

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

CIV 2009-404-1483

BETWEEN CPG NEW ZEALAND LIMITED
(FORMERLY DUFFILL WATTS
LIMITED)
Plaintiff

AND MOGANS HOMES LIMITED
Defendant

Hearing: On the papers

Counsel: M Broad for plaintiff
A K Singh for defendant

Judgment: 22 September 2009

COSTS JUDGMENT OF ALLAN J

Solicitors/counsel :
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[1] In a judgment given on 28 May 2009 I dismissed the defendant's application for orders restraining publication and staying this liquidation proceeding. I directed that counsel should file memoranda as to costs, and indicated that I would deal with that topic on the papers unless either counsel sought an oral hearing. Counsel have duly filed memoranda; neither counsel sought a hearing.

[2] On 6 January 2009 the plaintiff served on the defendant a statutory demand seeking payment of \$37,659.90 for professional services associated with a subdivisional proposal. The defendant did not pay that sum. The statutory demand expired on 29 January 2009. The plaintiff served liquidation proceedings on the defendant on 26 March 2009, following which the defendant made the application, the subject of my earlier judgment.

[3] The plaintiff argues that while a category 2B award is generally appropriate, the final award should be adjusted by:

- a) allowing costs in accordance with category 2C for item 4.13, being the preparation and filing of the plaintiff's notice of opposition to the defendant's interlocutory application together with supporting affidavits;
- b) increasing the costs awarded pursuant to r 14.6.

[4] The claim for additional costs in respect of the notice of opposition and supporting affidavits is based upon the scope and complexity of these documents which, Mr Judd submits, effectively cover the whole of the ground that would be required for a defended liquidation hearing, or for an application to set aside a statutory demand. The allowance for a category 2B case in respect of a defended liquidation hearing is two hours @ \$1,600, making a total of \$3,200. The corresponding allowance for a notice of opposition and supporting affidavits in respect of an application to set aside a statutory demand is 1.6 hours at \$1,600, making a total of \$2,560.

[5] By contrast, the allowance for the preparation and filing of a notice of opposition to an interlocutory application, together with supporting affidavits, on any category 2B scale is only 0.6 days, which at \$1,600 per day, makes a total of \$960. In my view, the plaintiff's point is well made. The entitlement of the plaintiff to be paid was effectively determined on this application, and indeed it is worthy of note that the defendant paid the sum concerned immediately following delivery of my judgment. It fell to the plaintiff to place the relevant material before the Court, the defendant simply claiming that the plaintiff had failed to carry out the work for which it was seeking payment. The plaintiff is entitled to costs in respect of item 4.13 in accordance with the allowance in category 2C.

[6] The plaintiff also seeks increased costs pursuant to r 41.6. It claims that the defendant:

- a) took an unnecessary step or pursued an argument that lacked merit (r 14.6(3)(b)(ii));
- b) failed without reasonable justification to admit evidence or accept a legal argument (r 14.6(3)(b)(iii)); and/or
- c) failed to accept an offer of settlement (r 14.6(3)(b)(v)).

[7] I put to one side the argument based upon a claimed offer of settlement, which appears to relate to an oral indication that if the matter could be settled prior to the hearing the plaintiff would not seek costs. The remaining grounds are rather more substantial.

[8] The defence to the plaintiff's claim in the liquidation proceedings was that the plaintiff had simply taken too long to obtain local authority consent to the subdivisional proposal. But at the hearing, Mr Singh for the defendant accepted that a contractual variation agreed between the parties in June 2008, required the defendant to pay outstanding invoices " ... when you see that things are moving again". The defendant had contended that nothing further was done by the plaintiff, but affidavit evidence filed by the plaintiff demonstrated that a very great deal had in

fact been done by it subsequent to the June variation, and moreover, that the defendant had failed at any point to respond to reports and communications from the plaintiff during the latter part of 2008. I concluded that the logical inference was that the defendant had simply lost interest in the subdivisional proposal.

[9] Against that background it was not tenable for the defendant to assert that the plaintiff was nevertheless not entitled to payment of its fees. In my view the argument advanced at the hearing of the defendant's application lacked merit (r 14.6(3)(b)(ii)) and the defendant failed to accept the plaintiff's unanswerable argument in opposition (r 14.6(3)(b)(iii)). Had the defendant properly considered the affidavit evidence filed by the plaintiff in opposition to the defendant's application, it would have concluded that it had no defence to the plaintiff's claim, and determined that the appropriate course was simply to pay the amount owing. The plaintiff was put to additional expense by virtue of the defendant's decision to pursue its application to a hearing. In those circumstances, it is appropriate to allow the plaintiff increased costs in respect of its preparation for the hearing of the interlocutory application and in respect of the appearance at the hearing itself. Category 2B costs are increased by 20% in respect of each of those items.

[10] Counsel for the defendant suggested that certain steps taken by the plaintiff merit no more than a category 1A award, but there is no basis upon which it would be proper to confine the award in that way.

[11] In the result, I allow the plaintiff the following costs:

	\$
Preparation and issue of statutory demand 0.2 days	320.00
Preparing statement of claim and other documents 0.6 days	960.00
Appearance at callover hearing 0.2 days	320.00
Preparing and filing notice of opposition to interlocutory application and supporting affidavits (calculated in accordance with category 2C) 2 days	3,200.00
Preparation for hearing of interlocutory application (increased by 20%) 0.5 days	960.00

Appearance at hearing of defended interlocutory application (increased by 20%) 0.5 days	<u>960.00</u>
	<u>6,720.00</u>

[12] The plaintiff is also entitled to disbursements of \$400 in respect of the filing fee on the liquidation proceedings, and \$103.13 in respect of a service fee, making a total of \$503.13. The total costs award is therefore \$7223.13.

C J Allan J