EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT QUEENSTOWN

CIV-2014-059-162
[2016] NZDC 11917

BETWEEN	REMARKABLE WINES LIMITED Plaintiff
AND	CAMP CREEK LIMITED First Defendant
AND	ROBERT ANDREW DALZIEL Second Defendant

Hearing: (on papers)

Appearances: D Lester for the Plaintiff
J Moss for Defendants

Judgment: 30 June 2016

JUDGMENT OF JUDGE M J CALLAGHAN
[COSTS]

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[1] This is an application for costs against the plaintiff in favour of the first defendant in respect of proceedings related to the reconnection of the water supply to the plaintiff's property, specific performance of a water agreement by the first defendant, and relief for a wrongly placed structure which encroached over a right-of-way.

Chronology

[2] The proceedings were issued against the first defendant and second defendant on 7 November 2014 and included an interlocutory application for an interim injunction in respect of the reconnection of the water supply, and relief under s 323 of the Property Law Act 2007 in respect of the wrongly placed building.

[3] The application for an interim injunction did not proceed to hearing as the first defendant agreed to reinstate the water supply.

[4] There were discussions entered into between the first and second defendant and the plaintiff in respect of the Property Law Act matter, which did not come to fruition. The interlocutory application was therefore set down for hearing on 25 March 2015.

[5] The first defendant did not file a notice of opposition, and on 16 March 2015 the Court set the application down for a formal proof hearing on 25 March 2015.

[6] The first defendant filed a notice of opposition and affidavit on 23 March 2015.

[7] On 24 March 2015, Judge Phillips made a direction, having read the documents, that the matter would still be called on 25 March 2015.

[8] On 25 March 2015, there was an appearance by the first defendant's counsel. An application for extension of time was made and the hearing was set for 8 April 2015. Costs were reserved.

[9] No hearing actually took place on 8 April 2015 because a joint memorandum was filed by counsel which resulted in the matter being set down on 18 August 2015, for a two day trial on 12 and 13 January 2016.

[10] The proceedings against the second defendant were discontinued, which necessitated a new statement of claim being filed against the first defendant only.

[11] On 4 January 2016 the plaintiff discontinued the proceedings.

Current application

[12] The defendant seeks costs on the substantive proceedings on a 2B basis, plus 50 percent of the 2B scale costs; and on the interlocutory matters, the defendant seeks indemnity costs.

[13] The plaintiff opposes the award of costs and said it should have costs awarded to it; or alternatively that costs should lie where they fall; or alternatively if costs are awarded there is no justification for increased costs.

[14] The defendant says in respect of the interlocutory matters that it was forced to file its notice of opposition and affidavit and travel to Queenstown to argue the interlocutory matter on 25 March 2015 when it should not have had to do so. The defendant says the interim issue was settled before the hearing and therefore there was no necessity for them to appear, and at the end of the day the plaintiff was not successful in respect of the interlocutory application.

[15] As to the substantive proceedings, the defendant submits the plaintiff sold the land in September 2015 but despite the sale, maintained its claim against the defendant. The plaintiff placed a caveat on the defendant's title and that was not upheld when challenged in the High Court.

[16] Notwithstanding that ruling, the plaintiff continued with the District Court proceedings set for 12 and 13 January 2016.

[17] Attempts to resolve the issues were not successful and it was only when new counsel for the plaintiff was instructed shortly before the hearing date, that the proceedings were then discontinued.

Applicable principles

[18] Rule 15.20 states:

> Unless the defendant otherwise agrees or the court otherwise orders, a plaintiff who discontinues a proceeding against a defendant must pay costs

> to the defendant of and incidental to the proceeding up to and including the discontinuance.

[19] Thus the presumption is that a plaintiff who abandons its claim and discontinues a proceeding will have to pay costs to the defendant.

[20] This rule is the equivalent of the High Court Rule 15.23. Sims Court Practice states that as a general rule in considering costs on a discontinuance, the Court will not consider the merits of the competing contentions, although there will be some circumstances where the merits one way or the other are so obvious they should influence the costs issue (HCR 15.23.4 – Principles on which costs awarded).

[21] Even where the proceedings are rendered nugatory, the position is normally that a defendant is entitled to costs. See for example *North Shore City Council v Local Government Commission and Independent Devonport Society (Inc)* (1995) 9 PRNZ 182, where proceedings were rendered nugatory by the passing of legislation, the presumption that the defendants should receive costs on a discontinuance had not been displaced.

[22] The position might be different where an action of defendant after the proceeding has commenced means that the proceeding has become nugatory (*Olive Francis Retirement Home Ltd v Director-General of Health* HC Auckland CIV-2005-404-001367, 13 July 2005; BC200560961); the rationale being that the proceedings have caused the defendant to take the action and therefore the proceedings were justified.

[23] Conduct outside the proceeding is not relevant on the question of costs under this rule. The costs regime as a remedy is restricted to its proper role: partially compensating the party "winning" a proceeding or a step in a proceeding for its legal costs in respect of that proceeding or that step in the proceeding (*Thames-Coromandel District Council v Coromandel Heritage Protection Society Inc* [2009] NZCA 204 BC200961166).

[24] Rule 14.6 states:

Despite rules 14.2 to 14.5 the Court may make an order –

a) Increasing costs otherwise payable under those rules (increased costs); or

b) The court may make the order at any stage of a proceeding and in relation to any step in it.

c) The court may order a part to pay increased costs if

d) The party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in it by –

i. …

ii. Taking or pursuing an unnecessary step or an argument that lacks merit; or

iii. …

iv. …

v. Failing, without reasonable justification, to accept an offer of settlement where in the form of an offer under rule 14.10 or some other offer to settle or dispose of the proceedings; or

vi. …

[25] In *Bradbury v Westpac Banking Corp* [2009] 3 NZLR 400 (CA) at [27] the Court of Appeal stated "increased costs may be ordered where there is a failure by the paying party to act reasonably". The unreasonable conduct must be in relation to the proceeding, and thus after it was commenced, not earlier conduct (*Paper Reclaim Ltd v Aotearoa International Ltd* [2006] 3 NZLR 188 (CA) at [160].

[26] Further, the Court should consider the extent to which the failure to act reasonably contributed to the time or expense of the proceeding. Only to that extent could any percentage uplift from scale be justified: *Commissioner of Inland Revenue v Chesterfields Pre Schools Ltd* [2010] NZCA 400 at [165].

[27] The Court uplifts from scale is not a question of awarding a percentage of actual costs. In *Hold Fast NZ Ltd v Selleys Pty Ltd* (2005) 17 PRNZ 897 (CA) the Court of Appeal provided the following guidance on the correct approach to the award of increased costs:

Step 1 : Categorise the proceedings under r 14.3;

Step 2 : Work out a reasonable time for each step in the proceeding under r 14.5;

Step 3 : As part of the Step 2 exercise, a party can, under r 14.6(3)(a) apply for extra time for a particular step.

Step 4 : The applicant for costs should step back and look at the costs award it could be entitled to at this point. If it considers it can argue for additional costs under r 14.6(3)(b) it should DO so, but any increase above 50 percent on the costs produced by steps 1 and 2 is unlikely, given the daily recovery rate is two thirds of the daily rate considered reasonable for the particular proceeding.

[28] A primary rule in respect of costs is "all matters are at the discretion of the Court as they relate to costs" (r 14.1).

Defendants' position

[29] The defendant submits that as the plaintiff had discontinued the entire proceedings, the plaintiff should pay costs.

[30] In respect of the March 2015 formal proof hearing, the defendant says that it made a Calderbank offer prior to that hearing and says that the actions of the plaintiff were such that indemnity costs should be awarded and sets those costs at $4632, plus disbursements of $426 in airfares, and $32 in parking.

[31] As to the balance of the costs, the defendant seeks an increase of 50 percent on scale 2B on the basis that the plaintiff has not acted reasonably from the outset; that these proceedings were misguided; and also lacked merit.

[32] The costs on a 2B scale for the entire proceedings are $21,718.75.

[33] By deduction of the costs that might be awarded on the March 2015 hearing, the actual amount on a 2B basis for the substantive proceedings would be $18,308.75, with a 50 percent increase being $27,463.13.

Plaintiff's position

[34] The plaintiff argues in respect of costs that all matters are at the discretion of the Court if they relate to costs, and refers the Court to r 14.1. It accepts that it discontinued the proceedings, but says that the presumption that costs should be payable on a discontinuance is rebuttable, and the presumption may be displaced if the Court finds there are circumstances that make it just and equitable that it should not apply.

[35] The plaintiff says the proceedings were appropriately commenced because the defendant had cut off the plaintiff's water supply and that the discontinuance was reasonable in all the circumstances because it would have been uneconomic to run the case or to defend it.

[36] As to increased costs, the plaintiff says there is no justification, the proceedings were not misguided from the outset, nor were they outrageous as was claimed by the defendant.

Assessment

[37] The costs for the March 2015 hearing - claimed, as they are, for indemnity costs – do not, in the Court's view, have a substance-based claim.

[38] The notice of opposition and affidavit in support were filed at a late stage, the defendant being aware that the proceedings were afoot, but chose to take no formal steps. The plaintiff was entitled to pursue the application, there having been an attempt to settle which had not come to fruition.

[39] However, on the filing of the notice of opposition, the plaintiff chose to continue its action in light of the material that had been filed, and in the end the application was never formally determined.

[40] Accordingly the defendant would be entitled to costs on that hearing, but on a 2B basis simplicita with disbursements, which would include the airfares.

[41] As to the costs on discontinuance, the presumption must favour the defendant. The plaintiff had sold the property in September 2015 and had chosen to continue with the proceedings, despite the fact that the property had been sold and his interest in it, therefore, had ceased.

[42] As to increased costs in respect of the award on the discontinuance, the Court can see no justification for an increase over and above the standard fees for this matter. There was nothing exceptional about the proceedings, and while there were offers to settle which were not accepted, there was nothing which says that the party against whom costs is being ordered, acted other than reasonably.

[43] The costs that are being awarded in respect of this matter amount to $21,718.75 on a 2B basis, incorporating the March hearing, and that is a substantial award of costs in any event.

[44] As to costs on the costs application, they are to be awarded a 1B basis in favour of the defendant.

Result

[45] Accordingly, from an overall perspective, there is no justification for an increased award of costs as sought by the defendant.

[46] Accordingly, there will be an order for costs against the plaintiff in favour of the first defendant on a 2B basis for both the March proceedings and for the proceedings that were discontinued. The airfares for the March proceedings are awarded as a disbursement. Costs on the costs application are awarded in favour of the defendant on a 1B basis.

M J Callaghan
District Court Judge