IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2010-485-1274
[2012] NZHC 1908

BETWEEN	DANIEL FRANCIS AYERS First Plaintiff
AND	ELEMENTARY SOLUTIONS LIMITED Second Plaintiff
AND	LEXISNEXIS NZ LIMITED Defendant

Judgment: 1 August 2012

JUDGMENT AS TO COSTS OF ASSOCIATE JUDGE D.I. GENDALL

This judgment of Associate Judge Gendall was delivered by the Registrar on 1 August 2012 at 3.30 pm under r 11.5 of the High Court Rules.

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Introduction

[1] This judgment addresses costs issues with respect to applications by the defendant for further and better discovery and for further particulars. I issued a judgment on these applications on 29 November 2011.

[2] In that judgment the application for further particulars succeeded entirely but the application for further and better discovery succeeded only as to part but failed as to the balance.

[3] At [86] of that 29 November 2011 judgment I reserved costs but indicated that in the event that the parties were unable to settle this issue between them then memoranda could be filed which would be referred to me for a decision.

[4] Counsel have now advised that the issue of costs has not been able to be resolved between them. Counsel for the defendants has now filed memoranda on the costs issue dated 29 March 2012 and 31 May 2012 and counsel for the plaintiffs has filed a memorandum as to costs dated 3 July 2012.

[5] The starting point for any consideration of a costs application is r 14.2(a) High Court Rules which encapsulates the primary principle that the unsuccessful party in any interlocutory application should pay costs.

Costs on Further and Better Particulars Application

[6] In the present case, the defendant was successful in relation to its application for further and better particulars and I see no reason why it should not be entitled to an award of costs on that application in the usual way.

[7] This appears to be accepted by counsel for the plaintiffs at para [2] of his 3 July 2012 memorandum. Notwithstanding this, counsel for the plaintiffs contends however that the defendant's further particulars application was not necessary as the plaintiffs by letter dated 1 July 2011 had already agreed to "provide quantified particulars of special damages as soon as the exercise of quantifying that damage is

complete," in an attempt to avoid the expense of an "unnecessary defended interlocutory application".

[8] Although it is difficult to tell whether or not those comments tell the entire story in this case, what is clear is that, in the plaintiff's 8 August 2011 Notice of Opposition to that application, the grounds advanced in opposition were that the orders sought were unnecessary as "the plaintiffs have already provided to the defendant further particulars as to the nature of special damages and the plaintiffs are not required to provide particulars as to quantum on special damages". Those grounds were not made out here.

[9] And, before me, the plaintiffs in addition and notwithstanding the position they advanced noted at [7] above, did present arguments in opposition to the application for further and better particulars.

[10] That said, it was necessary for the defendant to advance and argue its case in support of the further and better particulars application. As such, I take the view that the defendant is entitled to an award of costs here.

[11] A schedule of the defendant's costs on this particular application is attached to the 29 March 2012 memorandum from counsel for the defendant. This assesses costs on this application on a category 2B basis at $1,786.00 together with a disbursement for a filing fee on that application of $600.00. The quantum of those costs does not in any way appear to be disputed here by the plaintiff.

[12] Costs are therefore awarded to the defendant against the plaintiffs on its successful application for further and better particulars on a category 2B basis totalling $1,786.00 together with disbursements totalling $600.00. An order to this effect is now made.

Costs on Further and Better Discovery Application

[13] I turn now to consider the question of costs on the defendant's second application which was before the Court, being for further and better discovery.

[14] On this, the defendant was partly successful and partly unsuccessful. As such in terms of r 14.2(a) there seems little doubt that the defendant is entitled to costs with respect to that part of the discovery application which has succeeded but the plaintiffs are entitled to costs on that part of the application which they have successfully opposed.

[15] As *McGechan on Procedure* at HR 14.2.01(1) notes:

> The approach where the costs claiming party has been only partially successful, or where each party has had similar success, is outlined by the Court of Appeal in *Packing In Ltd (in liq) formerly known as Bond Cargo Ltd v Chilcott* (2003) 16 PRNZ 869 (CA) at [5].

[16] Tipping J. delivering the decision of the Court in *Packing In Ltd (in liq)*, stated at [5] and [6]:

> [5] In a case such as the present, where in broad terms each party has had similar success, we do not consider it helpful to focus too closely on the question which party has failed and which has succeeded. Costs in a case such as this should rather be based on the premise that approximately equal success and failure attended the efforts of both sides. To that starting point should be added issues such as how much time was spent on each transaction or group of transactions in issue, and any other matters which can reasonably be said to bear on the Court's ultimate discretion on the subject of costs. In the end, as in all costs matters, the Court must endeavour to do justice to both sides, bearing in mind all material features of the case.
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> [6] In the present kind of litigation, the liquidator of the company disadvantaged by allegedly voidable transactions must necessarily take the first step of filing in Court the prescribed notice to set aside. That is what the statutory process requires. Whether this be a "proceeding" or not (and we are inclined to the view that it is not), it is a mandated step if liquidators wish to assert that transactions are voidable. The beneficiary of such transactions may then seek to retain their benefit by seeking an order that they be not set aside. Success or failure in this context is better assessed by a realistic appraisal of the end result rather than by focusing on who initiated what step, and the extent to which that step succeeded or failed.

[17] As to these aspects, in the present case although the defendant was successful in obtaining one category of documents sought in its discovery application and unsuccessful as to the other three categories of documents sought, as I understand the position, the quantity of documents which are now to be discovered by the plaintiffs, pursuant to the orders made in my 29 November 2011 judgment, represents about 50% of the total documents sought in the application.

[18] I take the view here therefore that, given that the end result of this discovery application being partly successful and partly unsuccessful, was about even, costs on the application should lie where they fall. In my view, justice to both parties in this case requires that there be no order as to costs with respect to the defendant's application for further and better discovery.

Conclusion

[19] In summary, as noted above, on the defendant's successful application for further and better particulars, costs and disbursements are awarded to the defendant as outlined in the order made at [12] above.

[20] There is to be no order as to costs with respect to the defendant's application for further and better discovery.

'Associate Judge D.I. Gendall'