EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT NELSON

CIV-2015-042-000230
[2017] NZDC 2317

UNDER	the Contratual Remedies Act 1979
BETWEEN	WAIMEA NURSERIES LIMITED Plaintiff
AND	JR'S ORCHARDS LIMITED Defendant

Hearing: On the papers

Appearances: N Laing for Plaintiff
P W Michalik for Defendant

Judgment: 9 February 2017

JUDGMENTS OF JUDGE C N TUOHY AS TO COSTS

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[1] In my judgment dated 14 December 2016, I requested memoranda if the parties were unable to agree about costs. Memoranda have now been filed by both parties.

[2] Waimea Nurseries Limited (Waimea) seeks costs on a 2B basis up until 24 June 2016, the date of a Calderbank offer which it made, and full solicitor/client costs after that date. It characterises such an award as *"increased costs"* in terms of the Rules. At a minimum, it seeks 2B costs on all steps. On the former basis, the amount sought is $67,223.49 consisting of 2B costs up to 24 June 2016 of $10,413 and solicitor/client costs of $48,928.49 thereafter. On the latter basis a total of $25,098 is sought.

[3] JR's Orchards Limited (JR) submits that Waimea's request is not for increased costs in terms of the Rules, but for indemnity costs as from 24 June 2016. It submits that there is no basis at all for an award of indemnity costs; and that in this

case the rejection of the Calderbank offer does not justify increased costs, even though the plaintiff obtained a judgment greater than the offer it made; and, in any event, if increased costs are justified for this reason, they should not exceed an additional 50% of scale for the relevant period. JR's submission is that 2B scale costs are appropriate for all steps subject to a credit to it for costs on the costs argument. It accepts Waimea's calculation of 2B costs.

[4] I consider that JR's basic submission is correct in law. To ask for full solicitor/client costs for a particular period of the litigation is to ask for indemnity costs in terms of the Rules for that period. Indemnity costs are available only if the party seeking them establishes one or more of the pre-conditions set out in District Court Rule (DCR) 14.6(4). That has not been established here. The mere rejection of a Calderbank offer, even if that rejection was unwise, does not amount to the sort of bad behaviour at which paragraph (a) of DCR 14.6(4) is directed and none of the other pre-conditions are applicable.

[5] I also agree with JR's submissions as to the correct approach to assessing whether an order for increased costs should be made and, if so, assessing the quantum of it. In other words, I accept that the correct approach is as explained by the Court of Appeal in *Holdfast NZ Ltd v Selleys Pty Limited*[1].

[6] The primary reason given for seeking increased costs is the rejection by JR of a Calderbank offer which was a better result for it than the eventual judgment obtained against it. The relevant provision is DCR 14.6(3)(b) which gives the Court the power to make an order for increased costs where the party against whom the order is sought has *"contributed unnecessarily to the time or expense of the proceeding or of a step in the proceeding by ... failing without reasonable justification to accept an offer of settlement"*.

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1 (2005) 17 PRNZ 897

[7] Again, I accept JR's submission that the party seeking increased costs on this basis must establish that the failure to accept the Calderbank offer to settle was unreasonable in the circumstances then existing[2].

[8] I do not think its rejection of the offer could be categorised as unreasonable at the time, although a cautious litigant would probably have chosen to accept it. It is correct that both parties, for different reasons, addressed the question of the existence or otherwise of a contractual relationship, solely through the prism of Waimea's FTSA forms. That approach was initiated by Waimea. Viewing the case solely through that prism, it was not unreasonable for JR to consider it might have some chance of successfully defending the claim.

[9] In this regard, I also keep in mind that JR had some significant degree of success at trial in that Waimea failed to satisfy me that the terms and conditions in the standard FTSAs applied to the parties' contracts for 2012 delivery; therefore the claim for $157,000 contractual interest failed.

[10] As to the matter of interrogatories, I am not able to say on the basis of the memoranda that they were not justified. The fact that they were not put specifically to a witness does not establish that.

[11] Overall I am not satisfied that a case for increased costs has been made out.

[12] As to the Potbury expenses, Waimea is entitled to the costs of flying him down from Napier for the trial and accommodating him in Nelson. However, if he came down earlier for the purposes of having his evidence briefed, the expense of that cannot be claimed as witnesses' expenses.

[13] Finally, I am satisfied that there should be a credit to JR for scale 2B costs for one day on the costs argument. JR has been successful on this argument which has involved a difference of more than $42,000 and required detailed submissions by JR's counsel. However, I decline to allow it increased costs. Although the attempt

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2 *Easton Agriculture Limited v Manawatu Wanganui Regional Council* (HC Palmerston North, 22 December 2011, CIV-2008-454-31, Kos J).

to obtain partial indemnity costs had no foundation, the request for increased costs, although unsuccessful, was perfectly reasonable.

[14] The above rulings should enable costs and disbursements to be fixed by the Registrar if the parties are unable to do so.

C N Tuohy
District Court Judge