EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT WELLINGTON

CIV-2014-085-663
[2016] NZDC 21661

BETWEEN	PAMELA CHARLOTTE WIKI Plaintiff
AND	SHARYN HEENI WATENE First Defendant
AND	ZAPA TRUST LIMITED Second Defendant

Submissions: 31 August, 16 and 19 September 2016

Appearances: DD Vincent and PA McKenzie-Bridle for the Plaintiff
JR Grace for the Defendants

Judgment: 2 November 2016

RESERVED JUDGMENT OF JUDGE S M HARROP
(AS TO COSTS)

Introduction

[1] In my reserved judgment dated 24 August 2016 I found for the plaintiff and entered judgment against each of the defendants for $35,000 together with interest. As to costs I noted that the proceeding had earlier been categorised on a 2B basis and said that I provisionally proposed to award costs to the plaintiff against each of the defendants on that basis together with reasonable disbursements. However I reserved leave for either party to make further submissions on the question of costs.

[2] Mr Vincent filed submissions for the plaintiff on 31 August seeking a modest increase beyond the level of costs calculated on a 2B basis of $21,716. Counsel sought an award of $22,500 and noted that the plaintiff's actual costs were $23,798.80 made up of costs paid privately to Mr Vincent's firm of $10,322.64 and costs of $13,476.36 which had been paid to the Legal Services Agency.

[3] For the defendants Mr Grace appears to accept that an award of 2B costs is prima facie appropriate but he submits that the first defendant should be awarded costs in respect of the plaintiff's unsuccessful summary judgment application (the application was limited to the first defendant) and that because in his submission the case was something of a test case there should be a significant reduction in costs which are otherwise payable. He also submits deduction should be made because of changes to the plaintiff's claim in the course of the proceeding and to some extent at trial.

The submissions in more detail and discussion

[4] Mr Vincent submits that the costs calculated on a 2B basis, amounting to $21,716, are inadequate and should be increased pursuant to Rule 14.6(3)(b). He seeks an increase of some $784 or about 3.5% to $22,500.

[5] My immediate reaction to this application, without reference to the grounds in support, is that it is effectively tinkering with the 2B award and ought not to be countenanced except for good reason. That impression is reinforced by the reality that if 2B costs are awarded Ms Wiki will receive costs only $2,082.80 short of full indemnity costs.

[6] Mr Vincent's application is initially based on the failure of the defendants to comply in a timely manner with directions I made on 7 April 2016 as to the filing of an amended defence briefs of evidence and submissions. In addition there was a failure to provide documentation on discovery by 21 April.

[7] Without going into the details of these allegations, which are in themselves meritorious, I am not satisfied that in the end much if any increased costs resulted. I accept there was inconvenience and indeed frustration arising but not at a level which in my view would warrant increased costs.

[8] Mr Vincent also refers to a settlement offer made by the defendants, which he clearly regarded then and now as unreasonable, but the context in which an offer of settlement might be relevant under Rule 14.6(3)(b)(v) is where a reasonable offer of settlement has been made by an ultimately successful plaintiff which the defendant has unreasonably refused. That is not the position here.

[9] Mr Grace for the defendants submitted that amendments to the plaintiff's claim and changes to its case at the outset of the trial and in closing submissions would in any event be an answer to any criticisms made of his client's procedural failures. To the extent that he is suggesting that there should be a reduction in 2B costs as a result of the plaintiff's performance, I reject that. While there may be inherent force in some of the points Mr Grace makes in his submissions, again I do not see these as having given rise to any additional costs or any material prejudice to the defendants.

[10] Mr Grace further submits that the costs in relation to the plaintiff's unsuccessful summary judgment application, which were reserved by Justice France on appeal against Judge Walker's decision to award costs to the first defendant, should either be re-awarded to the first defendant or alternatively left to lie where they have fallen. He submits that the plaintiff ought to have known that the case could not be resolved on a summary judgment application especially as a detailed notice of response had been filed by the first defendant. He also notes that the plaintiff had failed to provide evidence of the truth of the essential facts contained in the statement of claim and that the allegations advanced at trial were different from those advanced at the summary judgment stage.

[11] In his reply submissions Mr Vincent refers to what the Court of Appeal said in *NZI v Philpott* 1990 [2] NZRL 403:

> "As with most questions of costs they should be approached on broad principles. Whilst the defendant may be regarded as successful in one sense in resisting an application for summary judgment, is of course not a final determination in the proceeding itself. If ultimately the plaintiff does succeed, it seems to us in the general run of cases that the defendant should pay for both proceedings, the Court paying particular attention to the reasons why the plaintiff was unsuccessful in the first case. ... but where the defendant has raised defences which cannot by their nature be resolved at a summary judgment application but ultimately turn out to have no basis, costs on both sets of proceedings belong to the plaintiff."

[12] It is apparent from Judge Walker's decision dismissing the summary judgment application that the primary reason for his doing so was uncertainty as to the circumstances in which the $35,000 payment had been made. His Honour said he was not persuaded that the standard terms of the standard form agreement, which itself contained no reference at all to the payment of a deposit, could be said to govern the terms under which a deposit or part payment has been made.

[13] During the trial before me Ms Watene acknowledged that the payment of the deposit on 24 March 2009 *had* been made in connection with the written agreement which had been signed earlier in March 2009 and that as a result after it was paid the balance to be paid was undoubtedly $500,000. As I recorded in paragraph [29] of my judgment, although the defence contended that the deposit was paid under an earlier collateral oral agreement later incorporated in the written contract that was ultimately of no moment because Ms Watene accepted under cross-examination that the deposit paid was part of the agreement for sale and purchase and made in reduction of the original purchase price of $535,000. As I held paragraph [30], it followed that clause 2.0 in the November 2009 agreement, governing the treatment of deposits paid to a stakeholder, clearly applied. This was the very issue which Judge Walker described as being uncertain and as warranting the declining of summary judgment. At the trial it was in effect no longer an issue. In my view Mr Vincent is correct in his submission that the plaintiff should have costs both in relation the proceeding generally and in relation to the summary judgment application, on the application of the principle set out in *NZI v Philpott.*

[14] Mr Grace also submitted that the case was in some ways a test case in that it involved the rare situation in which there was no settlement date and no finance date recorded in the contract. While I accept that there was no direct case authority on that issue, I do not consider this case as properly regarded as a "test case" having ramifications beyond its particular facts. The case turned primarily on whether a reasonable time had passed before Ms Wiki avoided the contract; that was a fact-specific assessment. I see no justification for reducing the costs otherwise payable to the plaintiff on this account.

Conclusions

[15] Having considered all of the submissions of counsel, I am not persuaded that the provisional view I expressed in my reserved judgment should be altered. Predictability of costs is important to both sides and costs should generally follow the event at the level assessed as appropriate to the proceeding at an early stage, unless there is good reason (such as a relevant Calderbank offer) otherwise. Despite the points made by each counsel, which to an extent cancel each other out, I am not

persuaded there is sufficient reason to depart from the award of costs to the plaintiff on a 2B basis together with reasonable disbursements.

[16] Mr Grace made submissions about the effect of Ms Wiki's grant of legal aid. In my view in the present context that is irrelevant. The sole question I have to decide is whether 2B costs are appropriate including whether they should be increased or decreased. I note that, subject to the point about the inclusion of the summary judgment-related costs, Mr Grace does not contend that Mr Vincent's calculation of the 2B costs is in any way erroneous.

[17] Given that part of Ms Wiki's legal costs have been funded by the Legal Services Agency my understanding is that she will be required on receipt of payment in satisfaction of the judgment, including interest and costs, to account to the Agency in full for the amount it has outlaid. A grant of civil legal aid is effectively a loan to the plaintiff. Where the plaintiff succeeds there is an obligation to repay the "loan". But this has no bearing on whether 2B costs are appropriate or not.

[18] Where a legally-aided plaintiff is unsuccessful and costs are prima facie appropriately awarded against him or her, then the Court may need to consider the extent to which, if any, costs should be awarded against her or paid by the Agency. However, that is not the position here.

Result

[19] For these reasons I award costs to the plaintiff against each of the defendants jointly and severally on a 2B basis together with reasonable disbursements.

S M Harrop
District Court Judge