IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2008-404-003323

BETWEEN	KENNETH MILLER Appellant
AND	TODD ANDREW PARKIN AND LYNDAL ELLEN BUHLER Defendant

Judgment: 23 December 2009 at 3:00 pm

RESERVED JUDGMENT OF COURTNEY
AS TO COSTS

This judgment was delivered by Justice Courtney
on 23 December 2009 at 3:00 pm
pursuant to R 11.5 of the High Court Rules.

Registrar / Deputy Registrar
Date……

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Introduction

[1] In the District Court Mr Parkin and Ms Buhler sued Mr Miller for the recovery of a total of $150,000 comprising payments of $50,000 and $100,000 in relation to their proposed purchase of shares in Mr Miller's company. Although they failed on an application for summary judgment, Mr Parkin and Ms Buhler ultimately obtained judgment for the full amount. On appeal, however, I held that Mr Miller was only liable to repay $50,000. Mr Miller now seeks costs in respect of both appeal and the District Court proceedings.

[2] Mr Connor, for Mr Miller, proposes a general approach to costs in this case that would see Mr Miller receive a net one-third of costs that would normally be awarded, this reflecting the respective success of the parties. To achieve this, he has submitted that an adjustment should be made to the District Court costs award. Mr Langstone, for Mr Parkin and Ms Buhler, has submitted that each party should bear their own costs on the appeal. He accepts that there ought to be an adjustment to the District Court costs so as to recognise that Mr Parkin and Ms Buhler ultimately succeeded on their cause of action but at a lower quantum.

[3] In a case such as this, where both parties have succeeded to some extent, the assessment of costs will not necessarily be most fairly determined simply by reference to the quantum of the judgment. I adopt the approach described in *Packing In Limited (in liquidation) v Chilcott*:[1]

> [5] …where in broad terms each party has had similar success, we do not consider it helpful to focus too closely on the question which party has failed and which has succeeded. Costs in a case such as this should rather be based on the premise that approximately equal success and failure attended the efforts of both sides. To that starting point should be added issues such as how much time was spent on each transaction or group of transactions in issue and any other matters which can reasonably be said to bear on the Court's ultimate discretion on the subject of costs. In the end, as in all costs matters, the Court must endeavour to do justice to both sides, bearing in mind all material features of the case.

[1] (2003) 16 PRNZ 869

Costs on appeal

[4] Mr Miller appealed against the District Court Judge's finding in respect of both the payments that Mr Parkin and Ms Buhler were seeking to have refunded. In relation to the $50,000 payment the issue turned on whether there had been an oral contract for the sale and purchase of the shares in Mr Miller's company and whether the payment was to be refundable in the event of the sale not proceeding. Although Mr Miller raised an estoppel defence which required some legal argument, this issue was mainly a factual one and required a fresh assessment of the evidence, about the communications between the parties and their conduct. Overall, the argument over the $50,000 payment represented the majority of evidence and argument.

[5] The issue over repayment of the $100,000 was a legal issue. The essential relevant facts were undisputed and I found that the Judge had erred in his application of the correct legal principles.

[6] In these circumstances I consider that justice would not be done by making an assessment of the costs by reference to the amount each party succeeded on. Had the appeal been argued only in respect of the issue that Mr Miller succeeded on then the scope of the appeal would have been much reduced. On the other hand, if Mr Parkin and Ms Buhler had recognised the strength of Mr Miller's legal argument in relation to the $100,000 payment the likelihood of settlement would have been much higher. Overall, I consider that justice is best done between these parties by leaving the parties to bear their own costs. I therefore decline to make any order for costs on the appeal.

District Court costs

[7] The District Court Judge awarded Mr Parkin and Ms Buhler costs of $23,360. In addition, he increased the costs for steps following the summary judgment proceeding by 15%, this mainly reflecting the Judge's criticism of Mr Miller's failure to accurately assess the merits of his defence.

[8] However, it follows from my conclusion in relation to the costs on the appeal that the same approach ought to be applied in relation to costs in the District Court. To achieve that necessitates an adjustment to the costs awarded in the District Court.

[9] The District Court Judge awarded costs on the unsuccessful summary judgment application. He did so for two reasons. First, he concluded that when the application was made there was not sufficient information to impugn the plaintiffs' oath that they honestly believed that Mr Miller had no defence. Secondly, the Judge was mindful of the undesirable effects that costs awards on unsuccessful summary judgments could have.[2] It is true that there are good reasons to encourage summary judgment applications; even if ultimately unsuccessful they frequently have the benefit of identifying issues and committing parties to a position at an early stage in the proceedings which can have the effect of enhancing the prospects of settlement. In this case, however, although Mr Parkin and Ms Buhler may have had good grounds for believing that the summary judgment procedure was appropriate when they filed their application, it must have been apparent when papers in opposition were filed that there were significant areas of disputed facts. They were facts involving oral communications between the parties and conduct. It ought to have been clear at that point that those issues could not be resolved in the context of a summary judgment application and proceeding to a defended hearing of the application therefore caused unnecessary cost to both parties.

[10] The second aspect to consider is that the Judge made an award of increased costs on the steps that followed the summary judgment application largely on the basis of his view about the strength of Mr Miller's defence. The Judge was critical of many aspects of the defence, including his assertion that there had been an oral agreement for the sale and purchase of the shares and that Mr Miller's change of position and estoppel defences were:

> ….completely devoid of any basis at worst or at best referred to only in limited evidence.

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[2] See Heath J's comments in *Wallace Corporation Limited v International Marketing Corp Limited* HC AK CIV-2003-404-007227 28 February 2005

[11] However, my conclusion on the evidence was that, whilst, objectively, there was no concluded oral agreement, there was evidence to suggest that Mr Miller genuinely believed there to have been such an agreement. I accepted that there had been representations that, if relied on to Mr Miller's detriment, would justify an estoppels defence. I found that there were aspects that would have constituted detriment and the estoppel defence only failed because those aspects were not permanent and Mr Miller was, in my judgment, able to retrieve the position. In light of those conclusions there is no basis on which to justify an award of increased costs.

[12] I consider that the District Court costs award ought to be adjusted so as to place the parties in the position, as far as reasonably possible, that they would have been had they been left to bear their own costs. I do this by requiring Mr Parkin and Ms Buhler to pay to Mr Miller the amount of the increased costs together with 50% of the balance of the costs and 50% of the disbursements.

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P Courtney J