

**IN THE DISTRICT COURT
AT WHANGAREI**

**I TE KŌTI-Ā-ROHE
KI WHANGĀREI-TERENGA-PARĀOA**

**CIV-2019-088-000402
[2020] NZDC 18456**

BETWEEN

JAYNE KAREN SENIOR
Plaintiff

AND

ASK THE ARBORIST LTD
Defendant

Appearances: Mr Browne & Ms Van Beek for the Plaintiff
Ms Elliott & Mr Benton as directors of the Defendant

Judgment: 1 October 2020

DECISION OF JUDGE J BERGSENG

Background

[1] This Decision is in respect of three discrete issues arising from my judgment of 19 November 2019 (the 19 November decision). In that decision I declined an application by the self-represented defendant to transfer proceedings from the Whangarei District Court to the North Shore District Court.

[2] I noted that the defendant having failed in its application was liable for costs on a 2B Basis.

[3] I invited the parties to attempt to agree on the issue of costs and in the absence of such agreement to file submissions.

[4] The parties failed to agree and Submissions were filed.

[5] The plaintiff filed a memorandum seeking costs in the sum of \$3,151.50 being costs calculated on a 2B basis.

[6] The defendant filed a memorandum in response on 3 December 2019 which raised new matters and effectively sought to re-litigate the application to transfer the proceedings.

[7] One of the issues raised was that the defendant had relied upon erroneous advice given to it by a Registrar of the Court and proceeded in a manner which resulted in the adverse decision.

[8] On 25 March 2020 I issued a minute in which I noted that the defendant is responsible for seeking its own legal advice and the court should not provide it with such advice.

[9] I further noted that in the circumstances I would treat the defendant's costs memorandum as an application for rehearing.

[10] I directed the parties to file Submissions in regard to the question of rehearing within seven days and for a telephone conference to be scheduled.

[11] The defendant has not filed Submissions as to the question of rehearing but instead has filed a memorandum seeking a transfer of the matter to the Disputes Tribunal.

[12] The plaintiff has filed comprehensive Submissions opposing any rehearing of the application for transfer and the application for transfer to the Disputes Tribunal.

Rehearing – The Law

[13] For the 19 November decision on the transfer of proceedings to the North Shore District Court to be reheard first a recall of that judgment would be required.

[14] Rule 11.9 of the District Court Rules 2014 applies. It provides that:

A Judge may recall a judgment given orally or in writing at any time before a formal record of it is drawn up and sealed.

[15] Rule 11.9 is silent as to the criteria for a judgment to be recalled however the Supreme Court decision of *Horowhenua County v Nash* (No 2) applies.¹ It sets out three categories upon which a successful application to recall may fall:

- (a) Where since the hearing there has been an amendment to a relevant statute or regulation or a new judicial decision of relevance and higher authority;
- (b) Where counsel have failed to direct the courts attention to a legislative provision or authoritative decision of plain relevance; and
- (c) Where for some other very special reason justice requires that the judgment be recalled.

[16] Neither category (a) nor (b) apply and accordingly the only arguable category is (c).

The Plaintiff

[17] The plaintiff refers the court to the Court of Appeal decision of *Unison Networks Limited v The Commerce Commission* where the court said at [34]²

The cases in which justice will require a recall on this basis are likely to be rare.

[18] Further it refers to the case of *Faloon v Commissioner of Inland Revenue* where it was noted;³

...the Discretion to recall must be exercised with circumspection, and it must not in any way be seen as a substitute for appeal.

[19] In summary the plaintiff argues;

- (a) that the 19 November decision was correct. It was not made in ignorance of the relevant law and has applied the law in an orthodox fashion;

¹ [1968] NZLR 632.

² [2007] NZCA 49.

³ (2006) 22 NZTC 19,832.

- (b) any loss to the defendant as a result of advice received has nothing to do with the plaintiff and the plaintiff should not be denied her costs due to matters for which she is not responsible; and
- (c) the defendant has the option of seeking to recover any loss from the court.

Decision -Rehearing and Costs

[20] The defendant has not provided any basis upon which the court could recall the 19 November judgment.

[21] The plaintiff's argument summarized at paragraph 19, in the absence of any contrary argument by the defendant, succeeds.

[22] The question of the Court's responsibility for the erroneous advice alleged by the defendant, if that is to be pursued is to be taken up with the Registrar of the Whangarei District Court.

[23] The decision to decline transfer of the proceedings to the North Shore District Court stands.

Costs

[24] These proceedings are properly categorised as 2B. They involve a commercial lease and the nature of a payment made in terms of the lease. The proceedings are of average complexity and involving a normal amount of time.

[25] The general principle that the party who fails with respect to an interlocutory application should pay costs to the successful party is applicable.

[26] The defendant is to pay the plaintiffs costs on a 2B basis.

Transfer of the Proceedings to the Disputes Tribunal

The Defendant

[27] The defendant by way of memorandum seeks to transfer the proceedings to the Dispute Tribunal on the following basis:

- (a) The Dispute Tribunal is a more equitable forum to determine this matter as the plaintiff is currently represented by a solicitor familiar with the process and procedures of the District Court. The defendant on the other hand cannot afford to be legally represented and is unfamiliar with the District Court processes and procedures.
- (b) The defendant is unable to recover costs for time and effort, even if successful in its claim as it is unrepresented.
- (c) The determination of this dispute in the District Court could be some time away thereby creating an additional strain on the parties.

The Plaintiff

[28] The plaintiff opposes the application for transfer of the proceedings to the Dispute Tribunal.

[29] It says the plaintiff has already incurred significant legal expenses including undertaking discovery and briefing witnesses for trial. If the proceeding is transferred the plaintiff will lose her ability to claim costs in respect of these and other steps.

[30] The fact that the defendant is not legally represented is not in or of itself a reason to transfer the proceeding.

[31] The subject matter of this proceeding is a commercial lease between GST registered parties. It is a small-scale commercial matter better suited for the District Court.

Decision – Transfer to Disputes Tribunal

[32] The proceedings have to date been protracted with every aspect strongly contested by both parties.

[33] The proceedings are of average complexity.

[34] Expert witnesses are to be called by the parties and discovery has been completed. The likely duration of the hearing will be two to three days.

[35] Given these factors the proceedings are most suited to be heard in the civil jurisdiction of the District Court.

[36] The application to transfer the proceeding is declined.

J Bergseng
District Court Judge