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Blworths

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV-1999-404-1057
CP285-SD/99**

03/1185

BETWEEN	E ALEXANDER First Plaintiff
AND	G CORNELL Second Plaintiff
AND	BETTALIFE INTERNATIONAL (NZ) LIMITED Third Plaintiff
AND	COFIE HOLDINGS PTY LIMITED Fourth Plaintiff
AND	G CLEGG First Defendant
AND	NEW IMAGE INTERNATIONAL LIMITED Second Defendant

Judgment: 24 July 2003

**JUDGMENT OF SALMON J
ON COSTS**

Solicitors:
Buddle Findlay, PO Box 1433, Auckland
N Fisher, PO Box 9074, Auckland
Copies:
JG Miles QC, PO Box 4338, Auckland
AH Waalkens, PO Box 4338, Auckland

[1] In my judgment of 12 July 2002 I reserved the question of costs. Counsel have been able to agree on the appropriate order as to costs, but for one issue. That has to do with liability for the fees of the plaintiffs' expert witness, Mr Den Heijer.

[2] Counsel have submitted memoranda in relation to this issue, dated 19 and 22 May respectively. I apologise for the delay in this judgment, which has been brought about by the fact that the memoranda have only recently found their way to me.

[3] The plaintiffs claim 75 per cent of Mr Den Heijer's actual fees. An award at that level would be in accordance with the approach taken by the Court of Appeal in *Martelli McKegg Wells and Cormack v Commbank International NV* [1996] 10 PRNZ 153.

[4] The defendants argue that because I preferred the evidence of their witness, Mr Hagen, to that of the plaintiffs' witness on the question of special damages, no award of witnesses expenses should be made. The defendants' fall-back position is that if an award is made, it should be in accordance with the provisions of the Witnesses and Interpreters Fees Regulations 1974.

[5] The evidence of the two expert witnesses was called, as counsel for the defendants suggest, on the issue of special damages. It is correct that I preferred, and adopted the evidence of Mr Hagen, to that of Mr Den Heijer. Nevertheless, the plaintiff was entirely justified in calling an expert witness to give evidence on this issue and, as a successful plaintiff, should not necessarily be deprived totally of an award in respect of that witness solely because I did not accept that witnesses evidence.

[6] Counsel for the plaintiff relies upon the decision of Chambers J in *The Beech Road Preservation Society Inc v Whangarei District Council* (HC WHA CP27/00, 31 August 2001) in support of the proposition that a party is not to be denied costs of an expert witness because that witnesses evidence proved irrelevant. As Chambers J said in that case:

The fact that I did not feel it necessary to determine all the arguments advanced should not deprive the Society of costs in respect of those expert witnesses, whose testimony was obtained reasonably and in good faith.

[7] The situation in this case is a little different. This is not a case where it was unnecessary to rely upon the evidence of an expert witness, rather it is a case where the evidence of the respective experts was important and that of Mr Hagen was relied on.

[8] The plaintiff has annexed two accounts from Mr Den Heijer. The first for \$10,743.75 covers attendances for updating briefs of evidence, and review of defendants' evidence. The second for \$14,478.75 relates to attendances at the Court to present evidence, amendments to briefs of evidence, and a meeting to discuss cross-examination of the defendants' witness. As mentioned earlier, the plaintiff claims 75 per cent of each of these accounts.

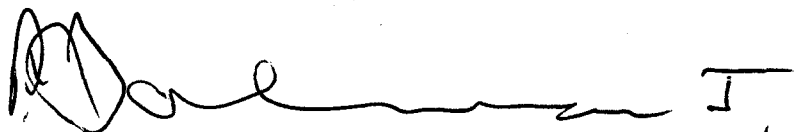
[9] I have decided that it would be unfair to require the defendant to pay witnesses expenses incurred in relation to the preparation of a brief of evidence, putting forward a calculation which I did not accept. I held in effect that he had calculated damages on the wrong basis.

[10] On the other hand, I consider that the plaintiff is entitled to an allowance reflecting the time taken in reviewing the defendants' brief of evidence, assisting in the preparation of cross-examination of the defendants' expert and attending at Court for the presentation of the evidence of Mr Hagen.

[11] The plaintiff is entitled to 75 per cent of Mr Den Heijer's fees for these attendances. This will, of course, require the preparation by Mr Den Heijer of a revised account.

[12] I reserve leave for the parties to come back to the Court if further assistance is required.

Delivered at 9 a.m./~~p.m.~~ on 24/7/ 2003.

A handwritten signature in black ink, appearing to be 'D. Heijer', followed by a horizontal line and a small vertical tick mark.