IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-005984

	BETWEEN	DOMUS REDUX LIMITED Plaintiff
	AND	DAVIDSON ARMSTRONG & CAMPBELL SOLICITORS NOMINEE COMPANY LIMITED First Defendant
	AND	THE PARTNESHIP OF DAVIDSON CAMPBELL & ARMSTRONG SOLICITORS Second Defendant
	(on the papers)	
Counsel:	DA Watson for plaintiff JG Krebs for defendants	
Judgment:	2 December 2009 at 12 noon	

JUDGMENT OF ASSOCIATE JUDGE FAIRE
[on costs]

Solicitors: Gibbs Mills Livingstone Solicitors, PO Box 82 024, Auckland for plaintiff
Davidson Armstrong & Campbell, PO Box 54, Waipukurau for defendants

[1] The first defendant seeks an order for costs as a result of the plaintiff discontinuing the proceeding against it. The notice of discontinuance is dated 11 November 2009 and was filed on that day.

[2] The plaintiff filed a notice of discontinuance in respect of the claim against the second defendant on 12 November 2009. That notice contains the consent of counsel for the second defendant. The document contains an acknowledgement that no costs would be sought by the second defendant. It is dated 5 November 2009.

[3] The costs sought by the first defendant are based on Category 2 Band B plus disbursements.

[4] Where a proceeding is discontinued r 15.23 of the High Court Rules applies. Rule 15.23 provides:

> **15.23 Costs**
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> 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.

[5] In *Kroma Colour Prints v Tridonicatco New Zealand Ltd* (2008) 18 PRNZ 973 at 975 the Court of Appeal said in referring to the relevant former Rule dealing with discontinuance:

> [12] The Judge correctly stated the law on r 476C. She referred to *North Shore CC v Local Govt Commission* (1995) 9 PRNZ 182, noting that the presumption in favour of awarding costs to a defendant against whom a proceeding had been discontinued may be displaced if there were just and equitable circumstances not to apply it. A Court would not speculate on respective strengths and weaknesses of the parties' cases. The reasonableness of the stance of both parties, however, had to be considered. She also referred to *Oggi Advertising Ltd v McKenzie* (1998) PRNZ 535 which recognised that the discretion reposing in r 46 could override the general principles relating to discontinuance.

[6] It is appropriate that I refer briefly to the approach which the Court must take on an applications for costs. Rule 14.1 provides that costs are to be in the discretion of the Court. In *Mansfield Drycleaners Ltd v Quinny's Drycleaning (Dentice*

Drycleaning Upper Hutt) Ltd CA 296-01 29 September 2002 the Court of Appeal, in noting the Court's over-riding discretion pursuant to r 14.1 said:

> there is a strong implication that a Court is to apply the regime in the absence of some reason to the contrary: *Body Corporate 97010 v Auckland City Council*. We do not think that a Court should hesitate to depart from the regime where appropriate but we agree that some articulation of the reason for doing so is to be expected, however succinct. If no reason is given it will expose the award to close appellate scrutiny.

[7] The general principles to be applied in the exercise of that discretion are those contained r 14.2. The first general principle there stated is that the party who fails with respect to a proceeding should pay the costs to the party who succeeds.

[8] In terms of r 14.3 of the High Court Rules this proceeding is a Category 2 proceeding. That is because it is a proceeding of average complexity requiring counsel of skill and experience considered average in the High Court.

[9] In terms of the Band to be applied for the purposes of r 14.5, Band B is appropriate. No specific information has been placed before me to suggest otherwise.

[10] Mr Krebs, counsel for the first defendant, has completed a calculation based on Category 2 Band B which is as follows:

	Narration	**Allocated Days or Part Days**	**Amount $**	**Sub-Total $**
2.0	Commencement of defence by defendant	2 days	3,200.00	
4.5	List of documents on discovery	1.5 days	2,400.00	
4.12	Preparing and filing interlocutory application and supporting affidavits		960.00	
4.14	Preparation for hearing of a defended interlocutory application	0.25 day	400.00	

4.15	Appearance at hearing of a defended interlocutory application	.25 day	400.00	
	Sub-Total			7,360.00
	Disbursements			
	Hire car (1/3)		101.00	
	Flight to Auckland (1/2 share)		178.00	
	Accommodation 07.11.09 – Hyatt Regency		271.00	
	Sub-Total			550.00
	TOTAL			**$7,910.00**

Background

[11] On 15 September 2009 the plaintiff filed this proceeding in the High Court at Auckland. It sought against the first and second defendants judgment for $80,000. It alleged breach of a duty of care being the duty to exercise reasonable care and to take reasonable steps to obtain the best price reasonably attainable in the actions taken by the first defendant as first mortgagee. The plaintiff was a subsequent mortgagee in respect of the subject property.

[12] The plaintiff filed a without notice application for a freezing order over a portion of the proceeds of sale destined to be repaid to the first defendant as first mortgagee. A freezing order was granted by Ronald Young J on 15 September 2009 and sealed on 16 September 2009.

[13] On receipt of the freezing order counsel for the defendants advised the plaintiff's counsel that the freezing order ought not to have been made because the funds charged were held by the defendants as a bare trustee and could therefore not be subject of a freezing order.

[14] The freezing order was not withdrawn. Application was made by the defendants for an order rescinding the interim freezing order. That application was filed on 5 October 2009. It was listed for hearing before Harrison J on 8 October 2009. With the application there was filed a memorandum of counsel requesting that the application be dealt with urgently. The reason advanced was that the freezing order was effectively preventing the sale of the property proceeding. That was because the first defendant, mortgagee, and the vendor, under the exercise of the power of sale, could not repay the moneys due under a nominee company mortgage and therefore could not give a discharge of the mortgage.

[15] The plaintiff's counsel filed a memorandum in answer to the memorandum seeking urgency, which I need not set out in detail. It set out reasons why the disposal of the application should not be determined on an urgent basis. That document is date-stamped as having been received by the Court on 6 October 2009 at 3:45pm. On 7 October 2009 the plaintiff filed an affidavit on behalf of a solicitor who holds a submortgage of the plaintiff's second mortgage relating to the subject property.

[16] The Court index does not contain a notice of opposition. The affidavit that was filed indicates that the application was being opposed.

[17] The matter was called before Harrison J on Thursday, 8 October 2009. Counsel confirms that some 15 minutes prior to the hearing on 8 October 2009, counsel for the first defendant was advised by telephone that the application for rescission would no longer be opposed subject to the defendants agreeing to the imposition of a strict timetable for further determination of the proceedings and that costs on the application be reserved.

[18] Harrison J issued the following minute of 8 October 2009:

> [1] I refer to the memoranda of counsel filed earlier this week.
>
> [2] Counsel have conferred and most constructively reached agreement. By consent orders are made as follows:
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> (1) The freezing order made in this Court on 15 September 2009 is rescinded;

(2) Both parties are to complete discovery by filing lists of documents by 5 November 2009;

(3) Both parties are to complete inspection by 26 November 2009;

(4) The Registry is requested to allocate a conference before an Associate Judge on the first available date after 26 November 2009. Counsel have indicated, again most constructively, that there is a prospect of participation in a settlement conference.

(5) Costs are reserved.

[19] The first defendant completed discovery. Its affidavit of documents was filed on 5 November 2009. No discovery was given by the plaintiff. Six days later the plaintiff's notice of discontinuance against the first defendant was signed by counsel for the plaintiff and filed on that day in Court.

[20] Ms Watson, counsel for the plaintiff, has filed an extensive memorandum which invites me to review the merits of the actual proceeding. Ms Watson acknowledges that Mr Krebs, counsel for the first defendant, was not advised until the morning of the hearing that the application to set aside the freezing order would not be opposed. That was the earliest time Ms Watson said that she was able to get instructions which, in the circumstances, is understandable.

[21] Ms Watson opposes costs. A number of the grounds, in fact, invite the Court to go into them merits of the case which cannot be, and traditionally is not, done following the filing of a notice of discontinuance.

[22] Having said that, I nevertheless record the matters that were advanced which were:

a) There has been no full hearing of the case. Apart from the freezing order attendances, little has been done on both sides. The plaintiff is merely withdrawing the proceeding. Another defendant has not sought costs;

b) The first defendant should have filed its application to set aside the freezing order more promptly. One of the reasons advanced was that it was alleged that the first defendant knew of the absence of counsel for the plaintiff for a period between 15 September 2009 and 5 October 2009;

c) Because of the shortness of time and the fact that the first defendant was seeking priority, the plaintiff was disadvantaged. In addition, the first defendant was taking advantage of a position where its preferred counsel, Mr Krebs, was in Auckland for other business;

d) There was, in fact, really no urgency because the purchaser was not threatening to walk away from the mortgagee's exercise of the power of sale;

e) Costs were, in any event, reserved on the application to set aside the freezing order;

f) The defendant should not be allowed costs for the filing of a statement of defence because that was not necessary. Further, it is claimed, that the filing of the affidavit of documents was not necessary because there were discussions in relation to the discontinuance of the proceedings; and

g) The disbursements claimed are disputed.

[23] None of the reasons for opposing costs based on Category 2 Band B, in my view, are justified. I note the following:

a) This is a case where the plaintiff had obtained a without notice order. It had consequences for the first defendant. Any responsible counsel would have to proceed with and obtain an order for discharge without delay;

b) The overall proceeding has been discontinued;

c) I can find no unreasonable steps taken by the first defendant in relation to the proceeding;

d) The costs sought are based on Category 2 Band B. It might be argued that an allowance for a quarter of a day for a defended hearing overstates the position because all that was required was a mention hearing in view of the advice given fifteen minutes before the hearing that the defence would not be proceeded with. I take into account that some time was required to have matters tidied up and that a quarter-day allowance, in the circumstances, is therefore appropriate;

e) A statement of defence was required because that is what the notices which the defendants received required them to do. No notice had been given by the plaintiff confirming any release from this requirement; and

f) One area relating to disbursements, which I shall shortly refer to, does need further consideration.

[24] The conclusion I reach is that the first defendant is entitled to an order for costs based on Category 2 Band B in the sum of $7,360.00 as set out in [10] hereof. The fact that no such costs are sought by the second defendant, in my view, is irrelevant. As it happens, it was the same counsel who appeared for both the first and second defendants. It is the first defendant, however, who was particularly affected by the freezing order.

[25] It is necessary, however, to consider the issue of disbursements. Ms Watson takes issue with counsel's disbursements for travel from Napier to the Auckland High Court, accommodation of counsel from Napier in Auckland and rental car expenses, all of which were incurred for the purpose of the hearing on 8 October 2009.

[26] The hearing on 8 October 2009 was an interlocutory application. It was undertaken to ensure that settlement of the sale by the mortgagee should occur. One can therefore appreciate that some urgency was involved.

[27] Rule 14.12 now sets out the position in relation to disbursements. No issue is taken that the matters which are the subject of the claim are matters that would ordinarily be charged for separately from the legal professional services provided by the solicitor or legal adviser in the bill of costs. The issue is whether the disbursement was, in terms of r 14.12(2), reasonably necessary for the conduct of the proceeding. That question was considered under the old Item 11 contained in the former High Court Rules by Fisher J in *Russell v Taxation Review Authority* (2000) 14 PRNZ 515 at 521. The issue of necessity equally applies under the current Rule. His Honour said of these claims as follows:

> **Counsel's travel and accommodation**
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> [24] Practitioners almost invariably charge their clients for counsel's travel and accommodation as separate disbursements. The principal question under item 11 will be necessity. I accept Mr Judd's submission that the custom of allowing travel and accommodation expenses for out of town counsel in the Court of Appeal is distinguishable given the limited locations in which that Court sits and the likelihood that counsel already familiar with the case will need to travel from other centres.
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> [25] The position is different in the High Court. It would be hard to argue necessity where there is an adequate choice of suitable counsel in the High Court centre involved and no other special justification for instructing out of town counsel. Of course that is only the starting point. Available experience and expertise is one obvious dimension. I hope that Gisborne practitioners will not take it amiss if I speculate that there would be few counsel there equipped to lead in a microbiology patent case. Another could be the location of the client. If the client comes from a different region the cost of transporting counsel from that region might well be outweighed by efficiencies gained during the preparatory stage. A third could be disqualifying associations between local counsel and the parties or issues at stake eg proceedings against a local lawyer.

[28] What is apparent here is that this was a matter that was required to proceeded on an urgent basis. The issue was relatively straightforward. The application to set aside the freezing order was listed in a Duty Judge List, not as a separate special fixture. I do not regard the scope of matters to be considered on the application as necessarily involving Mr Krebs' presence. Competent counsel could well have been briefed to appear on the application. It therefore seems to me that there is no reason

why this could not have been done. The fact that it could have been done means that it is not appropriate to allow the disbursements for hire car, flight to Auckland and accommodation, all of which total $550 and which are claimed in the first defendant's counsel's memorandum for the purpose of fixing costs.

[29] I comment, before making the orders, on how this file has come to me for the purpose of giving judgment for costs. I am required to deal with costs on the whole proceeding as a result of the notice of discontinuance. However, as part of the exercise involves considering what happened with the application to set aside the freezing order some further comment is appropriate.

[30] Rule 14.9 provides:

> **14.9 Costs may be determined by different Judge or Associate Judge**
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> Costs may be determined by a Judge or an Associate Judge other than the one who heard the matter to which the costs relate, if he or she is not available conveniently to make the determination.

[31] There was, in this case, no determination by the Judge on the application to set aside the freezing order on the merits. My check with the Registry discloses that Justice Harrison who was the Judge who made the order at the invitation of the parties in relation to the freezing order is sitting out of Auckland this week. When I take the above matters into account, it seems appropriate that I do consider this matter on all aspects.

Orders

[32] I order that the plaintiff pay the first defendant's costs of $7,360.00 together with any other disbursements, other than the ones that I have ruled upon, as fixed by the Registrar

JA Faire
Associate Judge