

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

**CIV 2008 409 1111**

UNDER the Judicature Amendment Act 1972  
IN THE MATTER OF a decision on Resource Consent R075485  
BETWEEN BRENT GARY NICHOLLS  
Plaintiff  
AND SELWYN DISTRICT COUNCIL  
First Defendant  
AND FOODSTUFFS (SOUTH ISLAND)  
PROPERTIES LIMITED  
Second Defendant

Appearances: J Costigan for Plaintiff  
K Smith for First Defendant  
S Grieve for Second Defendant

Judgment: 28 November 2008

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**JUDGMENT OF ASSOCIATE JUDGE CHRISTIANSEN  
As to Costs**

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**Background**

[1] This judgment concerns the first and second defendants' applications for indemnity, increased or "3C" costs in the outcome of the plaintiff filing a notice of discontinuance.

[2] The plaintiff's proceeding sought judicial review of the first defendant's (SDC's) decision to have the second defendant's (Foodstuffs) application for resource consent proceed on a non-notified basis. Foodstuffs had in November 2007 submitted an application for resource consent for a land use consent to establish, operate and maintain a supermarket facility, with associated car parking and

landscaping at Gerald Street, Lincoln. The site in question was reportedly 750 metres west of the Lincoln town centre and constituted a small part of a larger rural block.

[3] A commissioner appointed by the SDC determined that the recommendation for consent contained in a report for the SDC be adopted, and that Foodstuffs' application proceed on a non-notified basis. That recommendation was adopted by the decision of the SDC on 5 May 2008.

[4] On 27 May 2008 the plaintiff filed and served his application for judicial review.

[5] Statements of defence were filed on 26 and 27 June 2008. An initial case management conference by telephone was held on 28 July 2008. In memoranda filed for that conference the plaintiff and the SDC jointly agreed that discovery and inspection be completed prior to evidence exchange, and that a fixture be allocated as soon as possible, subject to counsels' availability.

[6] Foodstuffs' memorandum recommended an evidence exchange occur prior to discovery and inspection. It expressed the view that it was not yet then possible to allocate a hearing date.

[7] In the outcome of that conference, I directed discovery precede the filing of affidavits. I also directed the Registrar to allocate a fixture of one day. Before then, I directed the plaintiff's affidavits be filed and served by 3 October 2008.

[8] Lists of documents were subsequently filed, albeit late, by the plaintiff.

[9] On 14 October 2008, and upon an urgent request of counsel for the defendants, I convened a case management conference by telephone. By then it was known a one day fixture had been scheduled for 12 December 2008 before Chisholm J. The defendants' counsel advised they were concerned the plaintiff's evidence had not been filed as required by 3 October 2008. My Minute of that conference records:

...

[2] Ms Costigan advises she has very recently obtained clear instructions from the plaintiff. She requests the matter be adjourned until Friday 17 October in order that time be given to enable the direction of the proceeding to be determined.

...

[4] I direct the plaintiff's evidence is to be filed and served by 4pm 17 October 2008, failing which the plaintiff's claim will be struck out.

[10] On 17 October 2008 the plaintiff filed and served a memorandum advising the proceeding was to be discontinued. On 23 October 2008 the plaintiff filed and served formal notice of discontinuance.

### **The cost claims**

[11] The SDC has filed a memorandum identifying actual solicitor's costs amounting to \$20,684.48. By its calculation costs on a 2B scale amounted to \$11,525.00, inclusive of filing fees.

[12] The second defendant has filed a memorandum which includes the statement "the affidavit of Roger John Davidson confirms that Foodstuffs' total cost in relation to this matter is approximately \$62,973.00".

[13] The plaintiff has filed a memorandum acknowledging liability for costs, and submitting these be fixed on a 2B basis. The plaintiff's counsel's calculation of those costs is in accord with that calculation provided by the first defendant's counsel.

### **Considerations**

[14] Foodstuffs' cost claim of \$62,9973.00 is detailed in the affidavit of Mr Davidson.

[15] As to that sum, Mr Davidson deposes Foodstuffs received an invoice dated 26 June 2008 for \$25,00.00 plus expenses, plus GST, an invoice dated 30 July 2008

for \$16,355.00 plus expenses, plus GST, an invoice dated 28 August 2008 for \$5,392.00 plus expenses, plus GST, and on 30 September 2008 an invoice of \$2,391.00 plus GST.

[16] Mr Davidson adds that he has been advised by his solicitor that there is further work in progress of approximately \$7000.00, inclusive of GST and disbursements.

[17] This Court has an ability to make an assessment of the reasonableness of claimed costs. It is not appropriate in that assessment to compare the claim for costs of one defendant by comparison with costs claimed by another defendant. In this case the glaring difference by that comparison could be explained because of the second defendant's perceived need to consider taking pre-emptive steps, i.e., in the preparation of interim orders which were not later sought.

[18] I accept the submission of the plaintiff's counsel that such steps are not those for which cost recovery can appropriately be sought. Neither are the rules designed to capture the cost to a party of the provision of legal advice.

[19] Rule 47(c) provides that costs should be assessed by applying the appropriate daily recovery rate and the time considered reasonable for each step reasonably required in relation to the proceeding or interlocutory application.

[20] Further, r 47(e) provides that what is an appropriate daily recovery rate and what is a reasonable time should not depend on the skill or experience of the actual solicitor, or counsel involved, or on the time actually spent by the actual solicitor or counsel involved, or on the costs actually incurred by the parties claiming costs.

[21] Rule 47(g) provides that so far as possible a determination of costs should be predictable and expeditious.

[22] A claim for increased, or indemnity costs, must identify a causal nexus between a party's steps (or omissions), and increased indemnity costs. That much is

clear from r 48C. In Rule 48C(3)(b) the preface to the grounds on which increased costs are awarded provides:

The party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in the proceeding by...

[23] The second defendant's grounds for its claim of increased costs are largely supported by the first defendant. Each complains about the plaintiff's failure to comply with the Court's direction to file evidence. However, this was dealt with by way of a costs award made by me at the time.

[24] Each complains having been required to provide discovery, but this overlooks the fact the first defendant supported the provision of discovery on the occasion of the first case management conference. Regardless, I directed that discovery occur ahead of evidence being provided.

[25] Each strongly supports a claim that the proceeding was brought by the plaintiff for an ulterior motive. Such a claim, if properly based, could justify an award of indemnity costs, as held in *Colgate Palmolive Co v Cussons Pty Ltd* (1993) 118 ALR 248.

[26] In this case all parties acknowledge that a high threshold must be met for an order for indemnity costs to be made.

[27] The basis for a claim of ulterior motive is supported by the following statements:

- (a) The plaintiff never made his personal interest in the proceeding clear.
- (b) After filing his proceeding the plaintiff then attempted to get various community groups behind the proceeding, without success.
- (c) It was well known that the SDC was in discussions with Foodstuffs' rival, Progressive Enterprises, regarding a

Woolworths supermarket proposed for the Lincoln town centre. As soon as it became clear that Progressive was no longer proceeding with a supermarket, no further step was taken in this proceeding by the plaintiff.

(d) At the very least, it is submitted that an inference can be drawn that the true motivation of the plaintiff was to delay Foodstuffs, rather than to challenge it's consent for genuine reasons.

[28] The second defendant relies up Mr Davidson's affidavit to support these propositions. I am satisfied, on balance, that the evidence referred to provides a basis for suspicion, but not for substantiation. The plaintiff's challenge has been allied with the interests of a commercial rival, but any conclusions to be drawn from that only amounts to supposition.

[29] This proceeding has not been beset by delay, although a brief delay occurred, in the outcome of which I immediately convened a case management conference. An "unless" order was made requiring the plaintiff's evidence to be filed and served within three days. Within that time the proceeding effectively came to an end upon receipt of the plaintiff's advice he was discontinuing. The premature ending to a proceeding for which a hearing was arranged nearly two months later conceivably provided a saving in costs for all.

### **Judgment**

[30] This is a proper case for costs to be fixed in accordance with Category 2B. Those costs shall be fixed in the sum of \$11,200 payable to each of the defendants, together with payment of disbursements as approved by the Registrar.

[31] Upon the application for costs, each defendant shall pay to the plaintiff the sum of \$700.

Solicitors

Goodman Steven Tavendale Reid, Christchurch for Plaintiff  
Buddle Findlay, Christchurch for First Defendant  
Anderson Lloyd, Christchurch for Second Defendant