IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-404-005500

BETWEEN	GRACE HADEN First Appellant
AND	VERISURE INVESTIGATIONS LIMITED Second Appellant
AND	NEIL EDWARD WELLS Respondent

Judgment: 19 January 2009
(on the papers)

COSTS JUDGMENT OF VENNING J

This judgment was delivered by me on 19 January 2009 at 4.00 pm, pursuant to Rule 540(4) of the High Court Rules.

Registrar/Deputy Registrar

Date……

Solicitors: St Lukes Legal Services, Auckland
Brookfields, Auckland
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Introduction

[1] In a judgment delivered on 4 December 2008 John Hansen J dismissed the application for special leave and called for memoranda as to costs.

[2] The memoranda have now been filed. John Hansen J was sitting as a temporary Judge. He is not conveniently available to deal with the issue of costs so the Registrar has referred the file to me as duty Judge to determine costs: r 48F.

The parties' positions

[3] The respondent seeks the following orders:

(1) that any and all costs be awarded to the trustees of the animal Welfare Institute of New Zealand (AWINZ); and

(2) that costs be awarded either on an indemnity basis or increased costs from a category 2C basis.

[4] The appellants oppose the application for increased costs and submit that costs should be fixed on a 2B basis.

The identity of the recipient of the costs award

[5] Mr Wells, the successful respondent, seeks that any costs award be made in favour of the trustees of the Animal Welfare Institute of New Zealand. The Institute was named as an intended respondent in the failed application for special leave and funded the opposition to the application. Counsel for the appellants did not take issue with that request. However, despite that, the issue is one of enforcement of any order for costs. It is not apparent to the Court just who the trustees of the Animal Welfare Institute of New Zealand may be. I note that in the judgment of John Hansen J the respondent was recorded as Mr Wells. Mr Wright was recorded as representing Mr Wells. The Institute and its trustees were not mentioned. In the

circumstances I make the costs award in favour of Mr Wells. It is up to him what he does with the costs award once paid.

The appropriate level of costs

[6] In the memorandum for the appeal conference counsel purported to agree that the appropriate costs categorisation was 2B. The respondent now seeks to increase that to a 2C category or otherwise to seek an uplift. The appellant opposes that application. Counsel were under a misapprehension as to the costs principles in purporting to categorise the costs as "2B" in their memorandum. There is a difference between the costs categories 1, 2, 3 and the time bands A, B and C. The costs category applies to the proceedings generally. But different time bands may apply to different steps within the particular proceeding. So a proceeding may be categorised as 2, but costs for steps within it may, depending on the time allocation, be 2B or 2C, for example.

[7] The start point then is that the costs categorisation was 2. The time band is however a different matter.

[8] Where a costs category has been fixed then following hearing the costs category will only be increased where there are special reasons: r 48(2). There are strong policy reasons for not departing from an initial costs categorisation particularly after the hearing. Where a party is seeking a retrospective reclassification of the proceedings after the result is known, even the fact the skill classification is inadequate is unlikely to be a special reason: *Capital Property Limited v Cook* HC AK CP257-IM-02 3 February 2003 Fisher J; *J L Tindall & Ors v Far North District Council* HC AK CIV 2003-488-000135 25 May 2007 Winkelmann J and *Body Corporate No. 189855 v P L Hough & Ors* HC AK CIV 2005-404-005561 2 October 2008 Venning J. In the present case the applicant does not suggest the skill category was inadequate, but seeks indemnity costs or an uplift on other grounds.

[9] Given the costs categorisation fixed at category 2, a party may still seek an uplift from that or in appropriate circumstances an indemnity award. In the present case the respondent seeks an uplift on the basis:

- the application for special leave was frivolous;
- the application was hopelessly unmeritorious;
- the application involved three separate decisions which raised novel issues;
- the application sought to reintroduce two former parties to the proceeding;
- the appellants were specifically warned at an initial conference that seeking to introduce new respondents would give rise to the potential for indemnity costs.

[10] The appellants oppose the application for indemnity costs or an uplift for costs on the basis that:

- it could not be said the arguments raised by the appellants were frivolous;
- there were unresolved issues of principle whether the District Court could impose an unless order in the circumstances;
- when agreeing to category 2 the scope of the leave argument was known;
- the other parties were sought to be joined as an order against only one party on the appeal would be ineffective;
- the Institute had no interest in the unless order as the target of that was property of Mr Wells.

Decision

[11] The issues involved in the appeal were not particularly difficult. Category 2 is undoubtedly the correct classification for the appeal. However, despite counsel for the appellants' submissions, it is apparent from the judgment of John Hansen J that the application was doomed to fail. The authorities are clear a proper explanation for extension of time is required. There was no explanation given for the delay at all in this case. Further, the application for special leave was hopelessly out of time. As the Judge noted, that was insurmountable. As the Judge also noted that it would be illogical in the extreme if this Court could overturn a District Court interlocutory order but was fettered in the discretion to deal with costs orders. As to the unless order the Judge had no difficulty in finding that there was clear jurisdiction to make the unless order that following from r 433 of the District Court Rules. The appeal on this application for special leave was without merit.

[12] While falling short of supporting an award of indemnity costs, an uplift in costs is appropriate in accordance with the decision of the Court of Appeal in *Holdfast NZ Limited v Selleys Pty Limited* (2005) 17 PRNZ 897 and particularly r 48C(3)(b)(ii), (iii). In this case I fix the appropriate increase at 50 percent on a 2B basis.

Result

[13] The appellants are to pay the respondent costs in the sum of $5,520.00 together with disbursements as fixed by the Registrar.

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Venning J