IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV 2008-470-192

BETWEEN	HUNTER GRAIN LIMITED Plaintiff
AND	RICHARD WILLIAM PRICE First Defendant
AND	PRICE COMMODITIES LIMITED Second Defendant

Hearing: On the papers

Judgment: 22 December 2008

COSTS JUDGMENT OF ALLAN J

In accordance with r 540(4) I direct that the Registrar endorse this judgment with the delivery time of 3.30 pm on Monday 22 December 2008

Solicitors:
Izard Weston, john.burton@izardweston.co.nz PO Box 5348, Wellington
Iain Thorpe, PO Box 10048, Wellington iain@thorpe.co.nz
Simpson Aspen Law, PO Box 13537, Tauranga
H Fulton, PO Box 5577, Wellesley St, Auckland fulton.barrister@xtra.co.nz

[1] On 25 July 2008, I delivered a judgment in respect of a number of interlocutory applications in this proceeding.

[2] The plaintiff (Hunter Grain) is a trader in grains and stock food products. It is associated with Hunter Grain Pty Ltd, an Australian company, which is a significant participant in the Australian market for those products. There are common directors.

[3] The first defendant (Mr Price) was formerly the managing director of the plaintiff. The second defendant is a company which was intended to serve as the vehicle for a business set up by Mr Price, broadly in competition with Hunter Grain.

[4] Hunter Grain believes that certain steps taken by Mr Price during the latter stages of his directorship, and at the time of his departure, constitute breaches of duty owed by him to Hunter Grain. There are two particular complaints:

a) that Mr Price engaged in negotiations while still a director of Hunter Grain with Toepfer International-Asia Pte Ltd (Toepfer), a major international trader in grain and stock food commodities, in order to secure for himself the New Zealand agency for that company; the plaintiff says that in doing so Mr Price appropriated to himself a corporate opportunity which he ought to have disclosed to Hunter Grain; and

b) that at the time of his departure from Hunter Grain, he took with him two computers upon which were stored a significant number of confidential documents belonging to Hunter Grain. Some of those documents are not otherwise available to Hunter Grain. To date not all of that confidential information has been returned to the company. Mr Price accepts that he caused a hard drive containing much of the material in dispute to be destroyed.

[5] Hunter Grain's initial concerns about Mr Price related to the removal of confidential information. That was the basis upon which it sought Anton Piller and related orders from this Court. Such orders were made on 17 March 2008 and executed the following day. Hunter Grain only subsequently became aware in the course of execution of the Anton Piller orders and their aftermath, of Mr Price's allegedly improper negotiations with Toepfer.

[6] The defendants applied to discharge the orders made on 17 March 2008. Mr Fulton argued that as matters have developed there has proved to be no basis for their continuance.

[7] For its part, Hunter Grain further applied (by notices of application dated 4 and 23 April 2008 respectively) for the following orders (as summarised in Mr Thorpe's synopsis of argument):

> 7.1 To vary the Anton Piller and related orders (4 April 2008) requiring the defendants to:
>
> 1.1 make affidavits of documents (4 April 2008); and
>
> 1.2 answer interrogatories; and
>
> 7.2 for an injunction (23 April 2008) from dealing with or soliciting business from certain entities;
>
> 7.3 for sanctions (debarring them from defending the proceedings and for an award of indemnity costs) to be imposed on the first and second defendants for contempt arising from breach of the Anton Piller and related orders:
>
> 7.4 for the release to it by the independent solicitors of certain information belonging to the plaintiff; and
>
> 7.5 for orders relating to the inspection of certain computer records and allegedly privileged information.

[8] At [124] of my judgment I summarised the outcome in the following manner:

> [124] In summary, the result of the application before the Court is:
>
> There is an interim injunction restraining the first and second defendants from dealing with, trading with, or directly or indirectly soliciting business from Toepfer International GMBH or related entities (including Toepfer International-Asia Pty Ltd) until 1 December 2008. [81]

> The defendants' application to discharge the Anton Piller and related orders is refused. [92]
>
> Directions are given in terms of counsels' memorandum of 15 July 2008. [95]
>
> The application raising issues as to privilege is adjourned. [98]
>
> The first defendant is ordered to file an affidavit as sought in paragraph A of the plaintiff's application of 4 April 2008 within five working days of the date of this judgment. [106]
>
> The plaintiff's application for an order holding the first defendant in contempt is refused. [123]

[9] I reserved questions of costs but required counsel to file written submissions, which have now been received. I indicated I would deal with the question of costs on the papers unless either counsel sought a further oral hearing in respect of costs. No such request has been made.

[10] This present judgment deals with costs issue in respect of the applications dealt with in the earlier judgment, and in respect of the plaintiff's initial ex parte application for an Anton Piller order.

[11] Counsel have filed extensive submissions, the most detailed of which are Mr Thorpe's submissions in reply, accompanied by a lengthy affidavit by the plaintiff's chief executive. Mr Thorpe's submissions contain no figures. His primary aim is to secure an order from the Court directing that the plaintiff be entitled to indemnity costs, or in the alternative, costs calculated in accordance with category 2C. He has chosen to leave the detailed calculations for later consideration.

[12] Mr Fulton for the defendants submits that this is a case for the award of category 2B costs in the ordinary way.

Indemnity costs

[13] The plaintiffs rely on r 48C(4)(f) which empowers the Court to order a party to pay indemnity costs if a reason exists which justifies the Court making an order for indemnity costs, despite the principle that the determination of costs should be

predictable and expeditious. The long standing approach to party and party costs is that costs will not be awarded to indemnify successful litigants for their actual solicitor and client costs, except in rare cases generally entailing breach of confidence or flagrant misconduct: *Prebble v Huata* [2005] NZSC 18 at [6].

[14] With respect to the ex parte application for, and execution of, the Anton Piller order itself, Mr Thorpe argues that indemnity costs ought to be awarded because:

a) The order arose by reason of the first defendant's admitted wrong-doing in converting the plaintiff's hard drive by removing it from the plaintiff and later destroying it;

b) The first defendant knew that his actions were wrong and without authority, but pursued them in contumelious disregard of the plaintiff's rights;

c) The first defendant's claim that he understood that the information stored on the destroyed hard drive would be backed up on the plaintiff's other computers is not credible, given the fact that the first defendant conducted the plaintiff's business without significant reference to anyone else;

d) The appropriate inference is the first defendant paid no attention to his fiduciary obligations as a director of the plaintiff;

e) The first defendant cannot be shown to have acted in good faith;

f) It is a proper inference that the first defendant knew he was gaining an advantage over the plaintiff by removing from the plaintiff the confidential business information that was stored on the hard drive;

g) The first defendant and his solicitors unreasonably delayed their responses to the plaintiff's requests for information and for co-operation in retrieving the plaintiff's information stored on the hard drive;

h) By reason of the foregoing, it is a proper inference that the first defendant sought to obtain a tactical advantage: that is, the defendants' delays subsequent to the execution of the Anton Piller order were not accidental; there was an ulterior motive for them: *Bradbury v Westpac Banking Corporation* HC AK CIV 2006-404-1328 23 May 2008 [12].

[15] With respect to the costs of the inter partes application, Mr Thorpe argues:

a) The defendants' application to discharge the Anton Piller order had little prospect of success and ought not to have been made, but gave the defendants a temporary, but significant, tactical business advantage;

b) The defendants ought to have agreed to return the plaintiff's business records well prior to the hearing of the applications in July;

c) Much of the work in respect of the injunction was necessary in any event because it was inter-related with the retention of documents issue. Mr Thorpe submits that the applications should be considered "in the round" because they are heavily inter-dependent and the plaintiff has substantially succeeded on the principle issues for determination.

[16] Mr Thorpe supports his argument for indemnity costs by reference to material which has become known to the plaintiff following the July hearing. He says there have been on-going and unnecessary delays in resolving matters of detail in respect of the return of the plaintiff's documents and there now appears to be documentary evidence to suggest that Mr Price was negotiating with Toepfer as early as June 2007, and not September as he had said in evidence. He says that Mr Stephen Swaps' involvement in Mr Price's unlawful activities appears to have been greater than was earlier conceded, and that Mr Price was, contrary to his earlier evidence, involved in a purchase in December 2007 of a consignment from Toepfer.

[17] The process of identifying the documents which ought to be returned to the plaintiff is on-going. Questions of costs relating to that process ought to be deferred until it is complete. I am not prepared to have regard to the course of events following the July hearing for the purposes, as Mr Thorpe suggests, of finding further support for an alleged ulterior motive on the defendants' part. Nor would it be proper to take into account claims that Mr Price had not been candid, or indeed honest, in his evidence, in circumstances where he has had no opportunity on oath to respond to the claims recently made by Mr Thorpe in his costs submissions.

[18] Mr Fulton's response to Mr Thorpe's wide-ranging and extremely detailed submissions, is to submit that the plaintiff has not made out a case for indemnity costs, and that the necessary element of culpability arising out of the defendants' conduct of the proceedings, is missing here: *Rio Beverages Ltd v Frucor Beverages* (2002) 16 PRNZ 547 at [19] and *Fifty-Seven Willis St Ltd v Mortgage Holdings Ltd* (2005) 17 PRNZ 841 at [5].

[19] It is made clear in *Prebble v Huata* that an award of indemnity costs is rarely made and then only in very special circumstances.

[20] I am satisfied that in this case a partial award of indemnity costs is appropriate. But this is not a case akin to *Hoole v Darby* HC AK CIV 2006-404-5235 30 March 2007, to which Mr Thorpe referred. There, after a day long costs argument involving oral evidence, Venning J found a defendant to have flagrantly disregarded existing Court orders, and to have actively obstructed the attempted execution of those orders. That is not this case.

[21] Nevertheless, it is not really in dispute that when Mr Price left the plaintiff's employment and relinquished his directorship, he took with him two computers containing confidential information that belonged to the plaintiff. One hard drive was destroyed at his direction, but with expert assistance and by reason of the grant of an Anton Piller order, the plaintiff has been able to retrieve from the remaining computer a very significant number of its own documents. Mr Price says he did not use the documents concerned. That may be so, but on the evidence available to the Court he had no proper basis for removing them. His explanation, that they were

contained in the same hard drive as certain personal information belonging to him lacks substance. It was incumbent upon him to make arrangements to ensure that the plaintiff retained access to its own confidential information.

[22] It is a proper inference too, that Mr Price must have known that at least some of the information he had on his computer was not otherwise available to the plaintiff. The unchallenged evidence is that much of his work was done without reference to other officers or staff of the plaintiff. The evidence of Mr Wynn-Williams establishes that there was no backed up version of a great many of the documents Mr Price had on his computer, and Mr Price must have known that.

[23] In those circumstances the plaintiff had every justification for the making of an Anton Piller order, and for defending the defendants' application to discharge it. Mr Price's actions amounted to a breach of his fiduciary obligations to the plaintiff, and an award of indemnity costs is in order in respect of both the ex parte application for the order and its execution, and the defence by the plaintiff of the application to discharge it: *Lines v Wakefield Buildings Ltd* HC NAP CIV 2005-441-825 23 August 2006 at [35].

[24] The plaintiff is also entitled to indemnity costs in respect of its successful interim injunction application. The evidence demonstrated a breach of certain basic fiduciary obligations owed by Mr Price to the plaintiff, to the point at which I considered it appropriate to restrain the defendants from taking advantage of their connection with Toepfer for a period of about four months. Breaches of that sort constitute an exception to the ordinary rules in respect of costs.

[25] The position is different however, with respect to the remaining applications. The plaintiff's contempt application failed. I considered that the plaintiff had not succeeded in establishing the claimed contempt to the high level of certainty required. Nevertheless, Mr Price's activities on the day of execution of the Anton Piller order leave much to be desired. To a significant extent he brought the application upon himself. I direct that there be no order as to the costs of and incidental to that application.

[26] There will be an order that the defendants pay to the plaintiff costs in accordance with category 2B in respect of the application in relation to which I made an order at [106] of my earlier judgment.

[27] Mr Thorpe's submissions do not refer to the quantum of the orders sought. The plaintiff is entitled only to such indemnity costs as are reasonable in all the circumstances. If counsel are unable to agree, then leave is reserved to either party to refer the issue of quantum to the Court for further resolution.

[28] I also reserve general leave in case I have overlooked any aspect of the plaintiff's application for costs.

[29] The plaintiff is entitled to the costs of and incidental to the costs argument, in accordance with category 2B.

C J Allan J