IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2010-404-005021
[2012] NZHC 3562

	BETWEEN	JOSEPH FRANCIS KARAM Plaintiff
	AND	FAIRFAX NEW ZEALAND LIMITED Defendant

Hearing: 5 October 2012 and 26 October 2012 (Submissions in writing)
(Heard at Auckland)

Appearances: M P Reed QC, P A Morten and M A Kararm for Plaintiff
R K P Stewart for Defendant

Judgment: 20 December 2012

JUDGMENT OF ASSOCIATE JUDGE OSBORNE
[as to costs of interlocutory applications]

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[1] By judgment dated 10 May 2012[1] I determined four applications:

[a] Plaintiff's application to strike out the defendant's defence of honest opinion;

[b] The defendant's application for determination of separate questions;

[c] The plaintiff's application for further discovery from the defendant;

[d] The defendant's application for further discovery from the plaintiff.

[2] On the first application (strike out) the plaintiff was successful in having four items in a schedule of facts struck out but was substantially unsuccessful with the remainder of the application dismissed.

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[1] *Karam v Fairfax New Zealand Ltd* and *Karam v Fairfax New Zealand Ltd* both identified as [2012] NZHC 887.

[3] The defendant was entirely unsuccessful on the second application (separate question), with that application being dismissed in its entirety.

[4] Those two applications took approximately the same amount of hearing time.

[5] Counsel have accepted that it is appropriate that in relation to those two applications, costs should lie where they fall. That accords with my view of the just outcome on costs.

[6] The contest between the parties is as to the costs orders which ought to be made on the third and fourth (discovery) applications.

The discovery applications

[7] The plaintiff submits that there should be costs orders:

[a] On the plaintiff's application on an increased basis;

[b] On the defendant's application, on a 2B basis.

[8] The defendant opposes the making of any costs order on the discovery applications and submits that costs should also lie where they fall in relation to those applications.

The defendant's discovery application

[9] I dismissed the defendant's application for further discovery.

[10] The primary applicable principle is that the unsuccessful party should pay costs: r 14.2(a) High Court Rules. Counsel for the plaintiff submitted a calculation as to costs on a 2B basis (without certificate for additional counsel) which indicated correctly a total of $5,076.00. In my view, a 2B approach is appropriate.

[11] Counsel for the defendant did not suggest that that was an incorrect approach if the defendant's application were considered in isolation. But counsel submitted

that this was a case of equal success on competing applications which should lead to costs lying where they fall.

[12] I therefore turn to consider the competing application.

Plaintiff's application for discovery

[13] The plaintiff's application for further and better discovery was dismissed. But counsel for the plaintiff submits that when the history of the application and of the defendant's provision of documents is examined, it can be seen that the need for orders pursuant to what was initially a justified application gradually fell away. It was to that history which I was referring in my judgment on the discovery applications[2] when I said that I was not dealing there with historical considerations which were relevant to costs only. In addition to the historical picture, counsel for the plaintiff referred me to the defendant's discovery of additional material following the delivery of my 10 May 2012 judgment. It was submitted that that additional discovery indicates that documents were in existence and ought to have been discovered by the defendant but had not been up to the time of the judgment.

[14] It is unnecessary to detail the limited observations I made as to the history of the defendant's discovery in my judgment, as those appear in that judgment.[3]

[15] Following the filing of the initial discovery application, the defendant's pleadings altered and additional documents were disclosed. Close to hearing, the most relevant reporter filed an updated affidavit dealing with (as required from a deponent) documents which may have existed but were no longer in the reporter's control. In the way in which matters developed, it was understandable and arguably prudent that the plaintiff had the application still brought on for hearing, with the other applications, to enable the Court to reach a view on the adequacy of disclosure to date. The Court's judgment proceeded in part on the "unequivocal" assurance given close to the hearing by the reporter.

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2 At [30].
3 At [22]-[24].

[16] It transpired that there were additional documents to be discovered by the defendant which were subsequently completed pursuant to the defendant's continuing discovery obligation.

[17] I find in the unusual circumstances of this case that this was an application which the plaintiff was entitled to take to hearing and is entitled to an award of reasonable costs notwithstanding the dismissal of the application itself.

[18] Counsel for the plaintiff has presented a 2B calculation which includes four occasions on which inspection of documents was carried out because of the staggered nature of the defendant's discovery. I do not consider it just to include the costs of inspection in the order of costs relating to the interlocutory application. Those inspection costs can appropriately be dealt with in the broader context of the litigation. My focus should be on the discovery application itself.

[19] The correct calculation on a 2B basis would amount to the same total as that for the defendant's discovery application, namely $5,076, together with, in this case, a filing fee of $600.

[20] Counsel for the plaintiff submits that an order for increased costs should be made having regard to earlier failure by the defendant to comply with an order and a direction as to discovery and the complication caused by an unmeritorious reliance upon the "newspaper rule" before that reliance was abandoned.

[21] I do not view this case as appropriately within the category for increased costs on the basis that the defendant unnecessarily contributed to the time and expense of this step in the proceeding. The requirements of discovery flow from the pleadings and the costs consequences of inappropriate pleadings should generally be dealt with specifically in relation to pleadings themselves. When focussing on this particular interlocutory application, there was indeed something of a moveable feast as the defendant provided more documentation and information. That said, I am satisfied that the alteration of position was genuinely to assist the process of discovery. The just order is that the plaintiff have his costs on an ordinary basis.

[22] Returning to the defendant's discovery application in the light of my conclusion as to costs on the plaintiff's application, I consider it just that the defendant pay the costs of both discovery applications upon the same (2B) basis.

Orders

[23] I order:

[a] The defendant is to pay to the plaintiff the costs of the defendant's application for further discovery in the sum of $5,076;

[b] The defendant is to pay to the plaintiff the costs of the plaintiff's application for further discovery in the sum of $5,076 together with a disbursement of $600;

[c] The defendant is to pay to the plaintiff costs on the submissions as to costs (based by analogy with a memorandum for a case management conference) in the sum of $752.

Associate Judge Osborne

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