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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP 67 SD 02

03/721

BETWEEN STEPHEN DAVIS

Plaintiff

AND INDEPENDENT NEWSPAPERS LTD & ANOR

Defendants

Date of hearing: 11 April 2003 and subsequent memoranda

Counsel: Mr Akel for plaintiff
Mr J Tizard for defendant
Ms W D Duggan (by memoranda) for non party (Wilson & Horton Ltd)

Date of judgment: 16 May 2003

JUDGMENT OF MASTER LANG
[re costs on review of compliance with order of discovery against non-party]

Solicitors
Simpson Grierson, , Private Bag 92-518, Auckland for plaintiff – facsimile 307 0331
Oakley Moran, PO Box 241, Wellington for defendants - facsimile 04 472 6657
Bell Gully, P O Box 4199, Auckland – facsimile 916 8801

Introduction

[1] On 12 March 2003 I delivered a judgment dealing with the plaintiff's claim that the discovery provided by Wilson & Horton Limited was inadequate. In that judgment I reviewed the terms of the order for discovery which had been made against Wilson & Horton and essentially concluded that Wilson & Horton Limited had in fact complied with the terms of the order.

[2] I do not propose to traverse the factual background in this minute. That is set out in some detail in my judgment. Instead I propose to deal with the remaining issue, which is that of costs.

A. The costs claimed by Wilson & Horton Limited

[3] Counsel for Wilson & Horton initially advised the Court (by memorandum) that her client had incurred costs in relation to the compliance issue totalling $27,149.

[4] There was no appearance by or on behalf of Wilson & Horton when the matter was called on 11 April 2003. During that hearing I heard the submissions of counsel for the plaintiff and the defendant regarding the memorandum which had been filed by Ms Duggan on behalf of Wilson & Horton. I then issued a minute in which I noted that no details had been provided to the Court regarding the manner in which the invoices rendered by the non-party's solicitors had been calculated. For that reason I invited counsel for Wilson & Horton to file any further material which her client wished the Court to consider regarding the quantum of the costs claimed.

[5] Ms Duggan subsequently took advantage of that opportunity and filed a further memorandum setting out details of the manner in which the invoices were calculated. In response Mr Akel filed a reply memorandum in which he made submissions regarding the matters raised in Ms Duggan's second memorandum.

[6] The matters raised by Mr Akel were in turn responded to by a further memorandum filed by Ms Duggan on 2 May 2003.

[7] In her latest memorandum Ms Duggan accepts that the sum of $1,097.50 needs to be deducted from the sum of $27,149. She also accepted that service charges amounting to $27.43 should also be deducted, leaving a total claim for costs in the sum of $26,024.07. She confirmed that costs amounting to $6,215.50 were also incurred in checking a number of matters which were raised in my judgment. The latter costs have been invoiced to the defendant in accordance with the original arrangement which was reached between the parties.

[8] Ms Duggan contends that the plaintiff ought to meet the costs which relate to the hearing in relation to the review of compliance with the order for discovery. She submits that, as a non-party to the proceedings, Wilson & Horton is entitled to full recovery of its expenses.

[9] I now turn to consider the basis upon which the plaintiff opposes the making of any award of costs against him.

Grounds for opposition by plaintiff

[10] Mr Akel for the plaintiff points out that his client did not originally seek non-party discovery against Wilson & Horton. That was sought by the defendants and consented to by Wilson & Horton on the basis that the defendants would pay its costs.

[11] Mr Akel submits that the plaintiff had put the defendant on notice that full discovery would need to be provided in terms of the order made. He says that it was not up to the plaintiff to liaise with the non-party regarding the potential scope for discovery.

[12] He submits also that the further discovery which was sought was necessary because the plaintiff believed that Wilson & Horton had only provided selective discovery. In those circumstances he submits that the non-party's costs should be

paid by the defendants, and that the plaintiff should not be penalised by being made to pay Wilson & Horton's costs.

[13] In response to the memorandum filed by Ms Duggan Mr Akel submits that Wilson & Horton is trying to recover from the plaintiff:

a) Costs that are not related to the non-party's discovery application.

b) Attendances and correspondence between Bell Gully and the defendant's solicitors.

c) Costs incurred for a multiplicity of attendances which amount to "over-lawyering" at an extreme.

[14] I now turn to consider each of these in turn.

(i) Costs not related to the non-party's discovery application

[15] Mr Akel has identified in Wilson & Horton's solicitor's time records a number of examples of charges for which Wilson & Horton seeks to be reimbursed by the plaintiff but which relate to the employment law case between the plaintiff and Wilson & Horton. These relate to attendances by Mr Drake of Messrs Bell Gully, who acted on behalf of Wilson & Horton in relation to the settlement of the employment law case involving Mr Davis. Mr Akel submits that all of these attendances fall outside the scope of the present application and that they should be ignored when the issue of costs is considered.

[16] Ms Duggan accepts that attendances being a total value of $1,097.50 should be deducted from the amount claimed. She accepts that these attendances relate to matters which were not properly part of the compliance issue. I accept her explanation that these attendances were overlooked when the relevant invoices were annexed to her earlier memorandum.

[17] I consider that the matters raised by Ms Duggan in her last memorandum effectively answer Mr Akel's submissions in relation to this particular item.

(ii) Attendances and correspondence between Bell Gully and the defendant's solicitors

[18] Mr Akel also objects to any attempt by Wilson & Horton to seek recompense in respect of contact between Wilson & Horton's solicitors and the solicitors acting for the defendants. He says that there was a mutuality of interest between the defendants and Wilson & Horton because they have a common interest in defeating the plaintiff's claim. Moreover, Mr Akel also points to matters referred to in the time records which indicate that a number of the discussions between Bell Gully and Oakley Moran for which costs are sought do not even relate to discovery issues.

[19] In her latest memorandum Ms Duggan explains the need for members of her firm to deal with the solicitors for the defendants. She explains that Wilson & Horton's legal advisors were obliged to have dialogue with the solicitors for the defendant because of the actions of counsel for the plaintiff. These stemmed from his insistence that Wilson & Horton had not properly complied with the terms of the order for non-party discovery.

[20] Ms Duggan assures the Court that she has reviewed her firm's files, and that all of the attendances which relate to dealings with the defendant's solicitors were necessary and related to matters raised by the plaintiff. Some of these arose as a result of the fact that the plaintiff had declined or neglected to provide Wilson & Horton's solicitors with copies of the pleadings. As a result Ms Duggan's firm was obliged to obtain copies from the defendant's solicitors.

[21] I accept Ms Duggan's explanation regarding the necessity for her firm's attendances on the solicitors acting for the defendants.

(iii) Excessive attendances

[22] Mr Akel submits that there is an inordinate number of attendances in the form of "discussions", "briefings" and "review" between the various solicitors referred to in the timesheets. He points out that this occurs not only between solicitors who appear to have been regularly working on the file, but also with solicitors on a one-off basis.

[23] Mr Akel submits that no fewer than four solicitors, including counsel, were involved in the preparation of the submissions for a hearing on a discovery issue that took less than one half day. He submits that this is quite extraordinary. He contends that even if such a multiplicity of attendances may be accepted by Wilson & Horton, nevertheless it is inappropriate to suggest that the plaintiff should meet those costs.

[24] Finally, Mr Akel notes that each of the time records included claims for service charges but no explanation has been given for the reason for these charges being levied.

[25] Ms Duggan strongly refutes any suggestion that her firm has been guilty of "over-lawyering". She points out that, in accordance with her firm's policy, work and resources are delegated in accordance with the experience, skills and cost-effectiveness of its solicitors.

[26] Ms Duggan has also gone on to explain the need for the involvement of the various (in her submission three not four) lawyers who worked on the file at different stages of the proceeding. By way of example, she explains that the need for Mr Ladd to become involved on a one-off basis was because senior counsel who would otherwise have dealt with the file had to abandon his involvement due to the pressure of other urgent commitments.

[27] Ms Duggan summarises the work carried out by the non-party's solicitors in preparation for the defended hearing as being "review of relevant documentation and affidavits filed to that point, review of the pleadings, consideration of plaintiff's

varied requests for discovery and whether or not they were relevant, research regarding applications against non-parties for further discovery and communications with the non-party regarding the numerous categories in the plaintiff's application".

Decision

[28] The exercise which was undertaken by the Court was a determination as to whether Wilson & Horton had complied with the orders for discovery which were made against it. That exercise was necessary because of issues specifically raised by the plaintiff. The defendants made it clear that they were content with the discovery which had been provided and that they did not seek any further discovery from Wilson & Horton.

[29] Virtually all of the grounds advanced by the plaintiff were rejected by the Court. In those circumstances I am satisfied that it is appropriate that the plaintiff should meet Wilson & Horton's reasonable costs in relation to the review of compliance.

[30] A non-party should generally be reimbursed in respect of all reasonable expenses which it incurs in complying with an order for discovery. The issue which needs to be determined in the present context is whether the costs which the plaintiff is being asked to meet are reasonable.

[31] It is clear that the invoices which have been rendered by Wilson & Horton's solicitors have been calculated on a time and attendance basis. However, in assessing whether or not costs are reasonable the Court does not look simply at the time which has been expended. It must view the matter overall in order to consider whether or not the costs are reasonable in all the circumstances. An important aspect of those circumstances is the nature of the exercise which was undertaken.

[32] In the present case there was nothing particularly complex about that exercise. It involved a comparison between the precise terms of the order for discovery and the scope of the discovery which had been provided by Wilson & Horton. It was not a

matter which was of any great complexity or which required special skill or expertise. It should not have required significantly greater preparation than other proceedings of this type.

[33] It is of course always difficult to judge from a distance whether or not the costs which have been charged by a law firm are reasonable. In the present case I bear in mind the fact that the hearing proceeded effectively as the hearing of an interlocutory application. It required the preparation of affidavits and the presentation of written submissions to the Court. The hearing itself occupied approximately two hours. On a scale 2B basis the total costs recoverable would be likely to amount to approximately $4,000.

[34] Even on a category 3 basis (which provides for a recovery rate of $1,900 per day for senior counsel) scale costs would only amount to approximately $7,000. I hasten to add that the compliance hearing did not begin to approach the applicable criteria for category 3.

[35] The scales provided by the High Court Rules are not directly relevant to the issue before the Court. They are, however, designed to provide a reasonable rate of recovery for a successful party. Whether or not they presently achieve this objective may in some quarters be a matter of some debate. They are nevertheless of some value as a point of broad comparison with the level of costs which are now being sought. The costs which have been charged in the present case are more than six times greater than the costs which would normally be awarded on an interlocutory application of this type and complexity. This fact in itself calls into question the reasonableness of the costs which are now sought by Wilson & Horton.

[36] The Court is regularly appraised of the actual costs incurred by parties to interlocutory applications. This arises for the most part in the context of applications by a successful party for an order for indemnity or increased costs. The Court therefore maintains an ongoing working knowledge of the actual level of fees being charged in respect of proceedings similar to that with which the Court was concerned in the present case. In the ordinary course of events the Court would anticipate that

the likely range of costs for such an application would be between $7,000 and $14,000. There was nothing about the present application which would have led to the supposition that the costs would approach $26,000. This factor also indicates that the costs which are now claimed by Wilson & Horton are not reasonable.

[37] Bearing in mind the matters referred to above I have concluded that the costs which the plaintiff should be required to pay are at the top end of the range to which I have already referred. I am therefore prepared to make an order that the plaintiff reimburse the non-party's costs but only to that level.

Order

[38] There will be an order that the plaintiff is to pay the non-party's costs in relation to the review of compliance with the order for discovery. Those costs are to be fixed in the sum of $14,000 which sum is to be inclusive of disbursements and service charges.

B. Costs claimed by defendants

[39] The defendants seek costs in relation to the compliance review also. Their counsel makes the point that the defendants had no quarrel with the adequacy of the discovery provided by Wilson & Horton. Notwithstanding this fact they were required to participate in the hearing on 25 February 2003.

[40] I note, however, that their participation in this aspect of the hearing was more limited than that of counsel for Wilson & Horton.

Order

[41] I consider that the defendants should receive costs and disbursements in relation to the hearing and the attendances which preceded it. Those costs are to be

calculated on a category 2B basis, with .3 of a day to be allowed for the hearing itself.

Master G Lang

Signed at: 1.30 pm on: 16 May 2003.