IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2008-485-2020

IN THE MATTER OF	Section 3 of the Declaratory Judgments Act 1908
AND IN THE MATTER OF	an application for declarations as to the construction of certain leases entered into by the Crown and Pastoral Lessees
BETWEEN	THE NEW ZEALAND FISH AND GAME COUNCIL Plaintiff
AND	HER MAJESTY'S ATTORNEY-GENERAL First Defendant
AND	C D MOUAT, D A AUBREY, A W SIMPSON AND J A WALLIS Second Defendants

Hearing: 2 October 2009 (On Papers)

Counsel: F B Barton and J C McLeod for Plaintiff
M T Parker for First Respondent
N R W Davidson QC, B E Ross and C D Mouat for Second Respondent

Judgment: 2 October 2009

JUDGMENT OF SIMON FRANCE J
(Costs)

Introduction

[1] This ruling deals with costs disputes.

[2] The plaintiff and first defendant were the initial parties. The second defendant initially was not involved but later joined the proceeding on an unopposed basis. The initial parties agreed on a category 2 classification.

[3] The case concerned pastoral leases entered into between the Crown and the second defendant. Both parties to the lease agreed it was a true lease conferring exclusive possession of the land in issue. The plaintiff disagreed. It is a body charged with representing anglers and hunters. The land to which the pastoral leases apply is regarded as important in itself and as providing access to desirable sites.

The first defendant

[4] The first defendant accepts a 2B classification. However, it seeks an uplift for the preparation allowance. The scale provides for two days, whether the category is 2B or 2C. Mr Parker notes the extensive nature of the authorities relied on by the plaintiff and submits the allowance, in this case, is inadequate. The work required to prepare for the hearing cannot be captured by reference to the amount of hearing time required. It is also noted that the case was a test case brought by the plaintiff in circumstances where the parties to the lease were not in dispute, and a legal opinion supporting the defendants' position had been provided to the plaintiff.

Second defendant

[5] The second defendant seeks a starting base of 2C. It then argues for an uplift based on:

a) the late abandonment (at the hearing) of one of the two declarations which the plaintiff had initially sought;

b) the fact that the case was of wider public interest to persons other than the parties to the lease;

c) the test case nature of the proceedings;

d) the fact that, in the second defendant's opinion, the case concerned access rights in circumstances where it could not be shown that reasonable access had ever been denied.

The plaintiff

[6] The plaintiff seeks a standard 2B costs award.

[7] It disputes it was a test case. A paper had been published by respected academics which advance the proposition that the leases did not confer exclusive possession. Debate was generated, and it was proper to seek clarification.

[8] The plaintiff submits it was reasonable to rely, as it did, on the High Court of Australia decisions. In making this point, I observe that the plaintiff has perhaps misunderstood a submission made by Mr Parker. The first defendant was not submitting reliance on the cases was unreasonable; just that they are very long cases where there are multiple opinions and considerable effort is required to get on top of them.

[9] Concerning the abandonment of the second declaration the plaintiff submits that this was a reasonable response taken once the defendant's submissions were received and their correctness on the point accepted by the plaintiff. It is not a basis for increasing costs.

[10] If increased costs are justified it is submitted an uplift in preparation time from two days to 7.5 days as the first defendant seeks is unjustified.

[11] In relation to the further points made by the second defendant, it is submitted a blanket uplift from a 2C base is not supportable. If a 2C base were appropriate, which is denied, the uplift should only attach to certain steps. It is disputed that the abandoned declaration was without merit, and the plaintiff queries the importance to persons outside the parties.

Decision

[12] I do not consider that abandoning the second declaration of itself justifies an increase. However the parties needed to prepare their argument on it, and its abandonment undoubtedly reduced the hearing time, which is of course the measuring stick for costs. In these respects it is a relevant factor when assessing the merits of adjustments to the scale.

[13] The parties did not specify the band; only that it was category 2. Before addressing any issues of increase, I need to settle the band. I consider that "C" is appropriate for any substantive step as opposed to the administrative steps such as case management conferences. That would mean steps 2, 8 and 9 should be calculated on a 2C basis. I make this ruling because I accept the general thrust of Mr Parker's submission, namely that the nature of the claim and the authorities on which it was based required research, analysis and time well in excess of the norm.

[14] I turn to increased costs. I focus first on Rule 14.6(3)(a) which involves an analysis of whether the time required for a particular step would substantially exceed the 2C rating. The issue is step 8, preparation time, bearing in mind I have set a 2C rating for step 2, which provides for some of the work that might come within step 8.

[15] I consider there should be an increase. The reasons are essentially those that commended a 2C assessment. Further, given that the actual hearing time reflects, in part, the abandonment of the second declaration at the hearing itself, I consider a one day hearing time does not capture the reality of this case and the preparation required. For step 8, bearing in mind the costs principles, I am of the view that four days is appropriate. That is of course an increase of more than the 50% rule of thumb, but I am applying it only to one step and it is in any event a guideline not a rule.

[16] Therefore under R 14.6.3(a), I increase the allowance for step 8 from two days to four days.

[17] I do not consider anything arises under R 14.6.3(b) or (c). The only issue concerning the conduct of the case is the decision at the hearing to abandon the other declaration. That was a responsible decision which recognised the merit of the other parties' submissions. It is to be encouraged. It did have an impact on preparation and hearing time but I have reflected that in the step 8 adjustment.

[18] The proceedings were of general importance to people in that hunters and anglers are not the only New Zealanders who would advocate for broader public access to land. However the defendants were parties because of their particular status as parties to the lease. I do not see (c) as applicable.

[19] Rule 14.6.3(d) is the final basis. Here I consider there is a unique factor that merits some increased costs. The reality is that the case was about the meaning of a lease. The parties to the lease were in complete agreement as to its meaning. Litigation about it was thrust on them but a body not connected to the lease. The parties to the lease had sought a legal opinion from the Crown Law Office which confirmed their understanding, and that opinion was made available to the plaintiff. Although its case was brought in good faith, it was nevertheless wrong and the position of the only two parties to their own lease was confirmed as correct.

[20] I temper the increase by recognition of the role the plaintiff fulfils, and the fact that there was objective support for its position in terms of the research article and, arguably, the High Court of Australia cases. There is dispute between the plaintiff and second defendant about the scope of the statutory role recognised for the plaintiff. I do not consider I need to address it more than has been done. Whatever the exact scope, it is a factor but no more than that.

[21] I increase the figure produced by the earlier adjustments by 20% to reflect the characteristic discussed at paragraph [19]. I do not see the actualities of current access, no doubt a disputed matter even if not addressed in evidence, as being relevant to the costs decision. To the extent this was a test case, that factor is reflected in the 20% increase. To the extent it is a novel case, that factor is sufficiently reflected in the adjustments to the steps.

Conclusion

[22] I allocate a 2C rating to steps 2, 8 and 9, and a 2B rating to other steps.

[23] I adjust the allowance of step 8 from two days to four days.

[24] Finally, I increase the overall costs figure by 15%.

[25] Those adjustments will produce costs payments lesser than the actual costs, and in the case of the second defendant by a wide margin. However, the authorities are clear on the method by which costs are to be fixed, and adjusted, and the ruling reflects those. The final figure may result in a larger adjustment than that sought by the first defendant. However, it is of course under no obligation to take more.

[26] These points were not in issue but for avoidance of doubt I confirm the second defendant is entitled to second counsel, and each defendant is entitled to separate costs awards.

[27] Finally I note that before issuing the judgment I received a further memorandum from the second defendant which was considered but produced no change.

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Simon France J

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