

**IN THE DISTRICT COURT
AT AUCKLAND**

**I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKĀURAU**

**CIV-2013-004-001186
[2018] NZDC 20130**

BETWEEN HAKAN ALTAN
Plaintiff (and Counterclaim Defendant)

AND DEBORAH WALLACE
Defendant (and Counterclaim Plaintiff)

Hearing: In Chambers

Appearances: P Lowndes for the Plaintiff
I M Hutcheson for the Defendant

Judgment: 27 September 2018

DECISION ON COSTS OF JUDGE P A CUNNINGHAM

[1] The Plaintiff was successful in this claim based on the third cause of action in a further amended statement of claim dated 25 January 2017. I said in my decision of 12 October 2017 that if the parties were unable to agree costs memoranda should be filed and I would decide costs on the papers. I now do so.

[2] On 4 December 2017 trial counsel Mr Lowndes filed with the Court a schedule of costs and disbursements which he referred to counsel for the defendant for review and comment. That seeks costs on a 2B basis. There appears to be agreement that that is a proper categorisation of the proceeding and I agree. The matter has been to the High Court by way of appeal and the need for costs to be determined in this Court arose in late July 2018.

Plaintiff's approach

[3] The plaintiff's case for costs is that this was an unremarkable proceeding and the principle applies that the successful plaintiff be entitled to costs in the usual way.

Defendant's submissions

[4] Counsel for the defendant takes issue with that stance on the basis that the plaintiff was not successful on two of the three causes of action and not successful to the extent claimed in the amended statement of claim for the third cause of action.

[5] The judicial settlement conference was wasted time and effort due to the manner in which the plaintiff's claim was then pleaded. A new counsel was appointed and statement of claim (as opposed to the original notice of claim) was filed in September 2015 seeking as relief remedies which were not ultimately successful. Another new counsel was appointed in January 2016 which led to the filing of an amended statement of claim.

[6] The pre-trial process was torturous and challenging including the late request for documents a day before the plaintiff's briefs were due to be exchanged. There was a need for a further pre-trial conference. The plaintiff was in default of the timetable for the provision of briefs. The late filing of the briefs meant that experts were only able to confer the day before the trial was due to commence. There was a supplementary brief of the plaintiff's expert received that evening. This substantially amended the amount sought.

[7] This has resulted in the costs being increased by actions or inactions taken by the plaintiff.

[8] Exception was taken with the cost of valuation (The Tilling Valuation) (\$834.90) which was not able to form part of the evidence for reasons referred to in paragraph [121] of my decision dated 12 October 2017.

[9] Accordingly reduced costs were appropriate and a discount of 50% be applied to the costs claimed.

Response by the plaintiff

[10] In response counsel for the plaintiffs filed a memorandum dated 15 August in which it was submitted that the defendant had not addressed any of the steps in particular, that should be the focus of a reduction in costs. There was a claim for two judicial telephone conferences which is not unusual as they were for the purpose of giving trial directions for briefs. Costs were not awarded to the defendant at the time of either conference as one might have expected had the defendant been entitled to those costs. In any event the costs are .55 of a day or \$979.00 at scale.

[11] With reference to the judicial settlement conference the plaintiff can equally say the same about the defendant. There was no Calder Bank offer. Further the defendant's attitude throughout the proceeding has been unrealistic in the sense that her position throughout the trial was that the plaintiff owed her money (hence a counterclaim was filed).

[12] Amendments to the pleadings are not uncommon. In relation to the cost of a Tilling valuation, the Court's decision made it clear that it was an appropriate basis for the plaintiff expert as a basis for obtaining a value of goodwill for the business.

[13] On the defendant's approach the plaintiff would receive only \$3,157.25 for the steps prior to the preparation for the trial of itself which is unrealistic. Rule 14.2 of the District Courts Rules which are the principles applying to the determination of costs which includes that as far as possible the determination of costs should be predictable and expeditious.

My assessment

[14] Rules 14.3, 14.4 and 14.5 together with Schedules 4 and 5 of the District Courts Rules 2014 are used to determine the categorisation of a proceeding, appropriate daily recovery rates and the determination of reasonable time to carry out steps in the proceeding. Notwithstanding this, costs are always at the discretion of the Court (see Rule 14.1 District Courts Rules 2014). That includes that a Judge may increase costs or refuse or reduce costs.

[15] In principle, I accept the submission by the plaintiff that costs should follow the event and that the claim was unremarkable. Having said that Mr Hutcheson for the defendant does make some valid points. Those I consider applicable follow.

[16] Two of the three causes of action were dismissed. Inevitably that means that time was spent defending a cause of action that was ultimately successful. Furthermore, there is some force in the submission that it was not until Mr Weber's amended report was received the night before trial that the defendant knew what the numbers were in relation to the part successful third cause of action. To be fair it must be said that the plaintiff faced a counterclaim that was also unsuccessful.

[17] The plaintiff had at least two changes of counsel throughout the proceeding. However that does not affect the basis for claiming costs which is based on the steps set out in Schedule 4 to the District Courts Rules. With the exception of the additional judicial telephone conference and resulting attendances in July 2017 I was not able to discern any steps that one could consider unnecessary or unusual. That includes the judicial settlement conference. The filing of an amended statement of claim is relatively common.

[18] In relation to the Tilling valuation, it was used as a basis for valuing the business by the plaintiff's expert. For that reason, in my view it is able to be claimed.

[19] In my view there should be some discount to the usual scale costs. 80% in my view is fair to the defendant.

Result

[20] Costs are payable in the sum of \$39,227.02 plus disbursements as set out in Mr Lowndes' memorandum making a total payable of \$50,897.10.

Dated at Auckland this 27th day of September 2018 at _____ am/pm.

P A Cunningham
District Court Judge