IN THE HIGH COURT OF NEW ZEALAND
GREYMOUTH REGISTRY

CIV 2008 418 000105

BETWEEN	LOWRY ESTATES LIMITED Plaintiff
AND	TE KINGA FARMS LIMITED Defendant

Appearances: DJC Russ for Plaintiff
S Caradus for Defendant

Judgment: 31 July 2009

JUDGMENT OF ASSOCIATE JUDGE OSBORNE
As to Costs

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[1] On 7 July 2009 I dismissed the plaintiff's application for summary judgment.

[2] I found the plaintiff's case as pleaded to have been misconceived as indicated by the fact that counsel for the plaintiff had moved in submissions to a fundamentally different formulation of the case.

[3] The defendant seeks increased costs. The plaintiff opposes increased costs. Counsel for the plaintiff submits that an award of $6,400.00 – which is what a 2B award would represent – is reasonable in the circumstances.

The defendant's submissions

[4] Mr Caradus's submissions in support of increased costs were brief and to the point. They centre on the fact that the defendant filed its defence to the claim as pleaded and that the plaintiff thereafter altered its argument. The alteration of

argument came about in the plaintiff's submissions filed on 22 April 2009, less than a week before the hearing. Mr Caradus submits that the additional attendances required to deal with the factual and legal arguments within the submissions is analogous to responding to amended pleadings. His submission is that the 0.5 day allocation for preparation for a hearing presupposes that the issues and facts raised at the hearing are the same as the original pleadings.

[5] Upon that basis the defendant seeks an additional one day for attendances in relation to receiving instructions, researching facts and law, and preparation of a response to the plaintiff's additional arguments. (In other words the defendant seeks a total preparation time of 1.5 days rather than 0.5 days.)

The plaintiff's submissions

[6] Mr Russ for the plaintiff emphasises, pursuant to what was said by the Court of Appeal in *Glaister v Amalgamated Dairies Limited* [2004] 2 NZLR 606, that it is important against the background of the regulatory nature of the costs regime, that the integrity of the costs scheme be maintained and to do so it is necessary that any departure from the costs regime be made in a particular and principled way.

[7] Mr Russ then turned to r 14.2. Under r 14.2(c) costs are to be assessed by applying the appropriate daily recovery rate to the time considered reasonable for each step reasonably required in relation to the proceeding or interlocutory application. Rule 14.2(d) provides that the appropriate daily recovery rate should normally be two thirds of the daily rate considered reasonable in relation to the proceeding or interlocutory application.

[8] For increased costs, resort is required to r 14.6. The jurisdiction to order increased costs arises if criteria specified in r 14.6(3) are met. Mr Russ submits, and I agree with him, that the criteria in r 14.6(3)(a) - (c) do not apply in this case. Therefore, the basis for considering increased costs would arise under r 14.6(3)(d) if there is some other reason which justifies the Court making an order for increased costs despite the principle that the determination of costs should be predictable and expeditious.

[9] Mr Russ referred me to the Court of Appeal's decision in *Holdfast NZ Limited v Sally's Pty Limited* [2005] 17 PRNZ 897, in which the Court identified appropriate steps in consideration of an award of increased costs. They involve:

(a) Categorise the proceeding under r 14.3.

(b) Work out a reasonable time for each step in the proceeding under r 14.5.

(c) As part of step (b), a party may under r 14.6(3)(a) apply for extra time for a particular step.

(d) One then steps back to look at the costs award – if there is an argument for additional costs under r 143.6(3)(b) nevertheless any increase about 50% of the costs produced by steps (a) and (b) is unlikely given that the daily recovery rate is two thirds of the daily rate considered reasonable for the particular proceeding.

[10] Mr Russ submitted that having regard to the summary judgment context of this application, the reasonable time provided for each step under r 14.5 is appropriate. Mr Russ submitted that there was no basis to suggest the time required for preparation would substantially exceed that allocated under Band C as provided for in r 14.6(3)(a).

[11] Mr Russ submitted that r 14.6(3)(d) is usually reserved for substantial prejudicial breaches of the rules and there is no basis for such an application in this case.

Discussion

[12] The single aspect of this case which distinguishes it from ordinary cases is that the defendant has been put to two tasks rather than one. The first task was to

analyse a case as presented in the application for summary judgment and to respond to that case. The second task was to analyse a case as reconstituted through Mr Russ's submissions and to respond to that case. Normal time would have been required for the preparation of the respondent's submissions if the plaintiff's case as presented in the application had remained the same in the plaintiff's submissions. The change of the case required in my view (to use the terminology of r 14.5(2)) "a comparatively large amount of time" for preparation for the hearing.

[13] That being the case, r 14.5(2) requires me to determine what is the reasonable time for preparation having regard to the comparatively large amount of time for that particular step.

[14] Item 5.3 of Schedule 3 (applying to preparation for the hearing of a defended summary judgment application) simply provides that the time allocated is "the time occupied by the hearing measured in quarter days" which is what led to the agreement of counsel that item 5.3 in this case results in an allocation of 0.5 days. Accordingly, for this particular item Schedule 3 does not recognise a different time requirement for Bands A, B and C. But the reality is that the defendant would have been required to spend more time in preparation than if the plaintiff had presented its case as originally presented.

[15] In my judgment, there therefore exists "some other reason" (see r 14.6(3)(d)) to justify the Court making an order for increased costs. The appropriate order in relation to preparation for hearing would in my judgment be an allowance by way of increased costs of a further 0.5 days for preparation.

Disposition

[16] I order that the plaintiff pay the defendant's costs of the application for summary judgment in the sum of $7,200.00, together with disbursements of $150.22. These costs are payable in any event.

Timetabling

[17] Counsel have advised that discussions are occurring between the parties with a view to exploring alternative dispute resolution. They have in mind a period of six weeks to explore that possibility. I adjourn the proceeding for a case management conference to ***9.30am 29 September 2009***. Counsel are to file preferably a joint memorandum 3 working days before the conference to advise the Court what progress has been made in relation to alternative dispute resolution. In the event the proceeding is still required, the memorandum is to deal with any interlocutory requirements; the estimated duration of hearing; the allocation of trial date and proposed pre-trial timetabling.

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Solicitors
Fletcher Vautier Moore, Nelson for Plaintiff
Rhodes & Co., Christchurch for Defendant