NZLR

LOW PRIORITY

IN THE HIGH COURT OF NEW ZEALAND 28/5
AUCKLAND REGISTRY

CP 120/93

IN THE MATTER of the Fair Trading Act 1986

BETWEEN FRADER GROUP LIMITED of Wellington, Investment Company

First Plaintiff

730

A N D CAPITAL FM LIMITED of Wellington, Radio Station Operator

Second Plaintiff

A N D MORE FM CHRISTCHURCH LIMITED of Christchurch, Radio Station Operator

Third Plaintiff

A N D INDEPENDENT BROADCASTING COMPANY (1990) LIMITED of 107 Great North Road, Grey Lynn, Auckland, Radio Station Operator

Defendant

Hearing: 22 April 1993

Counsel: P C Chemis for Plaintiff to Oppose
L L Stevens and S A Grimshaw for Defendant in Support

Judgment: 3 May 1993

JUDGMENT OF ROBERTSON J

This is an application for costs, disbursements and/or damages incurred by the defendant as a result of the issue of proceedings by the plaintiffs which have now been discontinued.

The dispute between the parties has its litigation genesis in a letter sent by the solicitors for the plaintiffs to the Chief Executive of the defendant on 3 March 1993. It noted that the defendant was apparently re-launching radio stations in Wellington, Hamilton and Auckland, and that the station's positioning statement would be *"not too heavy, not too soft."* It was alleged that this was the positioning statement of the MORE FM stations in Wellington and Christchurch (the second and third plaintiffs which were owned by the first plaintiff). It was alleged that the proposed activity would be in breach of the Fair Trading Act.

The following day the solicitor for the defendant responded. There was no denial of the factual allegations made but the claim that the plaintiffs had a proprietary interest in what was typified as a purely descriptive phrase was denied. It was asserted that the plaintiffs had no legal right which could be asserted against the defendant in the circumstances which had arisen. The defendant made it clear that it did not intend to desist from their planned activity and that its solicitor would accept service of any proceedings.

There was further correspondence which was peppered with very short deadlines. Meantime steps were being taken to facilitate the earliest possible Court time. Proceedings were filed on 9 March service having been effected the previous day.

The matter was first called in the Duty Judge list on 9 March 1993 before Williams J and was adjourned until the 11th so that the possibilities of cross-undertakings to preserve the status quo and avoid an urgent interim hearing could be explored.

On 11 March 1993, Henry J allocated a priority fixture. He was given letters which recorded undertakings which were placed on the Court file. A timetable order was discussed along with the possibility of an urgent hearing between 19 and 21 April when some time had fortuitously become available.

The file was again in the Duty Judge list on 15 March for confirmation of the timetable orders and the fixture date.

There were subsequent problems about the timetable and other matters which necessitated a judicial conference before me on 25 March 1993.

On 1 April 1993, the plaintiffs indicated that they intended to discontinue. The hearing before me was on the outstanding issues of costs and damages.

Rule 476 provides :

> *"(1) Unless a defendant otherwise agrees or the Court otherwise orders,*
>
> *(a) A plaintiff who discontinues a proceeding under r 474 shall pay to the defendant the costs of the proceeding and of all*

incidental steps up to and inclusive of the discontinuance; and

(b) A defendant may seal judgment for the costs of the proceeding.

(2) Where a cause of action has been discontinued by a plaintiff, no further step shall be taken by the plaintiff on that cause of action until the costs allowed on the discontinuance have been paid.

The defendant is entitled to all its costs up to and including the discontinuance. The Court may award higher (than scale) costs to compensate for exceptional pre-trial expenditure."

Mr Chemis agreed that in the circumstances of this case the defendants were entitled to an award and the only issue was the proper amount to be paid.

Mr Stevens contended that the issue initially turned on the meaning of the words *"the costs of the proceedings"* as used in r 476. He argued that they should be given a generous meaning. Further he argued that if the Court did not accept that submission then resort should be had to the general cost provision in r 46, and by reference to s 51(G) of the Judicature Act 1908. His final fall-back was the provisions of r 630 which deals with undertakings on interim injunctions. His primary submission was however that all matters could properly be dealt with under r 476 and I turn to that in the first instance.

The meaning of this section and its interrelationship with other provisions in the High Court Rules were considered by Henry J in ***Chase Corporation Ltd v Rank Overseas Holdings Ltd & Ors*** (1988) 1 PRNZ 426.

Three significant factors can be extracted from that decision which I respectfully adopt.

First, the reference to *"costs of the proceedings"* is to be read within the context of the rules. The phrase is not to be given a meaning different to that contained in other parts of the rules particularly rr 46 to 53.

Secondly, the general principles with regard to overriding of scale as discussed in a number of cases including the decision of Hardie-Boys J in ***Morton v Douglas Homes Limited [No 2]*** [1984] 2 NZLR 620 are relevant.

Thirdly, among matters which can helpfully be considered in the exercise are :

(a) The sum at risk in the proceedings;
(b) the number of interlocutory proceedings;
(c) urgency;
(d) the extent of preparation;
(e) the nature of discovery and inspection;
(f) the extent to which briefing and preparation of evidence had been completed;
(g) the interrelationship between the date of discontinuance and the date of trial;
(h) whether any unnecessary steps had been involved;
(i) the extent of representation; and
(j) the actual and reasonable costs which have been incurred.

Mr Stevens while embracing these factors argued for a more generous approach. He referred to comments of Tompkins J in

Carborundum Abrasives Ltd v Bank of New Zealand (No 2) [1982] 3 NZLR 757, where His Honour adopted a non restrictive interpretation of s 51(G) of the Judicature Act and held that there was no reason why an award of costs could not be made to other than a party. I respectfully concur with what was said by Tompkins J but it does not assist in the determination of this point. I adhere to the approach of Henry J in ***Chase v Rank.*** I see no reason of principle or practice to justify a more expansive approach.

Mr Chemis placed particular weight on comments of the Chief Justice in ***Waiatarua Action Group v Minister of State Owned Enterprises*** (1990) 2 PRNZ 447 particularly when he said at 451 :

> *"... but when it comes to awarding costs the proper starting point would still be on a 'normal solicitor/client' basis, ..."*

There was factual argument before me as to whether this is a case in which the Court had been used by the plaintiffs not as a forum for obtaining a solution to a legal problem, but to gain commercial advantage. In the ***Chase v Rank*** case, Henry J said at 430 :

> *"It is not possible in my view to form a judgment as to the real strength or weakness of the claims without undertaking a full evaluation of the evidence and the legal issues, a task which is presently quite unsuitable. There may be instances where a claim is so obviously without basis or an abuse of procedure when it can be said with confidence it should never have seen the light of day, and in such a case it may well be proper to be generous to a defendant in an award of costs. This is not such a case, and in my view this factor is to be ignored for present purposes. The simple fact to bear in mind is that the plaintiffs instituted the claim,*

and then some ten clear days before trial elected not to pursue it."

This approach was adopted by Barker J in ***Commerce Commission v Quantas Airways Ltd & Ors*** (CL 56/91, Auckland Registry, 23.3.92).

The defendant argued that this was a case where it was plain that the plaintiffs had abused the Court system and that a higher than usual award of costs was therefore appropriate. This was strenuously denied by Mr Chemis not only on the facts but also on the basis that the Court could only reach that conclusion having heard and seen witnesses, weighed the strength of the case and assessed the parties after full investigation. In response Mr Stevens relied on comments of the Chief Justice in ***Waiatarua*** at page 453 where he alluded to the possibility of drawing inferences on such a matter. I note no party invited the Court to embark on an independent hearing on this issue of abuse and/or bad faith.

Having read the various affidavits and the correspondence in their entirety I cannot conclude that the proceedings were issued or briefly pursued other than in good faith. It appears that the discontinuance was a subsequent decision to solve the problems of the competing stations through commercial activity rather than the enforcement of alleged legal rights.

The total legal costs claimed to have been expended by the defendants were $37,672.77. Counsel before me agreed that the scale of costs was of scant assistance in a proceeding such as this when there was not a specific money sum at issue and where the matter did not proceed to hearing.

I am not persuaded that the reasonable costs of the defendant for the purposes of this exercise should include costs of two counsel as well as the solicitor on the record although I recognise that because of the very short time span which was involved and the urgency of the matter, there were some difficulties.

Although it is no way determinative of the situation I do note that the total legal cost incurred by the plaintiffs was a little in excess of $21,000 excluding disbursements.

These proceedings were clearly of substantial importance to both parties. They involved four brief Court proceedings. They had a substantial degree of urgency which was created and driven by the plaintiffs. Because of the short time frame it was necessary to take substantial steps with regard to preparation and discovery. Final preparation had not taken place but the discontinuance was less than three weeks before the hearing date. It would have been necessary for the defendant to have taken major steps to ensure that it was in a position to respond to the Fair Trading allegations against it.

I am of the view that a proper contribution to be made in terms of r 476 with regard to costs and Court disbursements incurred is an all inclusive sum of $10,500. I am conscious that the amount is substantially less than the actual costs incurred. That in part reflects the legislative policy in this country not to provide full recovery as occurs in some other jurisdictions. This was discussed by Ellis J in ***Bacharach Holdings Limited v Harbour City Realties Limited*** (CP 202/88, Wellington Registry, 30.6.89). It

perhaps reflects also the fact that it is some time since the level of scale costs was re-assessed.

I have made no allowance in that assessment for further costs in a total sum of $17,971.82 which were claimed for.

i.	Cost of re-editing TV commercial	$1,396.07
ii.	Cost of having replacement promotional statement drafted	562.00
iii.	Cost of executive time	14,000.00
iv.	Cost of obtaining survey	2,013.75
		$17,971.82

Mr Stevens initially argued that all could be treated as disbursements in respect of the claim under r 476 but I was not persuaded that could apply to them all. Some were in my judgment matters which were not direct disbursements of the litigation but other costs which were incurred.

Rule 630 provides in part.

> *"(1) With every application for an interim order ... the applicant shall give an undertaking to the effect that if, by reason of the making of the interim order, any other party sustains damages (being damages which, in the opinion of the Court, the applicant ought to pay), the applicant will abide by an order which the Court may make in respect of those damages.*
>
> *(2) Every undertaking required of the applicant by subclause (1) or the Court shall be referred to in the order and shall be deemed to be incorporated in it; but the applicant shall be deemed to be bound by an undertaking in the terms stated in subclause (1) whether or not one has been signed or filed by the*

applicant and whether or not it has been referred to in the order."

In this case no actual undertaking was filed. The affidavit in support of the interim relief contained the following :

"48. THE first plaintiff has a fully paid up capital of $1 million and consolidated shareholders funds of over $2 million. The second plaintiff has a fully paid up capital of $835,000 and consolidated shareholders funds of over $1.5 million. The third plaintiff has a fully paid up capital of $475,000 and consolidated shareholders funds of $1 million.

49. THE plaintiffs are all substantial companies with high profitability, positive cash flows and substantial undrawn banking facilities. They collectively or individually are able to meet any damages or costs arising from this injunction."

It appears that it was an administrative oversight that no formal undertaking was filed. Counsel before me agreed that in terms of r 630 ss(2) the applicant was deemed to be bound by an undertaking in any event and nothing turns on its absence.

The first substantive issue under this head was Mr Chemis' contention that inasmuch as no actual interim relief was granted by the Court, then there was no basis upon which the Court could consider any question of damage sustained. He referred to ***Chisholm v Rieft*** (1957) 2 FLR 211 which discusses the relevant principle. Counsel submitted that the Court was bound to read literally the words of the section which are predicated on the basis of damage sustained by reason of the making of the interim order.

Mr Stevens invited the Court to take a more robust attitude and to consider the litigation history. The Court became seized of the matter because the plaintiffs sought interim relief. With a view to conserving the scarce commodity which is judicial time, the Court arranged an early substantive hearing date and the parties were encouraged to reach an accommodation by way of undertaking until that date. They did that by mutual agreement. The Court was specifically advised of this arrangement and copies of the correspondence were placed on the Court file.

The plaintiffs had sought the intervention of the Court by way of an order "*restraining the defendant, whether by its servants, agents, associated companies or otherwise howsoever, from promoting any radio station with the aid of a positioning statement or other slogan which is identical with or very similar to the plaintiffs' positioning statement of 'Not Too heavy, Not Too Soft.'*" That is what the plaintiffs asked the Court to give it pending the hearing of the substantive claim. As a price for making an application for such relief the plaintiffs were deemed to have accepted the undertaking provisions contained in r 630.

The Court took steps to assist in the early hearing of the substantive matter. By a letter which is dated 4 March (I suspect the date is an error but it is not material) the solicitor for the defendant wrote as follows :

> *"Following the callover of the above proceedings before the High Court this morning, I have now obtained my client defendant's further instructions.*
>
> *My client is prepared to desist from using the words* 'not too heavy, not too soft' *in conjunction with its Auckland and Hamilton radio stations (including use on*

air, TV, hoardings and in correspondence) pending a final determination of the proceedings by the Court subject to the following :

1. *That your client also desists using the words* 'not too heavy, not too soft' *in conjunction with the promotion of any radio stations, present and future within Auckland and Hamilton (including use on air, TV, hoardings and in correspondence) pending final determination of the proceedings; and*

2. *That the proceedings be brought before the High Court for hearing at the earliest opportunity as a priority fixture but nevertheless allowing due time for my client to respond to the affidavit filed by Mr Gold. Realistically, we would not expect the matter to be set down prior to Wednesday of next week.*

Please advise whether your client is prepared to accept these conditions. If so, it would be intended that this letter and your response be put before the High Court tomorrow with a view to arranging a permanent fixture."

The response from the solicitors for the defendants inasmuch as it is pertinent is as follows :

"1. Thank you for your letter of 4 March

2. *As discussed, we have agreed to the terms of your letter of 4 March, subject of course to the Court granting a priority fixture pursuant to r 436 of the High Court Rules. However, as Williams J suggested that course when this matter was called on 9 March, we do not anticipate any difficulty in this regard."*

These letters were specifically placed on the Court file. Because of them and the early fixture which was granted the application for interim relief was not pursued. I am unwilling to read r 630 so that it means that an undertaking given on an application for interim relief has no effect where a defendant when faced with such application gives an undertaking to the Court to desist from the course of action which the order would have precluded.

In my view it is imperative that a party such as the defendant in this case is not disadvantaged when it agrees to what is asked for by way of interim relief pending a hearing. It is often said that a breach of such an undertaking would constitute contempt. It is clearly desirable that parties should reach their own arrangements. To adopt the approach of Mr Chemis would force people into litigation even although a defendant was willing to agree to what was asked.

I interpret what occurred in the circumstances of this case as being the equivalent to the granting of an order for interim relief and to be treated as having the same force and effect as if it were. Mr Chemis in anticipation of such a finding argued that this case was to be differentiated from the situation where there was an undertaking given but with nothing expected from the plaintiff. Here the plaintiff agreed to refrain from certain action in the meantime as well. I am not satisfied that is a material difference which places it outside the general policy to which I have referred. It was because the plaintiff sought interim relief that the accommodation was reached. In my judgment the application for interim relief was the sine qua non and consequently the undertaking right is to accrue to the defendant even in the circumstances which arose.

The minute of Henry J of 10 March in his handwriting says it all. *"Application for interim injunction adjourned sine die. Leave reserved. Undertaking filed."* It was a part of the Court process and it would be wrong in principle to draw any line between those situations where the Court makes an order and those where an order having been sought is not necessary because an undertaking is given to the Court.

What of the actual claims made?

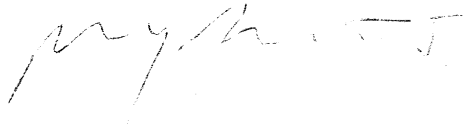
The Auckland Manager of the defendant deposed to the fact that because of the undertaking it was necessary to have a new television commercial relating to the introduction of the name and style of "Breeze" and the new positioning statement produced at a cost of $1396.07. I am satisfied that such expenditure is a cost which directly flows from the restraint and which properly should be compensated for. Likewise a new promotional statement had to be prepared and there were costs of re-editing/mixing of $562 which are recoverable.

There was a claim for $2013.75 in respect of a market survey which was carried out to determine the extent of knowledge by Auckland radio listeners of the words *"not too heavy, not too soft"* as being associated with the plaintiff companies. This is properly a disbursement reasonably incurred by the defendant in preparation for the hearing and necessarily incurred prior to the discontinuance. Under the provisions of the Fair Trading Act this would have been an important matter and allowance accordingly should be made. I accept Mr Chemis' argument that it is not a direct consequence of the interim relief. But it is a cost preparatory to the substantive hearing which never took place. It should be recovered as an additional disbursement under r 476.

The final claim was for a total sum of $14,000. $10,000 of this was for 50 hours of time spent by each of the Chief Executive and the Auckland Manager of the defendant in preparing for the defence of the substantive proceeding. In my judgment that is not a recoverable expense. It was claimed that if this work had been undertaken by outside consultants it would have cost $100 an hour. It was not a cost which flowed from the granting of the interim relief nor was it a disbursement which was actually incurred. As all litigants know, the cost of any Court proceedings is substantial not just in legal costs. When a company is involved it is inevitable that its officers and employees will spend time on the matter. There is nothing about this cost which makes it recoverable.

The final claim of $4,000 was for time spent by the Operations Manager and the Programme Director of the defendant, each of whom spent 20 hours in re-briefing announcers and re-drafting liners and programming so as to meet the requirements of the undertaking. I am of the view that such costs properly flow from the undertaking given. I am not satisfied that it is appropriate to allow for them on the basis of what it would have cost if outside consultants had been used at a cost of $100 per hour. I am prepared to accept that because these two officers of the defendant were forced to do these tasks they were precluded from doing other work which would have been productive and of value. The basis of claim I find to be unsustainable. I am prepared however in all the circumstances to make an allowance of $1000 under that heading.

Accordingly there will be judgment for the defendant against the plaintiffs jointly for $12,513.75 under r 476 and a further $2958.07 under r 630. There will be an order for costs on this proceeding of $840.



Solicitors

Buddle Findlay, Wellington for Plaintiffs
NGL Burton, Auckland for Defendant