IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2018-404-1976
[2020] NZHC 879

UNDER	the Fair Trading Act 1986 and the Defamation Act 1992
IN THE MATTER	of a Breach of the Fair Trading Act
BETWEEN	TECTRAX LIMITED Plaintiff
AND	SEALEGS INTERNATIONAL LIMITED First Defendant
	FUTURE MOBILITY SOLUTIONS LIMITED Second Defendant

Hearing:	On the papers
Counsel:	G Hazel and S Aymeric for the Plaintiff B Henry and A Kenwright for the Defendants
Judgment:	1 May 2020

JUDGMENT OF GORDON J
[As to costs]

This judgment was delivered by me
on 1 May 2020 at 1.30 pm, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors:	James & Wells, Auckland Goodwin Turner, Auckland
Counsel:	B Henry, Auckland

Introduction

[1] On 12 February 2020, in the absence of opposition, Lang J made an order on the papers granting the application by the plaintiff, Tectrax Ltd (Tectrax) to strike out the defendants' counterclaim. The proceedings otherwise remain on foot.

[2] This is a decision on the application by Tectrax for costs following strike out, given in my capacity as Duty Judge.

[3] On behalf of Tectrax, Mr Hazel seeks scale costs in the sum of $13,384 on a 2B basis with a 50 per cent uplift for increased costs, making the total claim for costs in the sum of $20,076.

[4] Mr Henry, on behalf of the defendants, Sealegs International Ltd (Sealegs) and Future Mobility Solutions Ltd (Future Mobility), accepts that costs should be awarded on a 2B basis as claimed in the schedule annexed to Mr Hazel's memorandum. But Mr Henry says that Tectrax is not entitled to a 50 per cent uplift.

[5] Although Mr Henry does not oppose scale costs as claimed, I have satisfied myself that the various memoranda and affidavits were filed and that appearances were made as itemised in the schedule. Tectrax is therefore entitled to scale costs on a 2B basis in the sum of $13,384.

[6] The issue is whether the Court should order increased costs.

Background

[7] I set out below a brief background, bearing in mind, of course, that these are simply allegations at this stage. The parties are competitors in the amphibious boating market. The defendants produce amphibious boats and Tectrax manufactures amphibious systems to be installed on boats produced by others. Tectrax says that the defendants viewed its technology as a threat to their business. It is alleged that around September 2017 Tectrax became aware that Sealegs and/or Future Mobility were publicly disparaging Tectrax and/or its amphibious system; making misleading statements about Tectrax and/or its amphibious system; and/or threatening to issue

proceedings against anyone who worked with Tectrax or in connection with its amphibious system.

[8] Tectrax says it wrote to the defendants in November 2017 requesting them to raise any concerns or allegations they had directly with Tectrax and to stop making the alleged statements. Tectrax says Sealegs continued to engage in what it says was rumour spreading and unlawful interference with contractual relations.

[9] In August 2018, Sealegs, in a solicitor's letter, alleged that Tectrax's amphibious system infringed Sealegs' rights in its own amphibious system. It then threatened court proceedings.

Procedural background

[10] Tectrax commenced proceedings by filing its statement of claim on 17 September 2018. The causes of action include inducing breach of contract; causing loss by unlawful means; injurious falsehood and breach of the Fair Trading Act 1986.

[11] The defendants filed a statement of defence and counterclaim on 23 October 2018 and an interlocutory application on notice seeking orders to permit inspection of Tectrax's allegedly infringing craft on 18 March 2019.

[12] Tectrax filed an interlocutory application for an order striking out the defendants' counterclaim and in the alternative for further and better particulars of the counterclaim on 17 July 2019.

[13] On 12 September 2019, Lang J directed that counsel for the defendants file a memorandum to advise the Court when the outcome of the application for leave to appeal to the Supreme Court in *Zhang v Sealegs International Ltd*,[1] was known. In the same minute giving this direction, Lang J records:

> In this proceeding there are currently potentially two outstanding interlocutory applications. The first is an application by the plaintiff to strike out the counterclaim. Mr Henry, for the defendant, accepts this application must succeed if his client does not obtain leave to appeal to the Supreme Court and then succeed in that forum in the *Zhang* proceeding. … The counterclaim is

[1] *Zhang v Sealegs International Ltd* [2019] NZCA 389.

> based on matters that have now been determined by the Court of Appeal in the other litigation. For that reason the future of the counterclaim also depends entirely on the final outcome of the other litigation.

[14] The Supreme Court issued its judgment in *Zhang* on 13 December 2019 dismissing Sealegs' application for leave to appeal.[2] Mr Henry subsequently filed a memorandum in this proceeding advising he had instructions to withdraw the defendants' counterclaim against Tectrax. Lang J then made the order as referred to in [1] above.

Tectrax's submissions

[15] Mr Hazel submits that a 50 per cent uplift is justified as the counterclaim should never have been filed and, regardless of that, it was never properly articulated. The interlocutory applications flowed from the counterclaim. They were therefore unnecessary steps required purely by reason of the improper counterclaim. Mr Hazel describes the counterclaim as grossly inadequate and he says it failed to comply with what is required in a copyright pleading. Mr Hazel submits that this failure to articulate the claim properly was either the result of gross incompetence, treating the proceeding with insufficient seriousness, tactical choice or because the defendants knew they did not have a genuine claim (or a combination of all of these).

[16] Mr Hazel refers to the application by the defendants to inspect Tectrax's technology so the defendants could particularise their copyright claim as effectively an admission they did not have a sound basis for the counterclaim. In any event, Mr Hazel says the defendants had already inspected Tectrax's technology.

[17] Finally, Mr Hazel submits the defendants acted unreasonably and unjustifiably.

Defendants' submissions

[18] In opposition, Mr Henry submits that there is no basis for an uplift in costs. He refers to the judgment of Davison J given on 12 July 2018 in *Zhang*.[3] That judgment was in favour of Sealegs, which is a defendant in this proceeding. He says following

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2 *Sealegs International Limited v Zhang* [2019] NZSC 147.
3 *Sealegs International Ltd v Zhang* [2018] NZHC 1724.

the delivery of the judgment of Davison J, the defendants filed their counterclaim based on the successful claim in the High Court in *Zhang*. The defendants therefore had the copyright decision in that judgment in their favour.

[19] Mr Henry says that this proceeding was stopped pending the outcome of the decision of the Court of Appeal in the appeal from the judgment of Davison J and the Supreme Court leave application. The parties agreed not to incur any costs pending the outcome of the Court of Appeal decision, which was given on 27 August 2019.[4] He says Tectrax had not taken many steps in relation to the counterclaim other than filing the required the documents.

Tectrax's submissions in reply

[20] In reply, Mr Hazel submits that *Zhang* had a quite different and unrelated set of facts. The allegedly infringing item in the withdrawn counterclaim for copyright infringement in this case was completely unrelated to that in *Zhang*. Mr Hazel submits it was a risky approach for the defendants to rely on the High Court decision in *Zhang* and it was unreasonable for the defendants to continue with their counterclaim and interlocutory application after they had lost in the Court of Appeal in *Zhang*. That the defendants maintained their actions against Tectrax, despite the "resounding losses" in *Zhang* in the Court of Appeal, justifies an award of increased costs.

Decision

[21] The Court may award increased costs under r 14.6 of the High Court Rules. Rule 14.6 relevantly provides:

> **14.6 Increased costs and indemnity costs**
>
> **…**
>
> (3) The court may order a party to pay increased costs if—
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> …
>
> (b) the party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in it by—
>
> …

[4] *Zhang v Sealegs International Ltd* [2019] NZCA 389.

(ii) taking or pursuing an unnecessary step or an argument that lacks merit; or

…

(d) some other reason exists which justifies the court making an order for increased costs despite the principle that the determination of costs should be predictable and expeditious.

[22] Increased costs may be ordered where there is a failure by the paying party to act reasonably.[5]

[23] At the time the defendants filed their counterclaim, they had the decision of Davison J in their favour. Mr Hazel says the facts in that case were different and the allegedly infringing item in this case was different. However, it was agreed by the parties in this case that the judgment of the Supreme Court in *Zhang* would be determinative. As was noted by Lang J in his minute, set out above, the counterclaim was based on matters that had, at that time, been determined by the Court of Appeal in *Zhang*.

[24] In his memorandum, filed after the Supreme Court had delivered its decision refusing leave, Mr Hazel acknowledged as correct Lang J's statement that the future of the defendants' counterclaim depended entirely on the final outcome of the *Zhang* proceeding. In other words, despite any factual differences, between the two cases the decision in *Zhang* dictated the fate of the counterclaim in this case.

[25] In those circumstances I do not consider it can be said that the defendants acted unreasonably in filing their counterclaim following the delivery of the judgment of Davison J in *Zhang* even if they knew that decision would be appealed. There was a High Court judgment which provided a basis for their claim.

[26] Sealegs was entitled to apply to the Supreme Court for leave to appeal the decision of the Court of Appeal. No steps were taken which resulted in Tectrax incurring any costs after the judgment of the Court of Appeal. While ultimately the defendants have accepted that the counterclaim lacks merit on the basis of the judgment of the Court of Appeal, at the time it filed its counterclaim it had the decision

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5 *Bradbury v Westpac Banking Corp* [2009] NZCA 234, [2009] 3 NZLR 400 at [27].

of the High Court which it was entitled to rely on. In those circumstances, it also cannot be said that the defendants have failed to act reasonably.

[27] There is no separate basis to support Mr Hazel's allegations regarding lack of competence, treating the proceeding with insufficient seriousness, tactics or knowledge on the part of the defendants that they did not have a genuine claim.

[28] The issue of the defendants' application to inspect, so as to be able to particularise their claim, comes back to the adequacy of the counterclaim, which in turn comes back to Sealegs' success as plaintiff in *Zhang* in this Court. I do not consider this provides a separate basis for an uplift in costs.

[29] There is therefore no basis for increased costs.

Result

[30] Tectrax is entitled to scale costs only. I award costs in favour of Tectrax in the sum of $13,384 against the defendants.

Gordon J