted to support a dishonest defence by giving false evidence. There is nothing of that kind here, nor was the case one where rectification was sought and obtained.

The decision in King v Foxton Racing Club (Inc) [1953] NZLR 852 (C.A.) makes it clear that consideration may properly be given to conduct preceding the litigation, so long as it is connected with the litigation, when deciding whether to depart from the general rule. Such antecedent conduct was described in Ritter v Godfrey [1920] 2 KB 47 as conduct of the party that "brought about the litigation" and in Donald Campbell & Co Ltd v Pollock [1927] AC 732 as "conduct which induced the plaintiff to bring the action, and without which it probably would not have been brought." Both of these decisions were referred to and relied on by the Court in King v Foxton Racing Club.

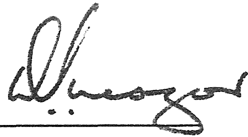
On the basis of the authorities, particularly Cates v Glass it is plain that my original indication as to costs must be reconsidered: the defendants succeeded and were not found to have been dishonest nor to have unduly prolonged the proceedings. On the face of it they should then have their costs.

I do not consider that the failure to organise and complete the transfer of shares was the only factor which precipitated the action, but it was plainly a factor in that course being taken, and a factor which I have held could be laid perhaps more at the door of one of the defendants than at that of the plaintiff.

On general principle I accept that the defendants are entitled to their costs, but having regard to the

circumstance to which I have referred I do not believe it would be fair as between the parties for them to have their whole costs.

Accordingly there will be an order for costs in favour of the defendants, but reduced by 10% of the final amount assessed. I certify for two extra days and award $200.00 to the defendants on this application.



D.P. Neazor J

Solicitors: Fitzherbert Rowe, Palmerston North for Plaintiff

J.C.A. Thomson, Palmerston North for Defendants