EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT AUCKLAND

CIV-2014-090-000690
[2017] NZDC 445

BETWEEN	COOPERS CREEK VINEYARD LIMITED Plaintiff
AND	LISA ANN BLACKBOURN Defendant

Hearing: On the papers

Submissions: 8 December 2016, 9 December 2016, 16 December 2016, 18 January 2017

Appearances: N Farrands for Plaintiff
E St John for Defendant

Judgment: 18 January 2017

COSTS DECISION OF JUDGE L I HINTON

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[1] Pursuant to my judgment on 24 November 2016 the plaintiff is entitled to damages of $33,000.00. I have since received submissions from Mr Farrands and Mr St John in relation to costs.

[2] The plaintiff is seeking interest, 2B costs and disbursements totalling $59,655.16 on the basis that the plaintiff was the successful party in the proceeding although the claim was $63,716.00 and the damages awarded $33,000.00. The plaintiff submits that while it may not have achieved the level of damages sought that does not alter its overall success in the proceeding. Further, Mr Farrands suggests that issues around the extent of damages did not add significant cost to the proceeding which largely concerned liability.

[3] In addition, the plaintiff seeks additional costs because the defendant applied for third party orchard owners to be joined to the proceeding, the plaintiff consented (with costs incurred as a result) and the defendant subsequently abandoned its claim against the third party.

[4] The defendant seeks costs against the plaintiff on a 2B basis as well as disbursements (including expert fees). No figure or costs breakdown has however been provided. The application is advanced on the grounds that the matter would have settled but for the plaintiff grossly inflating its damages claim and the plaintiff's rejection of a "perfectly reasonable settlement offer". Mr St John submits that the plaintiff was not successful in the proceeding.

[5] The plaintiff takes issue with the defendant's disclosure and reliance on the settlement offer. Mr Farrands submits this offer was not made "without prejudice save as to costs" so privilege has been breached, and in any event a calderbank offer is only effective when the settlement offer provided for a better outcome than that achieved at trial. Mr Farrands contends that the settlement offer made no allowance for costs incurred at that stage and that had the defendant taken a realistic and reasonable approach to the proceedings the matter could have settled.

[6] The defendant does not accept that privilege has been breached. Mr St John submits that the letter written by the plaintiff to the defendant, which contained a "without prejudice save as to costs" offer, breached privilege as it expressly referred to the JSC offer made by the defendant. The defendant states that the fact no issue was taken at the time meant there has now, in effect, been a joint waiver of privilege.

[7] The plaintiff's response, predictably, is that no breach of privilege arises with correspondence between the same parties to the original without prejudice discussions. In any event, Mr Farrands submits that even if the offer could be put before the Court, it was not sufficient as it took no account of the costs position at the time of the JSC (which the plaintiff claims would have supported an offer, in excess of $50,000) or that would apply following trial.

[8] Costs are at the discretion of the Court, to be exercised in accordance with the general scheme of part 14, and in particular rr 14.2 to 14.10.

[9] So far as the JSC settlement offer is concerned there seems to be agreement this was not made "without prejudice save as to costs". Mr St John's point is rather that the parties implicitly agreed to waive privilege when Mr Farrands included the reference in the plaintiff's Calderbank offer. This seems to me not a strong argument. My view is that the offer should not be considered by the Court. Of course a calderbank offer's effect is in any event discretionary. In this instance it would not have exceeded the damages ordered by the Court (albeit not a barrier necessarily). It may also not have incorporated costs incurred to the JSC stage and was probably not unreasonable for the plaintiff to reject at that stage.

[10] I have just received this afternoon a memorandum dated 18 January 2017 from Mr St John drawing my attention to a decision of Asher J in *Water Guard NZ Limited v Midgen Enterprises Limited* dated 8 July 2016. I note there seems no suggestion that the offer in that case was not a calderbank offer. I was aware of r 14.11 (4). I noted also the Judge's references to damages being 15% of the amount originally claimed, a quarter of the hearing time being spent on the successful claim, the plaintiff being unreasonable and inflexible, and so forth. The Judge decided this was not a case where a successful plaintiff who obtained less should get costs.

[11] As I see it the plaintiff here engaged in negotiation and I do not have an impression the plaintiff was unreasonable or inflexible. It seems to me the *Water Guard* decision is distinguishable.

[12] I think the plaintiff has been the successful party here. The award is a reasonably substantial one although less than the amount of the claim. That said, it is clear to me that the question of loss or proof of loss should have been examined much more closely, as my comments at the hearing indicated. I could not see how there ever was an entitlement to the amount claimed on the evidence presented. There was substantial merit in the criticism made by Mr St John at the hearing.

[13] The fact that the defendant had a reasonable measure of success here must be reflected in the award of costs. It is no answer in my view to say that the miscue in terms of evidence on damages is not material in that equation. The fact of the matter is that if a more realistic or disciplined approach had been taken to the issue of loss that this proceeding might have had more realistic prospects of resolution.

[14] My view is that the reduction in 2B costs should be 50%. It seems to me this fairly recognises the position of both parties. Nevertheless the plaintiff should be entitled to the additional costs of $2,325.00 in relation to the third party claim.

[15] So far as disbursements are concerned there should be a reduction overall for the same reasons of 50%. That reduction would be applied to the total disbursements sought of $18,594.06.

[16] The plaintiff is entitled also to interest. I agree with Mr Farrands' interest calculation attached to his memorandum of 8 December 2016 as logical and appropriate. So that interest is awarded at the rate of 5% per annum for the period from 11 July 2014 and 23 June 2015 until judgment under s 62B and thereafter post judgment on the judgment sum under s 65A.

[17] So that the result is that the plaintiff is entitled to:

(a) interest, in accordance with para [16] above;

(b) additional costs (third party claim) - $2,325.00;

(c) 50% of 2B costs claimed of $34,995.00;

(d) 50% of disbursements claimed of $18,594.66.

L I Hinton
District Court Judge