IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2006-404-005005

BETWEEN	GULF HARBOUR INVESTMENTS LIMITED First Plaintiff
AND	GULF HARBOUR MARINA HOLDINGS LIMITED Second Plaintiff
AND	RODNEY DISTRICT COUNCIL Defendant

Counsel: K W Fulton & K L Bannister for Plaintiffs
J G Miles QC & R M Gapes & J R C Lees for Defendant

Judgment: 22 December 2009

COSTS JUDGMENT OF KEANE J

This judgment was delivered by Justice Keane on 22 December 2009 at 3.30 pm pursuant to Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

Date:

Solicitors:

Simpson Grierson, Auckland

[1] In my decision, dated 5 February 2009, I held that Gulf Harbour Investments Limited, which as assignee holds a development licence, issued by the Rodney County Council on 1 November 1985, entitling it to three leases over the last remaining part of the Gulf Harbour Marina yet to be developed, Hammerhead Point, remains constrained by the licence.

[2] The leasehold interests to which GH Investments is entitled, I held, did not independently of the licence give any wider right of development constrained only by the District Scheme of the Rodney District Council, the successor to the County. The leasehold interests remained subject to the licence.

[3] The licence, I held also, and the leases and the planning instrument governing the marina were all expressions of, and subject to, the Rodney Council Council (Gulf Harbour) Vesting and Empowering Act 1977.

[4] The Rodney Council Council, I held, was not estopped by conduct from contending that the development licence, and the development scheme of which it was an expression, remained governing. The Council's duty to subdivide Hammerhead Point and issue the leases, I held also, was subject to the Resource Management Act 1991 and the Local Government Act 2002.

[5] GH Investments was not entitled, I held, therefore, to develop Hammerhead Point as intensively as it wished; an illustrative proposal was a 300 unit residential complex, offering timeshare accommodation, four storeys high, extending across most of the Point. The development licence, I held, as the Council contended, permitted only modest accommodation serving the marina.

[6] The result was not, however, an outright win to the Council. GH Investments issued in the first place because the Council at first denied any duty to subdivide and lease, arguing the licence was spent. GH Investments then contended the Council was estopped. The Council had accepted previously that the licence, and those duties, remained on foot. That was conceded at the outset of the hearing and I gave GH Investments that measure of declaratory relief.

[7] It is against that background that each side seeks costs, and the first issue is as to the cost category and band applying.

Principles applying

[8] Costs lie within the discretion of the Court: HCR 46. The one who fails ordinarily pays the costs of the one who succeeds: HCR 47(a). Costs may be reduced or denied, however, when the one apparently entitled is not deserving or not fully so: HCR 48D.

[9] That can be so, for instance, where parties succeed only partly or enjoy equal success or failure: *Packing In Ltd (in liq), formerly known as Bond Cargo Ltd v Chilcott* [2003] 16 PRNZ 869, CA. There the Court held that justice must be done to each side, taking into account the time taken in each phase of the case, without fixing unduly on success or failure in any phase. Costs have to be set finally against the result.

[10] Thus a defendant was awarded costs on a plaintiff's claim, and the balance of a counterclaim, when it succeeded as to both: *Harnak v Green* [1958] 2 QB 9, CA. A defendant was allowed costs on its counterclaim, when it admitted the plaintiff's claim but succeeded on its counterclaim; the plaintiff received costs up to the admission: *N V Amsterdamsche v H & H Trading Agencies* [1940] 1 All ER 587. Where both plaintiff and defendant failed in their cross-claims, each was allowed costs: *Medway Oil & Storage Co Ltd v Continental Contractors Ltd* [1929] AC 88, HL.

[11] A contrasting instance on which GH Investments relies is where a defendant largely abandoned its defence to a claim but that did not save it from costs incurred by the plaintiff; costs, in effect, forced by its stance until then: *Carmel College Auckland Ltd v North Shore City Council* (AK HC, CIV 2007-404-005894, 20 January 2009), Venning J.

Costs category

[12] The Council claims that this case lies within category 3B. The evidence spanned 30 years. The issues spanned contractual interpretation, rectification and estoppel as well as issues concerning planning, validity and frustration due to supervening legislation. The public interest was high. The case called for counsel of special skill and experience and second counsel.

[13] GH Investments contends that the case lies within category two. The issues of law were not novel. The evidence was neither lengthy nor complex. The length of trial was not great. It was typical litigation in this Court. The Council was entitled to elect to be represented by senior counsel and second counsel. That did not alter the character of the case.

[14] There is something in each of these submissions. The case more naturally lies in category 2 than category 3. It turned on a connected series of instruments giving effect to a statute. There was no acute issue of interpretation. Statutory issues were equally confined. The evidence was within a small compass. The public interest was, however, I accept, high. The Council was entitled to engage senior and second counsel.

Relative success and failure

[15] On the face of it a watershed event distinguishing between success and failure may seem to be when the Council conceded in June 2008 that it was under a duty to subdivide and lease. That, however, does not stand analysis.

[16] Before then the case divided into three phases. In the first phase between August – November 2006 GH Investments applied for summary judgment, seeking specific performance relying on estoppel. That application was settled on the basis that the Council was entitled to some award of costs: see minute of Abbott AJ dated 23 November 2007.

[17] In the second phase, December 2006 – September 2007, GH Investments continued to seek specific performance on a wider basis, enlarged to include contract. The Council pleaded that it was subject to statutory impediments, those imposed by the Resource Management Act and the Local Government Act.

[18] In the third phase, between October 2007 – 25 June 2008, GH Investments amended again, still relying on contract and estoppel but in place of specific performance seeking damages and declaratory relief as to the scope of its right of development of Hammerhead Point. The Council pleaded to that much as it had and counterclaimed for declaratory relief.

[19] In the fourth phase, after 25 June 2008, the date of the concession, there remained pre-trial proceedings. There was an amended defence filed and conference regarding rectification and general preparation for trial. This culminated in the fifth phase, the trial itself between 25 – 29 August 2008.

[20] By 25 June 2008, therefore, when the Council did belatedly concede a duty to subdivide and lease, the case had transformed. That issue had ceased to be the only one and it was relatively confined. The issues became those on which I gave, with that one exception, declaratory relief to the Council.

Conclusions

[21] On this analysis the Council plainly succeeded on the case as it became and, given that GH Investments did not persist in its application for summary judgment, the Council cannot be said to have been altogether devoid of success before it conceded the duty to subdivide and lease.

[22] On that basis, I consider, the Council is entitled to costs and disbursements as claimed but in category 2B, not category 3B, and I certify for second counsel, but subject to this. GH Investments is, I consider, entitled to a measure of recognition. That need not be by a distinct award of costs. Rather, I consider, the Council's costs should be reduced as to one quarter.

[23] Any issue as to whether the Council's fresh calculation of costs accords with category 2B is to be referred in the first instance to the Registrar, who is also to fix the disbursements.

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P.J. Keane J