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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP.391/95

**LOW
PRIORITY**

BETWEEN: GRIFFITHS JOHN HAMILTON and
MARY PATRICIA HAMILTON
both of Auckland, Horticulturalists

Plaintiffs

A N D: PAPAKURA DISTRICT COUNCIL
a local authority constituted under the Local
Government Act 1974 and having its
principal place of business at Coles Crescent,
Papakura

First Defendant

A N D: WATERCARE SERVICES LIMITED
a duly incorporated company having its
registered office at Auckland and carrying on
business as a bulk water supplier

Second Defendant

Hearing: 23-27 February, 2-6, 9-13, 16-20 March 1998
Judgment: 10 September 1998

Counsel: *Matthew Casey and David Harvey* for plaintiffs
Christine Meechan and (from 5/3/98) *Kim Boreham*
for first defendant
Guy Chapman and Janie Weir for second defendant

Orders: 22 March 1999

ORDERS OF WILLIAMS J
[as to Costs, Witnesses' Expenses and Disbursements]

Solicitors:
Kensington Swan, Auckland, for plaintiffs
Bell Gully Buddle Weir, Auckland, for first defendant
Russell McVeagh McKenzie Bartleet, Auckland, for second defendant

1. All parties have agreed that the Court can determine all questions of costs, disbursements and witnesses' expenses on memoranda and without a hearing.

2. In reaching its decision as to costs, disbursements and witnesses' expenses, the Court has :
 - (a) reviewed its judgment delivered on 10 September 1998;
 - (b) read several times the memoranda from the parties dated 19 November 1998 and 22 January 1999 (plaintiffs) and 5 November 1998, 17 and 18 December 1998 (first and second defendants) including the authorities to which counsel refer;
 - (c) the authorities collected in *McGechan on Procedure* as to costs (paras HR46.05 p3-67 and 46.07 p3-69).

3. Factors arising out of counsel's memoranda particularly taken into account include :
 - (a) the history of the claim up to hearing, noting that costs orders have been made in relation to a number of interlocutory applications;

- (b) the duration of the hearing of 20 hearing days (and in that regard the Court notes that Mr Chapman is right in saying that the substantive hearing concluded on 20 March 1998);
 - (c) the complexity of the claim, particularly the factual complexity. It was clearly a major claim for all parties and one where the parties' respective views were supported by extensive expert evidence. In essence, the essential conflict was between two theories (or clutches of theories) each backed by expert evidence and all of which required careful evaluation. Neither the claims nor the defences could be characterised as misconceived or groundless. Whilst there may have been some aspects of the defence evidence which turned out to be of lesser importance at the hearing, the Court take the view that it is overstating the case to say that the defendants adopted a "Rolls Royce" approach to the claim;
 - (d) the amount in issue, \$746,291, and the fact that it was reduced by \$100,000 to that figure only at the commencement of the hearing.
4. Attempts at settlement. The first defendant's *Calderbank* matter appears to have been a reasonable first step in the settlement process. The Court accepts the plaintiffs' submissions that the second defendant's settlement proposals were never likely to be accepted. Factors outside the usual limits of litigation appear to have influenced the parties. The Court approaches the question of costs on the basis that no realistic attempts were made to settle the claim.

5. The scale, even though it is well-recognised that the scale is now hopelessly out of date.
6. The actual costs incurred by the defendants, both on a solicitor-and-client basis and for their experts' fees charged. The Court notes the plaintiffs' comments that the amount of the defendants' costs and experts' fees exceeds the amount of the claim.
7. The plaintiffs' ability to pay and the amount of the bonds totalling \$50,000 furnished by way of security for costs.
8. The desirability of ensuring that plaintiffs are not deterred from exercising their rights to litigate by the prospect of high costs awards in the event of their being unsuccessful. The Court notes the authorities cited by Mr Casey to the effect that even successful parties may not receive costs or the costs awarded may be on a more modest scale than in comparable cases in instances such as that or where losing parties are impecunious.
9. As demonstrated by the authorities, any award for costs should be a reasonable contribution to those incurred but that only a fraction of costs incurred should be awarded, not full indemnity.

10. The Court has read the comments by counsel as to publicity concerning this claim at or before the litigation was launched and surrounding the Waikato River pipeline application, together with the submission that the defendants have utilised the Court's decision in justification of their position in other venues. The Court does not have the material before it to make any realistic assessment of those matters and accordingly declines to take them into account.

11. Having regard to all those factors, the Court has reached the view that the appropriate sum for the plaintiffs to pay the defendants globally as a contribution to their costs is the sum of \$165,000 as follows :
 - (a) The sum includes the \$50,000 provided by the plaintiffs as security for costs.
 - (b) That sum is for the whole of the litigation excluding orders for costs made at earlier interlocutory stages. If those judgments remain unpaid the leave of the Court is granted to set off the same pursuant to R536.
 - (c) The sum is ordered on the basis that orders for costs do not incur GST.
 - (d) The sum is apportioned between the defendants in the proportion of one-third to the first defendant and two-thirds to the second defendant.

12. As to disbursements, doing the best that it can on the material available, the Court awards disbursements as follows :

(a) First Defendant

The Court allows the First Defendant its disbursements as appearing in Schedule A to counsel's memorandum of 5 November 1998. The disbursements shown in Schedule B.1 - B.7 total approximately \$4,000 excluding the G A B Robbins account shown as a disbursement on B 4. The Court does not have a great amount of supporting material in relation to these disbursements but most seem reasonable and the Court allows Papakura District Council \$3,000 for disbursements, the discount being allowed against the possibility that some of the disbursements may not have been directly incurred in relation to this litigation.

(b) Second Defendant

The Court again has little material on which to base its allowance for the Second Defendant's disbursements. But, assuming that the differences between the invoice totals and the fees shown in Schedule D to counsel's memorandum of 5 November 1998, represents disbursements, the Court allows the Second Defendant \$25,000 for disbursements but reserves leave to the Plaintiffs and the Second Defendant to apply further in that regard.

13. Turning to the question of witnesses' expenses, it is clear that, particularly in the case of the second defendant, the services of experts have been utilised in helping prepare the defendants' cases and in particular by assisting counsel to prepare the cross-examination of the plaintiffs' experts. But, that notwithstanding, the Court's only power is to award their expenses as witnesses although some compensation can be permitted in the preparation allowed to them in that capacity for their assistance in preparing the case and because the solicitors' costs are thereby lessened. The amounts allowed are as follows :

- (1) The sole expert for whom Papakura District seeks reimbursement is Mr Crowe. There is some weight in the plaintiffs' submission that, given the co-operation of the defendants in splitting the defence, the evidence of Messrs Crowe and Lucas overlapped to a degree. The cross-claim by Papakura District against Watercare is of limited relevance in that regard. The Court allows Papakura District \$10,000 by way of witness's expenses for Mr Crowe. The Court is not prepared to allow Papakura District's expert witness's fees for Mr Bird, it being coincidental that he left the employment of the first defendant by the time of the hearing: No doubt an arrangement was put in place between Papakura District and Mr Bird covering ongoing matters such as this which required his attention after he left their employment.

(2) So far as the second defendant is concerned :

- (a) The Court accepts that Dr Johnson was Watercare's principal expert and that his presence in Court throughout most of the hearing was not unreasonable in those circumstances. But there is some force in the plaintiffs' submission in reply that the amount of time claimed for Dr Johnson, particularly in the preparatory stages of the hearing seems excessive. The Court allows Watercare \$40,000 towards Dr Johnson's witnesses' expenses, disbursements and GST;
- (b) Whilst it now appears that Dr Graham was regarded by Watercare as an important member of the "team", in the Court's view, whilst it was not unreasonable for him to attend parts of the presentation of the plaintiffs' case touching on the matters on which he was to give evidence, the amount claimed for him seems excessive having regard to his participation as a witness. The Court allows Watercare \$15,000 for Dr Graham's witness's expenses, disbursements and GST;
- (c) Dr Rutherford's evidence was of critical importance at the hearing. It now appears that there is no substance in the plaintiffs' submission that Watercare prevented Dr Rutherford speaking with

Dr Wilcock about the claim. Dr Rutherford (and a Dr Bell) apparently provided their report to Watercare pursuant to a fixed price contract for \$6375 plus Dr Rutherford's attendance at Court. The Court allows Watercare \$7,500 or Dr Rutherford's witnesses' expenses, disbursements and GST;

- (d) Dr Hills' analysis was also of importance in the hearing and the hourly rate appears reasonable. The Court allows Watercare \$1,500 for Dr Hills' witnesses' expenses, disbursements and GST;
- (e) As far as Dr Rahman is concerned the plaintiffs are critical that a considerable proportion of the AgResearch claim for \$85,190 deals with Boron trials which formed almost no part of the hearing. There is force in that submission. The Court allows Watercare \$37,500 against the contract prices of \$26,000 and \$29,500 for the two Triclopyr and Picloram trials and \$2,500 against \$3,839 for Dr Rahman's appearance in Court;
- (f) Dr Holland's evidence was also of importance to Watercare at the hearing. The plaintiffs are not critical of his account. The Court allows Watercare \$4,000 against Dr Holland's claim for \$5,343 including for his appearance in Court;

(g) Watercare claims \$59,190 as an allowance towards Mr Lucas's fees. This seems excessive given the level of Mr Lucas's participation in the hearing although there is some weight in the fact that the Court's consideration of the evidence as to quantum was reduced as a result of its finding on liability. As to time given the paucity of the description in the fee rates, it would seem there may be some duplication. In the Court's view the appropriate allowance for Mr Lucas's evidence is \$15,000 against a claim for \$59,190;

(h) The Court is not prepared to accept that Mr Sharma was an expert for the purposes of the hearing nor any other of the Watercare employees.

14. The Court considers it desirable that the plaintiffs have a reasonable opportunity to meet the order for costs against them before enforcement proceedings can be issued. Therefore, pursuant to R.547(2), the Court directs that no execution process be issued by either defendant against the plaintiffs for enforcement of the order for costs, disbursements and witnesses' expenses within 9 months from the date of this order. Whilst the Court cannot order a stay of execution without an application, no doubt any Court dealing with an application by the plaintiffs under

R.565 would take this order into account, similarly under the Insolvency Act 1968 s 19(1)(d).

15. The delay in the delivery of this Minute has been caused by the file being mislocated.

A handwritten signature in cursive script, appearing to read 'Williams J.', written in dark ink. The signature is fluid and somewhat stylized, with a prominent initial 'W'.

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WILLIAMS J.