EDITORIAL NOTE: NO SUPRESSION APPLIED.

IN THE DISTRICT COURT
AT PORIRUA

CIV-2015-091-000222
[2017] NZDC 8183

BETWEEN	PAUATAHUNUI GS LIMITED Plaintiff
AND	ALBERT NG AND TINA YUK HUNG NG, AS TRUSTEES OF THE A&T NG FAMILY TRUST Defendants

Hearing:	On the papers - submissions as to costs 19 and 20 January, 10 April 2017
Counsel:	J C Corry for the plaintiff P S Davidson for the defendants
Judgment:	26 April 2017

JUDGMENT OF JUDGE SM HARROP
AS TO COSTS

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[1] In my lengthy reserved judgment dated 14 December 2016, I dismissed each of the plaintiff's four causes of action and entered judgment for the defendants on each of them. As to costs I indicated that in principle, the defendants were entitled to costs against the plaintiff on a 2B basis but formally reserved costs in case there were matters relevant to the exercise of my discretion as to costs which either party wished to raise.

[2] Initial submissions were filed on 19 and 20 January 2017 but regrettably through an error at the Registry these were not given to me until 27 March. Having read them, I decided it was appropriate to allow the defendants to reply to the plaintiff's submissions and they did so on 10 April 2017.

[3] The defendants claim costs on a 2B basis up to 8 March 2016 (these amount to $5,073) together with disbursements but, as a result of a Calderbank letter sent to

the plaintiff on 1 March 2016, they seek increased costs for steps taken from 9 March 2016 being the date when the offer made in that letter expired.

[4] Without any uplift the defendants would be entitled to costs of $16,287 for the period after 9 March 2016 making a total for costs on a 2B basis of $21,360, together with disbursements.

[5] However, because the offer made in the Calderbank letter was not accepted, the defendants seek an uplift of 90% on that $16,287 to $30,945.30, an increase of $14,658.30.

[6] Accordingly, leaving aside disbursements, the defendants say they should be awarded total costs of $36,018.30. Overall, that is about a 40% increase on costs calculated on a 2B basis.

[7] The defendants' actual costs have been $82,523.22, although that total includes both GST and disbursements. Exclusive of GST and disbursements (and GST should always be excluded from costs considerations in circumstances where the defendants are likely to be registered for GST) their actual costs appear to have been about $68,000, so they are seeking approximately 53% of their actual costs. They also seek disbursements totalling $2,766.02.

[8] The plaintiff opposes the award of both full 2B costs (because the judgment obtained judicial recognition of certain rights) and any increased costs based on the Calderbank offer primarily because it did not dispose of all matters in issue and it was reasonable for the plaintiff not to accept it. It says no increased costs should be awarded, based on the Calderbank letter or otherwise. The plaintiff also questions one aspect of the scale costs calculation; namely the claim relating to discovery ($1,780) on the basis that no list of documents was filed and served. Aside from that, the plaintiff accepts the calculations of 2B costs made by the defendants.

[9] The plaintiff also submits that the disbursements claimed should be disallowed.

Discussion

[10] The primary issue to be determined in this judgment is whether or not the Calderbank letter should result in increased costs and, if so, whether they should be increased by 90% or some other percentage. The onus is on the defendants to show there should be an increase.

[11] The Calderbank letter contained a proposal that the defendants pay the plaintiff $3,856.02 in full and final settlement of its proceeding; this being the notional portion of the rent paid from 30 June 2014 to 31 January 2016 for certain carparks using the valuation dated 20 April 2010. The defendants also offered to reduce the rent payable from 31 January 2016 until the next rent review date of 10 May 2016 by 5%. Costs would lie where they had fallen. The defendants warned that if this offer were not accepted they would, in the event of success at trial, seek indemnity costs from the date of rejection of the offer.

[12] I note that indemnity costs are not sought, but if they were as threatened in the Calderbank letter, the claim would be for approximately $68,000 not $36,000.

[13] The defendants submit (correctly) that there is clear jurisdiction in r 14.6(3)(b)(v) of the District Courts Rules 2014 for the Court to order increased costs if the unsuccessful party has contributed unnecessarily to the time or expense of the proceeding by failing without reasonable justification to accept an offer made under r 14.10 to settle the proceeding. Express provision is made in r 14.10 for a Calderbank offer such as the one that was made on 1 March. While r 14.11 provides that the effect of such on offer on the question of costs is at the discretion of the Court, r 14.11(3) says that a party is entitled to costs if they make an offer to pay money which exceeds the amount obtained in judgment. That applies here as the defendants offered $3,856.02 but were not directed to pay anything.

[14] In summary, the defendants say that various case authorities have considered certain factors to be relevant in deciding whether or not the rejection of (or failure to accept) a Calderbank offer was reasonable. The first is timeliness; here the offer was

made 8 months before trial and well before the major costs for preparation for trial were incurred.

[15] The next factor is the time for consideration. Here seven days was allowed. I note that had the plaintiff wanted more time to consider the offer that could easily have been sought but was not. There was indeed no response to the offer but the plaintiff implicitly rejected it when it continued with the proceeding, taking further steps including filing an amended statement of claim.

[16] The next factor is the extent of the compromise offered. The defendants submit this was a generous compromise given the state of the plaintiff's claim and the prospects of success. The offer was also clear as to its terms and foreshadowed the consequences if it were not accepted.

[17] The defendants say the plaintiff had an opportunity to bring the litigation to an end without any consequences well before trial and was warned what the consequences would be if the litigation continued, but it chose not to take that opportunity. It carried on despite obvious defects in its claim without particularising its losses, and without obtaining and adducing evidence that would support the claims for $75,000 general damages and without joining Mr Ellis as a party.

[18] In all the circumstances the defendants contend that an uplift of 90% is appropriate.

[19] The plaintiff, as I have noted, first submits that because it derived comfort and judicial recognition from some comments in the judgment, there should be a reduction in scale costs. I reject this suggestion out of hand. The reality is the plaintiff was entirely unsuccessful with its claim and costs must follow the event. In any event the right which it says was recognised in the judgment is, as the defendants point out, clear on the face of the lease and it was pleaded in the statement of defence. More generally, if a plaintiff seeks to obtain some collateral benefit from litigation such as judicial recognition of one or more aspects of a relationship, but it is unsuccessful in all respects with its causes of action, then it

must nevertheless (and without reduction on that account) pay the price of obtaining that recognition by meeting the costs of the defendant.

[20] As to the Calderbank offer, the plaintiff submits that it was reasonable not to accept it, because it did not dispose of all matters in issue between the parties. I reject this submission. The offer clearly would have disposed of *all matters in issue in the proceeding,* which is all it could reasonably be expected to dispose of. The plaintiff took a risk, and in my view, acted without reasonable justification in not accepting the offer having regard to the prospects of success at the time the offer was made. It was fully entitled, of course, to carry on with the case, but it did so clearly informed of the consequences that would follow if it were unsuccessful. As the defendants say, the Calderbank letter provided the plaintiff with a way out of the litigation with some cash, a rent rebate and no adverse cost consequences. I accept the offer was a genuine attempt, despite the defendants' belief in the weakness of the plaintiff's claim, to resolve matters without incurring substantial costs to both parties. I uphold the defendants' submission that it was an offer of precisely the type which should, on not being accepted, result in a significant costs uplift.

[21] Having considered all of the submissions carefully, I uphold those of the defendants and reject those of the plaintiff. In my assessment, applying the criteria identified by the authorities, the claim for a 90% uplift is justified in the particular circumstances of this case, for the reasons contained in Ms Davidson's submissions. In short, that is simply because the Calderbank offer was generous in light of the deficiencies in the plaintiff's case which existed at the time it was made and which persisted until trial. The offer should – and this is not applying the benefit of hindsight - have been accepted. Had it been accepted, the defendants would not have incurred the lion's share of their overall costs which was incurred after 9 March 2016.

[22] Based on the letter, the defendants could have applied for indemnity costs. While, if sought, full indemnity costs would not have been awarded, it needs to be remembered that, overall, what is being sought here is only just over half of what indemnity costs would be. Despite having been entirely successful and having made a generous offer eight months out from trial the defendants are still some $32,000

out of pocket. By comparison, the plaintiff, while of course having incurred its own legal costs, will, despite being entirely unsuccessful and having acted unreasonably in not accepting the offer, be paying out only some $36,000, plus disbursements.

[23] As to the question about whether it was proper for the defendants to include in their calculation of 2B costs the item for preparing a list of documents ($1,780) this has been answered, satisfactorily in my view, in the defendants' reply submissions. There clearly was a list of documents prepared following an order by Judge Tuohy on 7 March 2016 and while that list was short, I accept the defendants' point that a diligent search was still required in order to compile it. The documents referred to were provided to the plaintiff on 30 March. I therefore conclude that the calculation of scale costs properly includes that item.

[24] As to disbursements, there is a library research fee claim of $184. The plaintiff submits that this should be disallowed because this is not referred to in r 14.12(1) and, in any event, it ought to be considered as part of the research activity of counsel included in the costs allowance for trial preparation. As the defendants correctly point out, a disbursement does not need to be expressly referred to in r 14.12(1) to be claimed, but rather the rule provides examples of disbursements which may be claimed. The claim is modest and I should think that if Ms Davidson had spent the time doing the research herself, it would have been at much greater cost. I allow this disbursement.

[25] Mr Bill Smith, a qualified but not registered valuer, was called as a witness for the defendants at trial. A claim for $575 is made for his attendance as a witness. The plaintiff submits this should be disallowed because he was not qualified as an expert. In response, the defendants say, correctly, that Mr Smith was not called as an expert witness but rather as a witness of fact because he carried out the valuations on which the plaintiff relied. He is a professional person and is entitled to charge for his time in preparing for his affidavit and attending Court. The claim is reasonable as to its amount and it was undoubtedly properly incurred by the defendants in mounting their defence to the claim put forward by the plaintiff.

[26] Finally, there is a disputed claim by Mr David Horsburgh, who was called as an expert witness by the defendants. He submitted an account for $1,857.02 in relation to his time and expertise in monitoring the use of the carpark at the rear of the General Store premises and in obtaining and providing to the Court the images of its use in the period leading up to Labour Weekend 2016. The plaintiff submits that he was in reality not an expert witness, because he did not purport to draw any conclusions or make any expert comment. Rather, it was left to the Court to make what it could of the images.

[27] In my view the evidence was of assistance to the Court and Mr Horsburgh was effectively a combination of an expert and factual witness. As the defendants submit, his expertise was effectively in obtaining the images and providing them to the Court rather than in drawing conclusions from them and there would have been an objection from the plaintiff had he attempted to go further.

[28] Again, given the nature of his evidence and that he is in business, I consider that Mr Horsburgh's fees ought to be paid by the plaintiff. He gave relevant evidence and as a businessman engaged in this kind of work was entitled to charge for his services. The defendants were entitled to call him and, having succeeded in opposing all of the causes of action, should not be out of pocket for having used him as part of their defence case.

Summary and Result

[29] In summary, I entirely uphold the defendants' submissions on the questions of costs and disbursements and reject those of the plaintiff. The plaintiff is arguably fortunate that the defendants did not seek a greater increase in costs, closer to indemnity costs, as threatened in the Calderbank letter that contained an offer which was at least reasonable, indeed arguably generous, and which should have been accepted. Furthermore, it is not unusual for the Court to award "costs on costs" where there has been a significant argument about the level of costs that ought to have been awarded and one party's submissions have been entirely upheld. I note the defendants say that a further $6,000 has been spent in this regard. The plaintiff is fortunate that no application has been made for a contribution to those costs.

[30] The plaintiff is ordered to pay the defendants a total of $36,018.30 for costs together with disbursements of $2766.02

Judge S M Harrop
District Court Judge