1202 Null

NOT RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

24/11

HC 25/94

1886

1592

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| BETWEEN | STUART GRAHAM JUDGE and BERNICE GAIL JUDGE |
| | Appellants |
| A N D | DESMOND CECIL RHODES and MONA PATRICIA RHODES |
| | First Respondents |
| A N D | DAVID JOHN GUEST |
| | Second Respondent |
| A N D | HANNAH BRODSKY-PEVZNER |
| | Third Respondent |

Hearing: 1 November 1995

Counsel: Stuart Judge in Person
G J Kohler for First Respondents

Judgment: 1 November 1995

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ORAL JUDGMENT OF ROBERTSON J

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Solicitors
Gellert Ivanson, Auckland for First Respondents

There is listed before me an appeal against a decision of Judge Joyce dated 4 August 1995. His Honour described it as an addendum on costs to a 7 February 1995 judgment under which the present appellants were ordered to pay $2500 to Mr and Mrs Rhodes the first respondents, and $500 to the estate of the late Mr Guest, the second respondent. A memo on behalf of the estate has been filed and no other steps are intended to be taken by that interest.

The Judges and Rhodes used to be neighbours in Mission Bay. They did not get on. They got themselves embroiled in the most unbelievable wrangle. The Judges have previously had legal counsel, but Mr Judge has appeared in person today. He tells a story of being reluctantly drawn into litigation because of unreasonable and intractable conduct on the part of the Rhodes. Mr Kohler rejects the scenario and reminds me that matters got to such a parlous state that at one stage Mr Judge, a middle-aged professional man was charged with and convicted of wilful damage.

It appears that there were interminable hearings before Judge Morris in the District Court when he endeavoured to mediate. Even that valiant operator was unable to achieve a result between these parties. Eventually after an engineer's report had been obtained and an injunction proceeding had been unsuccessful, there was a hearing in February. It was restricted to a 129c application. It was not a particularly long hearing. Judge Joyce who presided, went to Mission Bay to see the site of "the war". He delivered a judgment which was in the Rhodes favour on that discrete issue.

The Judges wanted to appeal. They contend that there are errors of various sorts in the February judgment. From their perception the overwhelming

factor is that almost simultaneously with the judgement the Rhodes sold and their new neighbours soon agreed to the tree which was pivotal in all that was at issue, being cut down. The tree has been cut down and life is from the Judges perspective rather easier. However, with the tree gone there was nothing left to appeal about. Mr Judge finds that hard to cope with. He desperately wanted the opportunity to establish the rightness of his cause.

I suspect substantially on financial grounds, by mid year Mr Judge was conducting the litigation himself. A note sent to him from the District Court indicated that he needed to file a memorandum about costs. In the February judgment Judge Joyce had indicated that costs should follow the event, but he invited submissions on quantum.

Mr Judge wrote a series of letters to the Court in which he sought clarification about the parameters of the costs issue. He was particularly anxious that the Becca Carter report which had cost about $8000 and had been paid for by the Judges. Judge Morris indicated that at some appropriate time it would be open to the Judges to seek from the Rhodes either reimbursement or a contribution towards that outlay.

Further, in the course of the problems between the parties an application for an interim injunction was filed by the Rhodes requiring the Judges to empty their swimming pool. This relief was refused. As Mr Judge perceives the position, on that aspect he won, yet costs were merely reserved.

Now at the heart of his complaint before me is his contention that the District Court without providing any response to his enquiries determined the question of quantum of costs. The Judges have ended up in a position in which on the stand-alone discrete matter heard in February in which they lost

(and I need to remind myself which they do not think they should have lost and passionately believe that subsequent events have vindicated them but about which they are denied the ability to appeal because the tree has come down) they are required to make a contribution of $2500 towards the Rhodes' cost and $500 towards the Guest estate. They contend account has not been made for the outstanding issues in which they were successful, particularly the injunction proceeding.

On the issue of unanswered requests for definition, Mr Kohler is in no position to comment. He submits that on a comprehensive reading of the August decision, and looking at the history of the matter, what Judge Joyce decided was that all costs pre February should simply fall where they lie and that the successful litigant on the February proceedings should receive a contribution towards their costs.

The Judge was told that the costs incurred by the Rhodes were $12,000 Mr Kohler told Judge Joyce, as he has told me, that it was an open question what would actually be charged to these elderly folk. He submitted a contribution of $6000 would be appropriate in respect of the costs they had incurred across the board. The Judge determined that costs should fall where they lay on everything except the tree. He ordered the $2500 in respect of that proceeding.

Mr Judge's complaint is that he has been denied a hearing in respect of the matters in which he came out on top, and secondly, that the Judge did not have any information about costs on the tree hearing alone. Mr Judge's perception is that he has been required to pay something like $550 per hour for that four hour hearing in the District Court.

It is simplistic to restrict the focus to Court time alone. Frequently that may be but the tip of the iceberg. But Mr Kohler is forced to accept that there is no accurate material as to costs on the tree issue separate from everything else.

Clearly this unseemly wrangle (which does no credit to any of those involved) has to be brought to an end. Among the complaints which Mr Judge raises on the appeal are not getting a hearing, not getting the definition that he required, and not being given an opportunity to be heard. Those are issues which more properly arise in judicial review rather than appeal.

I told Mr Judge before he began presenting his submissions that the greatest problem he faced was summarised by Mr Kohler in his submission when he noted that the award of costs is always a discretionary matter. The one person who is in the best position to make that assessment is the Judge who has been through the hearing, That assessment I still adhere to.

But the difficulty which I apprehend is that there are substantial problems about what was encompassed within the hearing. There are the arguments as to whether the previously reserved matters were given proper weight in the adjudication.

I record that Mr Kohler submits that on the question of the engineer's report on the merits, Mr Judge should be left with that cost. He abandoned that aspect of the proceeding and should be paying. On the injunction proceeding although his client was unsuccessful Mr Kohler argues that the Rhodes were forced to take the proceedings and could have at least resisted costs against them and may well have been successful in getting further costs.

I have read the costs judgment a number of times. The only starting point figure which it records is $12,000 costs. It is plain that is the Rhodes total potential involvement for all aspects of the case. The Judge indicates what I consider a proper approach - namely, a reasonable contribution towards costs on one aspect. This is called $2500. I cannot avoid concluding that there is a co-relation between those figures. I do not ignore what Mr Kohler says about the fact that his clients are elderly and have now moved away. I have not heard or seen them. I have seen the assessment made by Judges of both the Judges and the Rhodes. I am concerned to find a way to bring this dispute to an end. To dismiss the appeal will inevitably invite another round of litigation either by an application for judicial review or by applications being made to the District Court as to whether the existing judgment does encompass all the outstanding issues from the earlier hearings.

As far as the costs to the Guest estate I have no doubt that the $500 contribution which was awarded cannot be attacked. The appeal is dismissed in respect of that. The sum is to be paid forthwith.

In respect of the balance of the proceedings I am persuaded, not without some hesitation, that the justice of the matter requires that it should be returned to the District Court for a formal rehearing on costs. It will necessarily include clear definition of the matters which are within contemplation. It must include all outstanding issues of costs which have been left reserved.

Mr Judge needs to understand that by going back he takes the real risk that the Judge may simply clarify that everything he complains of is included in the 1995 judgment, then he is likely to have to face the costs which are

involved in this additional process. There is a sufficient degree of uncertainty exposed to lead me to the conclusion that further clarification in the District Court must be provided. It seems the least unattractive of the various options which are available.

The appeal is accordingly allowed in respect of the order in favour of the Rhodes. The matter is remitted to the District Court for rehearing on that with clarification about the issues which stood reserved but which are not specifically addressed within the record of the decision.

I make it abundantly clear to both sides that I send the case back on the basis that the parties are at liberty to argue all outstanding issues of costs. That will include the quantum of costs reserved in the February judgment. There the Judge followed the normal practice of indicating that costs should follow the event but the quantum needed to be determined. What that award of costs should be is totally at large as is the question of costs which remained reserved and unresolved from the earlier involvements by Judge Morris. All those issues need to be finally determined. The possibility of costs being allowed under all or any of those headings or trade-offs between them are all to be assessed without precondition or restraint.

I make no order for costs on this appeal hearing.

J