

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2008-404-005341

BETWEEN KIWI BROILERS 2003 LIMITED
 Plaintiff

AND AIREY CONSULTANTS LIMITED
 First Defendant

AND GORDON BARRIE BEESON
 Second Defendant

Hearing: on papers

Appearances: P J P Grace for plaintiff
 C T Patterson for second defendant

Judgment: 29 June 2009 at 3:30pm

COSTS JUDGMENT OF ASSOCIATE JUDGE ABBOTT

*This judgment was delivered by me on 29 June 2009 at 3:30pm,
pursuant to Rule 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Solicitors:
King Gerard Partners, PO Box 327, Pukekohe for plaintiff
Kennedys, PO Box 3158, Auckland for first defendant
Lovegroves Lawyers, PO Box 25066, Auckland for second defendant

[1] This file is before me to determine a request by the plaintiff for costs in respect of steps taken to set aside a notice to protest jurisdiction filed by the second defendant.

Relevant background

[2] The second defendant was joined by an amended statement of claim filed on 2 March 2009 and served on the second defendant on 6 March 2009.

[3] The second defendant was required by the High Court Rules to file his statement of defence by 14 April 2009. On 6 April 2009 he filed an appearance under protest to jurisdiction. The objection to jurisdiction was that the claim was statute barred under the Limitation Act 1950.

[4] The solicitors for the plaintiff wrote to the solicitors for the second defendant on 17 April 2009 noting that a protest to jurisdiction was not available for time limit arguments, which should be pleaded as affirmative defences. The plaintiff's solicitors advised that an application for judgment would be made if the statement of defence was not filed within 5 working days.

[5] The second defendant had taken no steps by 11 May 2009. On that date the plaintiff's solicitors sent the second defendant's solicitors by post a document described as a notice of opposition to the appearance. The document which was filed (in duplicate) on 12 May 2009 is described (on the front page) as a notice of opposition but inside takes the form of an application to set aside the appearance under protest and for an order directing filing of the statement of defence within 5 working days. The letter from the plaintiff's solicitors appears to have reached the second defendant's solicitors on 12 May 2009 (a copy produced by counsel for the second defendant is stamped with that date).

[6] On 18 May 2009 the second defendant filed and served a statement of defence and cross claim against the first defendant. In his statement of defence he

pleads the Limitation Act as an affirmative defence. He did not formally withdraw the notice of appearance under protest, but this document has the same effect.

The request for costs

[7] In his memorandum for a case management conference on 18 June 2009 counsel for the plaintiff sought costs for the steps taken to have the second defendant withdraw his notice of appearance, on the grounds that the time and cost was incurred unnecessarily.

[8] Counsel for the second defendant has filed a memorandum inviting the Court to let costs lie where they fall on the grounds that the second defendant had not been warned of the application to set aside the protest to jurisdiction, it was not filed or served until 18 May 2009, and was a different application to that indicated (an application for judgment). He also contends that the only time wasted was the preparation of a single document. He submitted only actual costs that should be allowed (under 4 14.2(f)) rather than awarding costs on the basis of item 14.12 of schedule 3 as there was no supporting affidavit.

[9] Counsel for the second defendant appears to be under a misapprehension as to the date of service of the plaintiff's application. As I have said above, it appears to have been served on his instructing solicitors on 12 May 2009, although I note that the instructing solicitor only forwarded it to him on 18 May 2009.

[10] I accept the point that the plaintiff's document is a brief one. I also note that it appears to have been accepted by the Court as a notice of opposition (without payment of a fee) rather than an application. Although counsel for the second defendant complained about the failure of counsel for the plaintiff to provide him with a copy of the memorandum for the conference on 18 June 2009 in which he sought costs (he had to obtain a copy from the Court) I do not see that that need reflect on the plaintiff's entitlement.

[11] Weighing these matters I direct that the second defendant pay the plaintiff costs in respect the document filed to set aside the inappropriate appearance under protest in accordance with item 4.12 of schedule 3 of the High Court Rules but on a 2A basis.

Associate Judge Abbott