IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV-2011-470-275
[2012] NZHC 179

BETWEEN	LOVERIDGE LIMITED Plaintiff
AND	WATTS & HUGHES CONSTRUCTION LTD Defendant

Hearing: 16 February 2012

Appearances: Mr K J Catran for plaintiff
Mr N Smith for defendant

Judgment: 16 February 2012

ORAL JUDGMENT OF ASSOCIATE JUDGE DOOGUE

Counsel:
Cooney Lees Morgan, P O Box 143, Tauranga - by email: kcatran@clmlaw.co.nz

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(Counsel: Nathan Smith, Barrister – by email: Nathan@nathansmith.co.nz)

[1] I gave a judgment in this matter on 29 September 2011 following a defended hearing on 15th August 2011. The subject matter of the proceeding was a series of claims by a sub-contractor against a head-contractor relating to a construction site at Rotorua. The hearing was largely taken up with consideration of relatively difficult questions about how the Construction Contracts Act 2002 provisions regulated and impacted upon the dispute between the parties which arose over payment for services which the plaintiff rendered on the construction of the building at Rotorua. There was quite a high level of documentation much of which was copies of notices of claim under the Act. There was also what I would consider an average number of affidavits of average size filed in the proceeding.

[2] There was no agreement between counsel appearing before me today concerning the duration of the hearing, given that Mr Smith actually attended at the hearing (Mr Catran did not have carriage of the matter on the day) and given the advice from Mr Smith that he has checked his timesheets and they are consistent with a one-day hearing, I take the view that on balance the Court should accept that the hearing actually took one day.

[3] Following the issue of the judgment in September last year the plaintiff has discontinued its proceedings. As part of that discontinuance the parties did not come to any agreement as to costs. The parties have sought to have the costs determined and that has been the purpose of the hearing before me today.

[4] The proceeding effectively terminated after the filing of the statement of claim, the summary judgment application, filing of opposition to the application and the hearing of the defendants summary judgement application. There have been no further significant steps in the proceeding.

[5] The overall impression that I obtained from the material that was put before the Court for the summary judgment application, and reviewing the evidence given on affidavit, was that the plaintiff company found itself in difficulty when grappling with the complexities of the contractual documentation which it had executed as a party and had difficulty in understanding and findings its way around the provisions

of the Construction Contracts Act. I gained the impression that the plaintiff was a small to medium sized company and it may have lacked the administrative resources to deal with these matters in a familiar and assured way. Certainly, when its claims ran into difficulty the response which the plaintiff made did not seem to be particularly well thought-out. The plaintiff embarked upon a series of amended and varied payment claims and the paperwork seems to have become a morass. Whether in such circumstances it was wise for the plaintiff to press on with the summary judgment application in hindsight may be questionable. I consider though that the claims were bona fide and that the difficulties that the plaintiff encountered were not through its being obdurate or unreasonable.

[6] I turn now to the matter of fixing costs.

[7] Rule 14.2 which both Mr Catran and Mr Smith referred to makes it clear that the power to award costs involves very much a discretionary judgment. As *McGechan* notes in the commentary[1] to the rules, the costs rules attempt to balance amongst other things the parties' access to justice, insuring the successful party does not end up seriously out of pocket and other matters.

[8] The statement of principles in rule 14.2 explicitly includes the consideration that the party that fails with respect to a proceeding or interlocutory application should pay costs to the party who succeeds. That is relevant because the plaintiff in this case failed on its summary judgment application and the defendant succeeded.

[9] Further, the plaintiff as a discontinuing party is constrained to have acknowledged that its proceedings were doomed. While I understand the reasons that impelled the plaintiff to bring the proceedings in the first place the fact is that it has been unsuccessful in resolving its dispute by litigation and that must have resulted in expense being incurred by the defendant. I am in no doubt that the plaintiff ought to pay costs.

[10] The next issue concerns what the quantum of those costs should be. The parties' dispute here is in two parts. The first is as to the number of steps which costs

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[1] McGechan commentary 14.201 (4).

are broken down into in the rules actually applied in the circumstances of this case. The second is that the rules make provision for a range of time scales for which the parties should be compensated with those various time allowances being based upon what the Court considers is a reasonable time for each step: rule 14.5. So it is not just a matter of what time the parties' counsel and solicitors actually spent on the item it is a question of what the Court considers was objectively reasonable.

[11] I will deal first of all with which items in the rules at Schedule 3 are properly recoverable. Mr Catran's main point here was that to award an allowance under Item 2 in addition to allowances which are specific to those provided for in summary judgment applications (broadly 5.2, 5.3 and 5.4) would be duplicatory. I do not agree. I remind myself that the court's task is to finalise of the proceeding as a whole.

[12] Obviously when the defendant instructed its legal advisors there needed to be a review of the dispute overall. That requirement was not affected by the fact that the plaintiff elected to file an application for summary judgment at the same time it commenced the proceedings. It is correct that one of the elements of Item 2 that was not present in that statement of defence was not filed but the drawing of the statement of defence might be seen as being a relatively routine matter and of secondary importance to the time that would have taken up in researching the facts and the law which are the other items provided for in Item 2. I consider that the Item 2 matters are properly recoverable.

[13] Mr Catran for the plaintiff accepted that a costs award was reasonable in respect of Item 5.2 which was concerned with preparing and filing opposition and supporting affidavits. The other items claimed were preparation for hearing of defended summary judgment application, 5.3, and 5.4 arguing defended summary judgment application. Mr Catran accepted that these two were properly allowable. He made that concession though without prejudice to his earlier submission that one had to avoid duplication that could arise from ordering the allowance under Item 2.

[14] While there is no easy answer to Mr Catran's point I think the safest approach is to allow Item 2 to the defendant but not Item 5.2. Broadly that will compensate the defendant for the work that it had to do in getting its defence ready.

[15] However, I view 5.3 and 5.4 though as being separate from, additional to, and not duplicatory of Item 2. It is one thing to research a case and generally make decisions about the form of the defence overall, strategies that are to be allowed by the defendant etc on the one hand an , on the other, to undertake the separate task of preparing arguments to take to the Court to advance the defence. The same arguments in my view apply to 5.4. The actual attendance at the Court in presenting the arguments is also additional to and discrete from the preliminary exercise of researching the facts and the law etc. To summarise, I would allow Item 2, Item 5.3 and 5.4. I will come back to which time band is applicable shortly. There are also claims in respect of filing memoranda for two case management conferences, 16 November 2011 and 15 February 2012. I can see no reason why those also ought not to be allowed.

[16] I now turn to the question of time allowances. A judgment is required on that point only in respect of commencement of defence, the argument of the summary judgment etc but not the filing of the memoranda for case management conferences. The defendant accepts with respect to those memoranda that time Category B is applicable and I accept that.

[17] Reverting to Item 2, to fix the time band for that (that is the commencement of defence including receiving instructions, researching facts and law) the Court has to be guided by rule 14.5 which is concerned with determination of reasonable time. If time Band C was thought to be applicable six days would be chargeable at the recoverable rate. If on the other hand Band B was applicable, two days at the recoverable daily rate would be indicated. In choosing between those two bands rule 14.5 requires the Judge to have regard to the matters in 14.5(2) so that the reasonable time under Band B would be ordered "if a normal amount of time is considered reasonable" or under Band C "if a comparatively large amount of time for the particular step is considered reasonable". Putting it another way Band C is available where for reasons of complexity the proceeding was abnormal in the demands it

placed on time for preparation under the various heads referred to in Item Two. It has to be recognised that Band B will cover a continuum of items ranging from those which can be relatively quickly disposed of up to those which require considerable reflection, enquiry and research. If a lesser case obviously was of such a scale that it could not fit within that continuum of Band B then the Court will move it to consider placing it in category C.

[18] Where then does this proceeding lie? I have already mentioned the complexities of the Act but of course those might not have posed the same challenge for the defendant which gave the impression of being a relatively sophisticated construction firm. The proceedings involved only one party but while the Construction Contracts Act can and in this case did pose complex matters for determination, there was only one type of cause of action involved and that was under the Act and the ultimate question for the Court to decide was a matter of statutory interpretation of the Act. In regard to those matters I am not persuaded that this case was one in which an abnormally large amount of time for which the party would not be properly compensated by a category B allowance was involved.

[19] On the other items 5.3 and 5.4 the defendant concedes that time Band B applies and I will order accordingly.

[20] Therefore, in summary, the only part of the defendant's submissions which I have ruled against it on are:

(a) Categorising Item 2 as Band C rather than Band B;

(b) Disallowing Item 5.2 for preparation and filing opposition and supporting affidavits.

J.P. Doogue
Associate Judge