

NZLR

IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

31/7

CP.118/89

**LOW
PRIORITY**

1366

BETWEEN:

HARRY JOHN EDWARDS
and
FRANCES GILLIAN EDWARDS
of Hastings, Orchardists

Plaintiff

A N D:

RICHARD BOND NESBITT
of Napier, Accountant
DAVID CHRISTOPHER MALING
of Wallingford, Farmer
GEORGE KENNEDY ORMOND
of Waipukurau, Farmer
MICHAEL RICHARDSON
ORMOND of Waipukurau,
Farmer, a n d
ARTHUR EYRE ORMOND
of Hastings, Farmer

First Defendants

A N D

MORRIS WAYNE WILLIAMS
of Napier, Accountant
ARTHUR EYRE ORMOND
of Hastings, Farmer
GEORGE KENNEDY ORMOND
of Waipukurau, Farmer
DONALD GRAHAM DOBSON
of Masterton, Solicitor, a n d
MICHAEL HENRY KEMBER
of Auckland, Accountant

Second Defendants

Hearing: 10 February 1992

Judgment: 20 July 1992

Counsel: M E J Macfarlane for plaintiffs
A K Monagan for defendants

JUDGMENT OF HENRY J as to COSTS

This proceeding came on for trial before Wylie J., at a hearing which commenced on 10 February 1992. On 11 February plaintiffs discontinued. Plaintiffs had originally been in receipt of legal aid pursuant to the provisions of the Legal Aid Act 1969. That aid was withdrawn on 1 November 1991. On discontinuance, the parties agreed that costs in favour of the defendants covering the period subsequent to 1 November 1991 to the date of discontinuance were to be fixed at \$3000.00. The defendants now seek an award of substantial costs covering the period down to 1 November 1991.

By reason of the transitional provisions of the Legal Services Act 1991 (s.160 (5)) the 1969 Act is applicable. Section 17 (e) of the 1969 Act provides that the defendants' liability for an order for costs is not to exceed the amount of their contribution other than in exceptional circumstances. There are, in my view, exceptional circumstances which warrant the making of a substantial order.

The proceeding had as its origin a sale and purchase, whereunder the plaintiffs were purchasers and the defendants were the vendors, of an orchard property situated at Ormond road, Hastings. The substantive issues in that proceeding concerned allegations of misrepresentation made as against the vendors. Substantial sums of money were in issue. Shortly before trial plaintiffs sold the orchard at a gross capital gain of some \$247,000.00. The discontinuance followed the cross-examination of the first-named plaintiff, in the course of which it is contended that the plaintiffs' case was virtually destroyed.

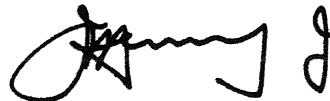
Having regard to the above background and to the now apparent means of the plaintiffs to meet a substantial order for costs arising at least in part from the profit from the sale of the asset in question, the proviso to s.17 (e) earlier referred to should be invoked. It is also to be noted that the plaintiffs have declined the invitation to present argument on this application for costs.

In all the circumstances I propose to fix costs as follows :

Preparation of statement of defence	350.00
Preparation for trial	3,450.00
Application to strike out	460.00
Lists of documents	170.00
Inspection	170.00
Costs of injunction hearing	2,000.00
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	<u>\$6,600.00</u>

The defendants are entitled to disbursements as fixed by the Registrar. I observe that those listed in Mr Monagan's memorandum of 8 July 1992 (other than perhaps that relating to a service fee for the Property Law Act Notice) would seem to be in order.

Pursuant to Item 36 of the Second Schedule to the High Court Rules the whole costs as above fixed are certified.



Solicitors:

Sainsbury Logan & Williams, Napier, for plaintiffs
Carlile Dowling, Napier, for defendants