

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CP 62/96

BETWEEN HAMILTON JOINERY
LIMITED

Plaintiff

AND (1) DIXON ALUMINIUM LIMITED
(2) L DIXON

Defendants

Hearing: 7 July 1998

Counsel: G Matenga and Mr Scott for plaintiff
NA Brodnax for defendants

Judgment: 16 July 1998

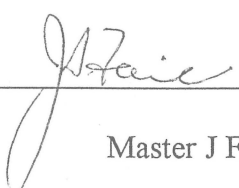
JUDGMENT OF MASTER FAIRE

Solicitors:

Preston Matenga, DX GB 21515, Hamilton for plaintiff
McKinnon & Co, DX GP 20002, Hamilton for defendants

- [1] Two applications were listed before me. The plaintiff applies to strike out the counterclaim of the first and second defendants undated, but filed in the District Court on 15 October 1996. The plaintiff also seeks security for costs from both first and second defendants.
- [2] This proceeding's history and the contentions of the parties are summarised in the judgment of Hammond J delivered on 11 February 1997 as a result of the defendants' application for an interlocutory injunction. For the purpose of these applications little need be added save for one significant matter. On 2 July 1998, both defendants filed amended statements of defence and counterclaim. This step apparently followed the termination of instructions given to previous counsel for the defendants and the instruction of new counsel.
- [3] In the case of the first defendant, with the exception of the allegation in paragraph 15(iv) of the amended statement of defence and counterclaim, the allegations are allegations in the nature of set-off. In the case of the second defendant, his statement of defence and counterclaim to the plaintiff's amended statement of claim pleads a defence of set-off and counterclaim and there is a prayer for relief in the sum of \$75,000 arising out of the central disputed area involved in this case, that is, the agreement between the parties. There is in addition, a cause of action alleging oppressive conduct, seeking remedies pursuant to the Companies Act 1993.
- [4] Mr Matenga properly conceded that the strike out application was rendered unnecessary in view of the amended statement of defence and counterclaim. As a result the direction of the case now changes substantially. On that basis, I dismiss the application for an order striking out the statement of defence and counterclaim.
- [5] The applications for security for costs are also affected by the filing of the new pleading by the defendants and by the fact that the second defendant has advised that he has received legal aid. I have mentioned that with respect to the first defendant save for the pleading in paragraph 15(iv) of the first defendant's amended statement of defence and counterclaim, the matters pleaded are, in essence, a set-off. Paragraph 15(iv) involves a relatively modest sum, a claim for \$5,100.

- [6] Mr Matenga recognised that, in light of the change, it was really not appropriate to press for an order for security because of the new pleading and the relatively modest sum specified which is in the nature of a true counterclaim.
- [7] In the case of the second defendant, whilst the amount claimed is in excess of the claim itself, it has been substantially reduced from the amount claimed in the original document which was the sum of \$441,661.76 plus interest and costs, together with other relief. In addition, there is the factor that I have mentioned that the second defendant has now been granted legal aid. The result then is, and this was conceded by Mr Matenga, that it is appropriate that the application for security for costs be dismissed. I have briefly recorded the reasons for the dismissal because they clearly have a bearing on the question of costs.
- [8] The effect of the amended pleading has, in essence, meant, so far as the first defendant is concerned, a discontinuance of its counterclaim. This was acknowledged by Miss Brodnax. If one applies the scale there would be an entitlement to an allowance in respect of the discontinuance of the counterclaim in the sum of \$350. It seems to me that, in addition, that although the application against the first defendant has been dismissed, an order for costs is justified because it is the first defendant's action in substantially changing its position by the amended pleading that has led to the result which I have outlined. The current applications have involved three appearances and the preparation of one affidavit. The actions of new solicitors and counsel for the first and second defendants has meant that further costs have been avoided and I have taken that into account.
- [9] The order that I shall direct the first defendant to pay for costs in relation to the strike out application and the application for security for costs also includes the costs flowing from the amended pleadings. To cover those matters, I order that the first defendant pay the plaintiff's costs in the sum of \$750 plus disbursements as fixed by the Registrar. In view of the fact that the second defendant is legally aided I make no order for costs against the second defendant.


Master J Faire