IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2004 409 000911

BETWEEN	DENIS LLOYD MCLACHLAN Plaintiff
AND	ANTHONY DAVID MEYERS AND JULIETTE LOUISE PARKYN First Defendants
AND	ANTHONY DAVID MEYERS Second Defendant

Hearing: (Determined on the Papers)

Judgment: 24 November 2009

JUDGMENT OF ASSOCIATE JUDGE OSBORNE
As to Costs

Background

[1] As a result of substantially undisputed arrangements between the plaintiff and Mr Meyers in 2001, the plaintiff was to acquire a property at Oxford. However, the first defendants were co-owners and in subsequent years the plaintiff has been pursuing what he considers to be his rights as a result of arrangements entered into.

[2] As a result of a settlement reached between the plaintiff and Mr Meyers in 2005, Fogarty J made orders by consent on 21 March 2005. Those orders were not implemented. Subsequently, the Court has dealt with caveat issues in relation to the land.

[3] Now there is before the Court for hearing, at present undefended, a second amended notice of interlocutory application by the plaintiff seeking the recall of the judgment of 21 March 2005.

[4] The present application is an amended version of an application which the plaintiff made to have the 21 March 2005 judgment amended or set aside.

[5] That earlier form of the application has since been abandoned by the plaintiff. That abandonment occurred after the defendant J L Parkyn had filed a notice of opposition.

Costs

[6] The defendant, J L Parkyn, seeks costs for one item, being the filing of her notice of opposition. The application is made on the basis that these are wasted costs.

[7] The plaintiff opposes the application for costs. In opposition, Mr Hair notes:

(a) By their actions viewed as a whole, the defendants have caused a situation whereby the 2005 judgment was not carried out and the plaintiff has been burdened with having to seek its recall.

(b) The defendants have effectively been represented by one firm at various times in the course of the proceedings, namely R A Fraser & Associates.

(c) There has been an absence of co-operation in relation to the application for recall.

(d) It would be unjust and inequitable to order costs against Mr McLachlan.

(e) Alternatively, costs should be fixed but be costs in the cause.

(f) In the event of costs being ordered, they should be at the lowest end of the scale (1A) on the basis that all that was filed was a very brief notice of opposition.

Discussion

[8] Costs should usually follow the event. I view this as an appropriate case, in the discretion of the Court, to order otherwise. I am particularly influenced by the following considerations:

(a) In very difficult circumstances, essentially not of his own making, the plaintiff has been proceeding with legal advice to obtain orders giving effect to his interests. It is fair to say that the combined result of the defendants' approaches to the litigation has been to lead the plaintiff through a number of paths as the factual circumstances relevant to any enforcement have changed from time to time. To select the appropriate path will have been difficult for the plaintiff and his advisors. What has been appropriate in one year has proved to no longer be appropriate subsequently.

(b) The interlocutory application itself remains – it has simply been amended to seek what the plaintiff on legal advice considers a more appropriate route to enforcement of the plaintiff's interests.

(c) The costs of the current interlocutory application, including earlier amendments, can accordingly be taken into account at the conclusion of the interlocutory process.

[9] I accept Mr Hair's submission that, in any event, this is not an appropriate case for an award of costs on a 2B basis. Ms Parkyn's notice of opposition was very simple indeed.

[10] In the circumstances I fix the costs associated with the notice of opposition on a 1A basis, and I order that they be costs in the cause.

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Solicitors
Malley & Co., Christchurch
R A Fraser & Associates, Christchurch