IN THE DISTRICT COURT
AT AUCKLAND

CIV-2011-044-001578
[2017] NZDC 28759

BETWEEN	FILIPINO LINK LIMITED Plaintiff
AND	ANITA FERIA BISHARA Second Plaintiff
AND	NZ BUSINESS LIMITED Defendant
AND	ALAN CHELLP Second Defendant
AND	MICHAEL PAUL BISHARA Third Defendant
AND	ANTONY BISHARA Fourth Defendant
AND	PETER RICHARD BISHARA Fifth Defendant

Hearing:	2 November 2017
Appearances:	P Kennelly for the Plaintiff S W N Piggin/Ms Wong for the Second Defendant All other parties self represented
Judgment:	19 December 2017

RESERVED DECISION OF JUDGE P A CUNNINGHAM
[Application by second defendant to dismiss proceedings for want of prosecution and for costs]

Introduction

[1] The first and second plaintiffs have reached an agreement with the third, fourth and fifth defendants that the proceeding should be discontinued with no issue as to costs. The first defendant has now been placed into liquidation. The second defendant Mr Chellp was a director of the first defendant. The same offer to settle, without any issue any to costs was made to Mr Chellp and he declined that offer.

[2] In order to bring matters to a head Mr Chellp has filed an application to dismiss the proceeding for want of prosecution and he makes an application for costs in relation to steps taken by him in the proceeding. Mr Chellp is now in receipt of a grant of legal aid.

Background

[3] It is necessary to canvass some of the factual background to this claim which was commenced by way of the notice of claim procedure on 5 October 2011.

[4] The first plaintiff was a business that imported foodstuffs designed to meet the requirements of the Philippino community in New Zealand. The second plaintiff was a director, a shareholder and an employee of the first plaintiff.

[5] The first defendant was the landlord of premises at 2C/89 Ellice Road, Glenfield ("the premises") from which the first plaintiff ran its business. The second defendant Mr Chellp was the sole director and shareholder of the first defendant.

[6] The plaintiffs' case is that on the evening of Sunday 21 February 2010 the second defendant acting on behalf of the first defendant and on his own behalf together with other persons unlawfully attended the premises of the first plaintiff at the premises and entered them. Further that Mr Chellp allowed other persons to enter the premises. These actions were said to be in breach of the second lease and s 245 Property Law Act 2007 the entry being prior to the expiry of a notice pursuant to s 245. During this entry, cash, inventory, documents and chattels belonging to the first plaintiff were removed rendering the business of the first plaintiff unable to trade and

unable to pay its debts including wages. The locks were changed which prevented the plaintiffs from lawfully entering the building.

[7] The first plaintiff claimed a loss in the sum of $101,386.66. That the second plaintiff lost wages, loss of her business and a capital investment of $40,200.00 in the first plaintiff. Thus the total amount of the loss claimed by both plaintiffs was $161,228.43.

[8] There were two leases as between the first defendant and the first plaintiff company. The first was a lease dated 4 August 2008. The first plaintiff was unable to fulfil its obligations under the lease and cancelled it. A second lease was entered into dated 24 January 2010.

[9] Mr Chellp's position is that the plaintiffs promised to pay the first defendant arrears under the first lease and also rent under the second lease. He says that the plaintiffs failed to pay their rent and operating expenses and interest due under the first and second leases as a result of which the first defendant NZ Business Ltd suffered a loss of $21,851.98. A counterclaim was filed to recover that sum.

[10] It is the position for Mr Chellp that the premises were not wrongfully re-entered nor did he deny the plaintiffs' entry and that he did not allow any other persons to enter the premises as trespassers. He acknowledges that the premises were entered by a Bishara family member on 21 February 2010 but denies that either the first defendant or he entered the premises at that time. Furthermore he says anything he did was in relation to his duties as a director of the first defendant and that he did not do anything in his own right. He denies that the stock was worth more than $10,000.00.

The application to dismiss the proceeding

[11] This has been filed pursuant to rule 15.2 District Courts Rules 2014 on the basis that the plaintiffs have failed to prosecute the proceeding to trial.

[12] The proceeding was commenced in October 2011 against the first two defendants. A settlement conference scheduled to take place on 6 September 2012 was vacated due to unavailability of the Judge (due to illness). The settlement conference took place on 25 February 2013. Judge Hinton recorded:

> "Adjn" ("adjournment")
>
> Agreement on joinder.
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> Parties to file timetable.

[13] Michael Paul Bishara, Antony Peter Bishara and Peter Richard Bishara were later joined as third parties. At around that time Mr Chellp had ceased being represented by counsel and was acting for himself. There is a document on the file prepared by him dated 3 November 2013 in which he stated objection to his being a second defendant.

> as he was … "acting as a company office (Director) of NZ Business Ltd."

[14] He went on to say he has not benefitted in any way personally. He also said the following:

> 3. …Alan Chellp took expenses for damping the left outdated decomposed stock, for the left rubbish, for the premises damage and renovation, for the chasing debt and debt repayment cost.

[15] The case was set down for a two day full trial on 5 and 6 May 2014. It appears from the file that an application to set aside the third party notices had not been heard as at 2 April 2014. That application came before Judge M-E Sharp on 8 April 2014. Judge Sharp recorded in a minute that Mr Chellp was now acting for himself. There were deficiencies in service of the third party notices as a result of that lack of representation as recorded in a minute of Judge M-E Sharp dated 8 April 2014.

[16] On 29 May 2014 there was a directions conference before Judge D M Wilson QC. Directions as to trial were made. A (second) trial date of 5 May 2015 was subsequently vacated, it appears the reason for this was Mr Chellp's application for legal aid and a decision to hold a further settlement conference instead of a hearing.

The settlement conference occurred on 5 May 2015. It appears that some progress was made at the conference.

[17] Settlement did not occur and on 17 February 2016 I heard an application by the plaintiffs to join the third parties as defendants. That application was successful. Claims, responses and counterclaims followed.

[18] On 10 June 2016 I adjourned a case management conference because of the late filing of a document by counsel for the plaintiffs.

[19] The case then languished for ten months. On 11 April 2017 I issued a minute requiring all parties to attend a resumed conference. This occurred on 23 May 2017. It was at this time that Mr Kennelly, counsel for the plaintiffs advised that the plaintiffs were considering discontinuing the proceeding. Family reasons for this decision were mentioned. He was directed to advise the Court within 14 days whether that course was to be adopted. At that time the issue of costs was part and parcel of the discussion.

[20] By 8 August 2017 the plaintiffs had settled the issues of discontinuance and costs with all parties except Mr Chellp. However no notice of discontinuance had been filed. (There was no need to settle with the first defendant as it had been liquidated in early 2012). In a minute of 8 August 2017 I directed Mr Kennelly to advise what course of action the plaintiffs intended to take. There was no response. The application to dismiss by Mr Chellp followed.

[21] It is apparent that had Mr Chellp agreed to settle without costs the notice of discontinuance by the plaintiffs would have been filed by now.

Decision on application to dismiss

[22] Based on the above chronology it is obvious the plaintiffs do not intend to take the matter to trial and the application to dismiss the claim is granted.

[23] Costs on a 2B basis should be awarded to Mr Chellp as his application has been successful (provided these do not exceed his legal aid grant for this aspect of the matter).

Application for costs in relation to the proceeding

[24] Although the plaintiffs have not discontinued the proceeding, the reasons for that is failure to reach agreement in relation to costs with Mr Chellp. I intend to approach this aspect of the matter as if it was an application for costs on a discontinuance.

[25] The issue of costs on a discontinuance was discussed in *Ng & Anor v Pauatahanui G S Ltd*[1] His Honour Mackenzie J referred to a number of English cases on this topic. The first was *Brawley v Marczynski & Anor (No. 1)*[2]. A decision of the English Court of Appeal the Court said:

> It was held that the Court has power to make a costs order when the substantive proceedings have been resolved without a trial but the parties have not agreed about costs. There is no tradition of there being "no order as to costs" merely because the dispute has been settled except as to costs, though if it is truly impossible to say what the likely outcome would have been, that is a possible order.
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> The overriding objective is to do justice between the parties without incurring unnecessary court time and consequent additional costs.
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> At each end of the spectrum there will be cases where it is obvious which side would have won had the substantive issues been argued to a conclusion. In between the position will, in differing degrees be less clear. How far the court will be prepared to look into the unresolved substantive issues will depend on the circumstances of a particular case.
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> In the absence of a good reason to make any other order, the fall-back position is to make no order as to costs.

[26] The second case was *BCT Software Solutions Ltd v C Brewer & Sons Ltd*[3]:

> The arguments advanced on this appeal have demonstrated the real difficulties in hearings on asking a Judge to exercise his discretion in respect of the costs of an action, which he has not tried. There are, no doubt, straightforward cases in which it is reasonably clear from the terms of the settlement that there is a winner and a loser in the litigation. In most cases of that description the parties themselves will realistically recognise the result and the costs will be agreed. There will be no need to involve the judge in any decision on costs. If he becomes involved, because the parties cannot agree and ask him to resolve the costs dispute, the decision is not usually a difficult one for him to make.

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[1] [2014] NZHC 3396 a decision of Mackenzie J 22 December 2014.
[2] [2002] EWCA Civ 756, [2003] 1WLR 813.
[3] [2003] EWCA Civ 939 per Mummery L J.

> There are, however, more complex cases (and this is such a case) in which it will be difficult for the judge to decide who is the winner and who is the loser without embarking on a course, which comes close to conducting a trial of the action that the parties intended to avoid by their compromise. The truth often is that neither side has won or lost. It is also true that a considerable number of cases are settled by the parties in the belief that the terms of settlement represent a victory, or at least a vindication of their position, in the litigation, or in the belief that they have not lost; or, at the very least, in the belief that the other side has not won.
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> In my judgment, in all but straightforward compromises, which are, in general, unlikely to involve him, a judge is entitled to say to the parties "if you have not reached an agreement on costs, you have not settled your dispute. The action must go on, unless your compromise covers costs as well."

[27] Thirdly *Venture Finance PLC v Mead*[4]:

> It is not in dispute that a judge has jurisdiction to make an order for costs in proceedings in which all substantive issues have been disposed of by agreement – see the decision of this court in *Brawley v Marczynski & Anor (No. 1)*[5]. But he is not obliged to do so; and the dangers of embarking on that course were illustrated in *BCT Software Solutions Ltd v C Brewer & Sons Ltd*[6] -see in particular the observations of Lord Justice Mummery at paragraphs [4] – [6] and [18]. In the judgment that I delivered on that appeal I sought to analyse the difficulties at paragraphs [22] – [24]. I pointed out, at paragraph [23] that that, unless the court had a proper basis of agreed or determined facts upon which to decide whether the case was one in which it should give effect to the "general rule" under CPR 44.3(2)(a), or should make some different "order" (and if so what order) pursuant CPR 44.3(a)(b), it must accept that it is not in a position to make an order about costs at all. I said this:
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> > That is not an indication of the court's function in relation to costs. It is a proper recognition that the course which the parties have adopted in the litigation has led to the position on which the right way in which to discharge that function is to decide not to make an order about costs.

[28] Mackenzie J applied the law as set out in the above three cases. I intend to adopt the same legal principles.

Submissions by the parties

[29] Mr Piggin submitted on behalf of Mr Chellp that he found himself in the middle of a family commercial dispute. There has been no substantive hearing because the plaintiffs have not proceeded.

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[4] [2005] EWCA Civ 325 per Chadwick LJ.
[5] [2002] EWCA Civ 756 [18], [2003] 1 WLR 813 at 819B.
[6] [2003] EWCA Civ 939, [2004] [F.S.R 9].

[30] Further that the likelihood that Mr Chellp would be liable in his own right as opposed to in his capacity as a director of the first defendant was unlikely.

[31] Mr Piggin also emphasised the delays on 23 May 2017 of Mr Kennelly not providing the Court with advice about the plaintiffs' intentions in relation to the discontinuance.

[32] Mr Piggin went on to emphasise the delay since the matter was said to be ready to go to trial almost two years ago. This has involved Mr Chellp in further costs.

[33] Mr Chellp's actual costs were $9,702.05 in respect of his grant of legal aid and earlier private work. Total costs on a 2B basis exceed that calculated at $10,5204 but Mr Chellp recognises he is not entitled to more than $9,702.05.

Submissions for the plaintiffs

[34] Firstly Mr Kennelly emphasised that the second plaintiff had only been joined because she was owed money as an employee and also in relation to an advance she had made to the company. This claim had come about as a result of a proceeding filed by Mr Chellp in the Disputes Tribunal. The plaintiffs then filed a defence with a counterclaim which is outside the jurisdiction of the Disputes Tribunal hence the matter was transferred to the District Court.

[35] The hearing set down for May 2014 was aborted because Mr Chellp wanted to join third parties.

[36] He submitted that the reason that the first plaintiff was unable to pay any costs was directly related to the actions of Mr Chellp in allowing the third to fifth defendants into the premises and taking items and for changing the locks. That at trial the plaintiffs would have alleged that Mr Chellp breached his fiduciary duties by taking Mr Michael Bishara to the bank and accepting money from the first plaintiff's bank account.

Discussion

[37] In terms of the substantive issues, I am in that position where it is not possible to make any proper assessment of the merits including because there are no affidavits or briefs of evidence on the Court file. However what I am able to make a decision about is the procedural aspects of the case.

[38] Firstly since the 23 May 2017 the plaintiffs have avoided bringing this proceeding to a close essentially because of the issue of costs. In those circumstances it is appropriate for Mr Chellp to be paid for steps he has taken in the proceeding since 23 May 2017 until the hearing of his application on 7 November 2017. That should be on a 2B basis. However an adjustment should be made to reflect the legal aid rate. This is essentially the difference between the 2B costs rate and charges made by his lawyer to legal aid for that work.

[39] The joining of third parties and subsequent applications for those third parties to be made second defendant appears to have had two effects:

(a) the proceeding did become bogged down from a process point of view because the adding of three additional parties complicated matters and slowed them down;

(b) having said that the joining of those parties has essentially led to a resolution that being a family decision for everyone to go their own separate ways.

[40] I am of the view that Mr Chellp cannot be held responsible for the fact that his wish to join third parties was in any way improper. Indeed on the plaintiffs' own narrative of events of the facts, the third to fifth defendants should probably always have been parties to the proceeding.

[41] There appears to me to be some merit in the submission that Mr Chellp's actions were in his capacity as director of the first defendant. That company was the landlord and the genesis of this action was a landlord/tenant dispute about whether the tenant was in arrears of rent and other expenses and whether the landlord wrongfully entered the premises.

[42] I award Mr Mr Chellp a sum of $2000. That is an amount I have calculated (doing the best that I can) to compensate him for his costs in defending the action in a proceeding where it seems unlikely he was personally liable.

[43] To summarise Mr Chellp is awarded:

(a) costs on the application to dismiss and the application for costs;

(b) costs for the period 23 May 2017 until 7 November 2017;

(c) $2,000.

The costs for (a) and (b) are on the basis referred to in the last two sentences in para [38] herein.

Who should pay costs

[44] Notwithstanding Mr Kennelly submission that Anita Bishara should not have to pay costs, the fact of the matter is that she is a plaintiff. I cannot see any principled basis on which she should not be liable for costs payable to Mr Chellp on a joint and several basis with the first plaintiff. The costs referred to above are payable by the first and/or second plaintiffs.

Dated at Auckland this 19th day of December 2017 at 9.45am.

P A Cunningham
District Court Judge