IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2008-404-4602

BETWEEN	SEALINK TRAVEL GROUP NEW ZEALAND Plaintiff
AND	WAIHEKE SHIPPING LIMITED Defendant

Judgment: 2 June 2009 at 11 am

COSTS JUDGMENT OF ASSOCIATE JUDGE H SARGISSON

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*This judgment was delivered by Associate Judge Sargisson on **2 June 2009** at **11 am** pursuant to Rule 11.5 of the High Court Rules*

Registrar/Deputy Registrar

Date .....

Solicitors:
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[1] There is an outstanding issue of costs on the plaintiff's discontinuance of this proceeding. Counsel have filed memoranda and the issue of costs is to be dealt with on the basis of the memoranda.

[2] Waiheke Shipping Ltd, the defendant, seeks increased costs under High Court Rule 14.6(3)(b). That rule states:

> The court may order a party to pay increased costs if –
>
> …
>
> (b) The party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in it by –
>
> …
>
> (ii) Taking or pursuing an unnecessary step or an argument that that lacks merit;
>
> …

Background

[3] In July 2008 the plaintiff, Sealink Travel Group NZ Ltd, filed a statement of claim that raised two causes of action against Waiheke Shipping, the first being in trespass, and the second alleging breach of contract.

[4] An interim injunction hearing was held on 12 August 2008. At the hearing Sealink ultimately relied solely on the cause of action based on the claim in trespass. Harrison J found the claim was unarguable. His Honour awarded costs on a 2B basis to Waiheke Shipping for the steps directly associated with the interim junction application. He also directed that if Sealink intended to pursue the claim for breach of contract it was to file an amended statement of claim joining the Auckland Regional Transport Authority (ARTA) as the first defendant.

[5] Following the hearing, Waiheke Shipping served a schedule of costs on Sealink, which sought 2B costs on all steps relating to the injunction application and hearing as allowed in schedule 3 to the High Court Rules. The schedule also

included costs for commencement of the defence. This last step is allowed in item 2 of schedule 3 to the High Court Rules and includes receiving instructions, researching facts and the law, and preparing, filing and serving the statement of defence.

[6] Counsel subsequently agreed that Waiheke Shipping was not yet entitled to costs for item 2 and that those costs would fall for determination when the substantive proceeding was resolved. Waiheke Shipping then served an amended schedule omitting the claim for those costs, and Sealink paid the amount sought in the amended schedule.

[7] The case was placed in my list for a case management conference, which was held on 8 November 2008. Directions were made by consent including directions that Sealink file and serve an amended statement of claim by 18 November 2008, and that there be a further conference on 11 March 2009. Essentially the further conference was for the purpose of reviewing compliance and making pre-trial directions.

[8] Sealink did not however file an amended statement of claim, and at the conference on 11 March counsel advised it would be discontinuing the proceeding. Counsel for Waiheke Shipping argued it should have indemnity costs. A discussion about costs issues followed and directions were made for the filing of memoranda as to costs when it became clear there was no consensus.

[9] On 16 March 2009 Sealink filed a notice of discontinuance of its proceeding against Waiheke Shipping. Costs memoranda followed.

[10] Waiheke Shipping now seeks increased costs for the steps not already covered by the costs award on the interim injunction application. The particular steps for which costs are sought are:

a) Commencement of defence;

b) Filing memoranda for the case management conferences on 8 November 2008 and 11 March 2008;

c) Appearances at the two case management conferences.

[11] With the exception of the two case management conferences, there is no dispute that Waiheke Shipping is entitled to a cost award in accordance with the presumption in r 15.23. It states:

> **Costs**
>
> Unless the defendant otherwise agrees or the court otherwise orders, a plaintiff who discontinues a proceeding against a defendant must pay costs to the defendant of and incidental to the proceeding up to and including the discontinuance.

Issue for Determination

[12] Ordinarily a costs award in a case of this kind would be made on a 2B basis. However, as Waiheke Shipping claims increased costs, the central issue is whether increased costs, as claimed, are justified. Sealink also raises for determination whether there should be any award at all for the costs associated with the conferences.

Discussion

[13] Sealink's contention that there should be no award for costs associated with the two conferences can be disposed of quite readily. There is no reason not to allow costs for the conferences. They were necessary to deal with Sealink's failure to comply with the direction made in August 2008 that it was to file an amended statement of claim if it intended to continue, and to make timetable directions. It was not until the conference in March that counsel for Sealink advised that the proceeding would be discontinued.

[14] That brings me to the question as to whether there is justification for increased costs.

[15] Waiheke Shipping has the onus of demonstrating that increased costs are justified: see *Radfords Ltd v Advertising Works New Zealand Ltd, t/a Ogilvy Advertising Works* 26/4/06, Associate Judge Faire, HC Auckland CIV-2006-404-325, at paragraphs 21-22.

[16] The correct approach to the question as to whether there should be increased costs is set out in McGechan HR 14.6.02.

> HR14.6.02 Increased costs
>
> (1) The correct approach
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> The court uplifts from scale, it is not a question of awarding a percentage of actual costs. In Holdfast NZ Ltd v Selleys Pty Ltd(2005) 17 PRNZ 897 the Court of Appeal provided this guidance on the correct approach to an award of increased costs:
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> - Step 1: categories the proceeding under r 14.3.
> - Step 2: work out a reasonable time for each step in the proceeding under r 14.5.
> - Step 3: as part of the step 2 exercise a party can, under r 14.6(3)(a), apply for extra time for a particular step.
> - Step 4: the applicant for costs should step back and look at the costs award it could be entitled to at this point. If it considers it can argue for additional costs under r 14.6(3)(b) it should do so, but any increase above 50% on the costs produced by steps 1 and 2 is unlikely, given that the daily recovery rate is two-thirds of the daily rate considered reasonable for the particular proceeding.

[17] There is no dispute that the correct costs category to this proceeding is category 2. Nor is there any dispute that a reasonable time for each step in the proceeding would ordinarily be calculated on a Band B basis. Waiheke Shipping has not argued that an extra time allowance be made for any of the steps in question under Band C.

[18] Essentially, it argues that 2B costs should be increased because Sealink pursued the two causes of action when they clearly lacked merit from the outset, and that it failed to withdraw its remaining claim in contract after it got a clear direction to either withdraw it or amend it.

[19] I accept that Sealink persisted with the remaining cause of action well after it should have abandoned or amended it. On that basis I accept that Sealink has made out a case for an increase in costs in respect of the case management conferences that took place after the direction was made at the interim injunction hearing.

[20] However I am not satisfied that it has made out a case for increased costs on the commencement of the defence. My reasons follow.

[21] In the case of the trespass cause of action, counsel for Waiheke Shipping submitted Sealink should never have advanced or included the cause of action in its statement of claim. She pointed out Harrison J found Sealink had no arguable case. However:

a) It is implicit in His Honour's order as to costs that (notwithstanding that he found that Sealink had no arguable case in trespass, and therefore that the trespass cause of action lacked merit), he was not persuaded that the approach taken by Waiheke Shipping on the trespass cause of action was sufficiently serious to warrant an award of increased costs in the context of the injunction application;

b) I do not think it appropriate to exercise the Court's discretion to award costs in respect of prior steps taken in respect of the trespass cause of action on an inconsistent basis. If the trespass cause of action did not warrant increased costs in the context of the injunction application notwithstanding that the cause of action lacked merit, then the prior step of commencing a claim that raised the trespass cause of action cannot be said to be sufficiently serious to justify the exercise of the discretion to allow increased costs. If Sealink's decision to commence a claim based on the trespass cause of action warranted an increased order of costs, then that question should have been raised in the context of the hearing when the issue of the merit of the proceeding was specifically addressed;

c) Accordingly, I do not accept there should be costs on an increased basis for the trespass cause of action.

[22] In the case of the second cause of action, counsel for Waiheke Shipping submitted that the contract that was allegedly breached was in reality a contract between Sealink and the ARTA, and not a contract between Sealink and Waiheke Shipping. She submitted therefore that the claim against Waiheke Shipping was always devoid of merit and that Sealink knew it was. She raised various factual matters in support, including that:

a) Prior to the commencement of the proceedings, Sealink's solicitors sent a letter to ARTA acknowledging the contractual position and acknowledging that the correct defendant should have been ARTA and not Waiheke Shipping*;*

b) In a minute issued by Priestly J following the first chambers conference in July 2008 His Honour indicated that the contract claim was problematic given that it concerned a contract to which Waiheke Shipping was not a party. And at that time he invited Sealink to reconsider its position*;*

c) At the interim injunction hearing Sealink did not present any evidence that showed Waiheke Shipping was aware of the contract or agreed to be bound by it or that it acquiesced to its terms but nor did it withdraw the second cause of action before the interim injunction hearing. The result was that Waiheke Shipping was faced to address it in full at that hearing*;*

d) At the interim injunction hearing Sealink conceded that it should have joined ARTA to the proceedings, but that it did not do so because of "commercial reasons".

[23] It is clear that at the hearing of the interim injunction application, a significant part of the hearing was taken up with the contract cause of action and

Waiheke Shipping was put to the trouble of addressing that cause of action only to find that Sealink did not pursue it. The Court was clearly unimpressed and gave a clear direction that indicated that the cause of action was to be withdrawn or amended. It is clear however that Sealink's unwillingness to abandon the contract cause of action at that time was not considered so serious as to warrant increased costs for up to that point. In these circumstances, where the Court was seized of the matters now relied on, I do not consider it appropriate to adopt an approach to costs for the commencement of Waiheke Shipping's defence that is inconsistent to the approach that was adopted by the Court on that occasion. My reasons are essentially the same as relating to the defence to the trespass cause of action.

[24] However as I have noted, steps taken after that date are quite a different matter.

[25] That brings me back to the question of the amount of the increase that should be allowed for the two case management conferences and the memoranda filed in support. Sealink has not provided evidence of the actual costs that it has incurred. In these circumstances, any order for increased costs must be subject to a condition that the costs awarded do not exceed actual costs. Subject to that qualification, I am satisfied that an uplift of 50% is appropriate.

Result

[26] There will be an order for costs against Waiheke Shipping on the following steps allowed by schedule 3 to the High Court Rules:

a) Item 2 -commencement of defence;

b) Item 4.10 -filing memorandum for case management conference x 2;

c) Appearance at case management conference x 2.

[27] The amount of the award in respect of the commencement of defence is to be calculated on a 2B basis. The amount of the award for the case management conferences and the memoranda are also to be calculated on a 2B basis but subject to

an uplift of 50%. The uplift is subject to the filing and service of a memorandum within **7 working** days confirming that the award (inclusive of the uplift) does not exceed the costs actually occurred for these steps.

[28] Waiheke Shipping is also entitled to disbursements to be fixed by the Registrar.

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Associate Judge Sargisson