IN THE DISTRICT COURT
AT HAMILTON

I TE KŌTI-Ā-ROHE
KI KIRIKIRIROA

CIV-2018-019-000682
[2019] NZDC 8026

BETWEEN	ROY DENNIS CONSTRUCTION LIMITED Plaintiff
AND	CLIMATE ZONE LIMITED First Defendant – (Discontinued)
AND	EXCEL REFRIGERATION & AIRCONDITIONING (WAIKATO) LIMITED Second Defendant

Hearing: On the Papers

Judgment: 2 May 2019 at 12.00 noon

JUDGMENT OF JUDGE R G MARSHALL
[Costs – Plaintiff and First Defendant on filing of notice of discontinuance]

Introduction

[1] On 9 April 2019 the plaintiff filed a notice of discontinuance in relation to proceedings against the first defendant.

[2] On 12 June 2018 the plaintiff had issued proceedings against the first defendant which was served on 17 June 2018.

[3] On 14 August 2018 the first defendant filed a statement of defence stating that it was not a party to the contract with the plaintiff and referred the plaintiff to the purchase order that the plaintiff relied on.

[4] As a consequence of that, on 23 August 2018 the plaintiff applied to join the second defendant to the claim and in October 2018 the plaintiff filed and served an amended statement of claim on the first and second defendants.

[5] On 27 November 2018 the first defendant sent a letter to the plaintiff pointing out that a notice of discontinuance had not been filed and the plaintiff had elected to continue its claim in the alternative against the first defendant. That letter also indicated that costs would be sought on a 2B basis and that an application for summary judgment for the first defendant would inevitably succeed.

[6] The first defendant does acknowledge that on or about 13 December 2018 the plaintiff did indicate it would be filing a notice of discontinuance in respect of it.

[7] A notice of discontinuance was subsequently filed as noted above.

Application for costs

[8] The first defendant seeks costs on a 2B basis for filing the statement of defence (1 day) and filing a memorandum as to costs (.25 days). The sum sought is $2,225.00.

[9] There was no agreement as to costs and the plaintiff resists an award as to costs.

[10] It is accepted by all parties that r 15.20 of the District Court Rules 2014 applies. That rule provides that:

> Unless the defendant otherwise agrees or the Court otherwise orders, a plaintiff who discontinues a proceeding against a defendant must pay costs to the defendant of and incidental to the proceeding up to and including discontinuance.

[11] Obviously, the onus is on the plaintiff to show why the presumption for costs in favour of a first defendant should not apply in accordance with r 15.20. The plaintiff relies on the *Earthquake Commission v Whiting, Jones & Peebles.*[1] There, the Court of Appeal stated:

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[1] *Earthquake Commission v Whiting*, *Jones & Peebles* [2015] NZCA 144 at [63].

> Rule [15.23] imposes a mandatory obligation on a plaintiff who discontinues a proceeding to pay the costs of the defendant in the discontinued proceeding. There are, however two important exceptions to this obligation: the defendant may agree "otherwise" or the Court may order "otherwise". Unless one of the exceptions applies, costs follow the event when a notice of discontinuance is filed.

[12] Rule 15.23 is the equivalent High Court rule to DCR 15.20.

[13] Here the plaintiff argues the second exception applies and that the Court has a discretion to make an order relating to costs departing from the mandatory obligation, where circumstances exist making it just and equitable to displace that obligation.

[14] The plaintiff says when it commenced proceedings against the first defendant, the plaintiff was of the firm belief that the first defendant was a contractual party and that belief was reasonable because the first defendant's registered name as a trading name was Climate Zone. Also the acceptance of invoices and a payment claim issued under the Construction Contracts Act 2002 were issued to that trading name and also the issuing of a payment schedule under the same Act was issued to that same name, Climate Zone. Further that the plaintiff took no further steps to continue with the first defendant when the second defendant admitted the contract.

[15] In support of its position the plaintiff refers to the affidavit of John Davis Dennis sworn on 22 August 2018 setting out the various references to Climate Zone and why it would be readily concludable that this was the contractual party.

[16] The first defendant points out that the work order number 2603 which is exhibit marked "B" in the affidavit of John David Dennis clearly identifies the contractual party as the second defendant, Excel Refrigeration & Airconditioning (Waikato) Limited. The first defendant states that there can be no ambiguity or mistake about that and this was the prime document relied on by the plaintiff in bringing its claim.

Discussion

[17] I do not consider that the presumption in DCR 15.20 has been displaced.

[18] The prime document work order number 2603 is very clear as to who the contractual party is. There may have been muddling or confusion afterwards, but the prime document speaks for itself. On that basis I would not consider it appropriate to exercise a discretion over-riding the presumption on the basis that circumstances dictated it was just and equitable that that rule did not apply.

Basis of cost award 1A or 2B

[19] The plaintiff accepts that in a joint memorandum for counsel for first case management filed on 15 February 2019, the parties agreed that the categorisation of the proceedings in relation to costs is 2B.

[20] Notwithstanding that, the plaintiff submits that DCR 14.3(2) which allows for a determination of costs in advance should not apply because in accordance with that rule, there are "special reasons to the contrary" justifying a different categorisation.

[21] The plaintiff submits that the filing of the statement of defence was a straightforward task being able to be completed by junior counsel which would lead to a category 1 categorisation. Also, the plaintiff submits that paragraph 8(e) of the joint memorandum of counsel for the first case management conference categorising proceedings as 2B should not apply to proceedings and steps taken before that memorandum.

[22] In any event the plaintiff is concerned that awarding costs to the first defendant on a 2B basis would be contrary to DCR 14.2(f) which states:

> An award of costs should not exceed the costs incurred by the party claiming costs.

Discussion

[23] It appears to be that there was clear agreement between the parties in the joint memorandum for the first case management conference that the proceedings would be categorised as 2B. The parties were fully aware as at 15 February 2019 that the plaintiff would be filing a notice of discontinuance against the first defendant. I do

not consider that there are special reasons established to justify a ruling for costs now under a different categorisation.

Result

[24] The first defendant is entitled to costs on a 2B basis in the sum of $2,225.00 for filing a statement of defence (1 day) and filing a memorandum as to costs (.25 days). This is however conditional on the first defendant filing and serving a memorandum within seven days confirming that its costs are equal to or exceed the sum of $2,225.00 and attaching copies of its actual legal costs incurred in respect of these proceedings.

R G Marshall
District Court Judge