

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV-2011-404-5949
[2012] NZHC 3153**

BETWEEN AS PIRE 2008 LTD
Plaintiff

AND SPAZIO CASA FRANCHISING LTD
First Defendant

AND SPAZIO CASA LTD
Second Defendant

Hearing: (On the papers)

Counsel: D McGill and U Schall for Plaintiff
PF Dalkie for Defendants

Judgment: 26 November 2012

JUDGMENT OF BREWER J
(Costs)

SOLICITORS

Duncan Cotterill (Auckland) for Plaintiffs
Short & Partners (Auckland) for Defendants

COUNSEL

PF Dalkie

Introduction

[1] This judgment fixes costs on a proceeding determined before hearing by arbitration.

[2] On 26 September 2011, the plaintiff commenced proceedings against the first defendant and the second defendant. The statement of claim, which ran to 13 pages, alleged against both defendants wrongful termination of a franchise agreement. The termination stemmed from, inter alia, damage to the plaintiff's premises in the Christchurch earthquakes.

[3] On the same day, the plaintiff sought interlocutory injunctive relief against both defendants. The usual supporting documents were filed, including an affidavit which ran to 125 paragraphs.

[4] The matter was first called in this Court on 29 September 2011 before Asher J. His Honour recorded that there was to be a meeting between the parties to see whether a resolution might be found and that in the meantime the defendants had provided an interim undertaking to the plaintiff that they would not take any further steps to deal with the plaintiff's business. The plaintiff had accepted the undertaking.

[5] On 27 October 2011, Lang J minuted that counsel had agreed that the application for an interim injunction could be dismissed and his Honour made an order accordingly. Lang J also recorded that the parties had agreed to attend arbitration, being the dispute resolution mechanism provided for in the franchise agreement. Accordingly, the proceeding would not be advanced and his Honour listed it again for mention on 26 April 2012.

[6] On 24 April 2012, the parties advised the Court that the arbitration was scheduled for May 2012 so the matter was again adjourned for mention on 23 May 2012. Prior to that date, the parties advised the Court that the arbitration had concluded and that the parties were awaiting the determination of the arbitrator.

They requested that the matter next be called in or around late August 2012. The Court fixed the next call of the proceeding for 30 August 2012 accordingly.

[7] By memorandum dated 28 August 2012, the parties advised that the arbitrator's award had been received, that the plaintiff wished to discontinue the proceeding, but that costs would need to be resolved. A timetable for submissions on costs was suggested by counsel and adopted by the Court.

Discussion

[8] My task is to determine the issue of costs. I must do this in relation to the High Court proceedings only, although the result in the arbitration is of relevance to this costs determination.

[9] The plaintiff seeks costs on a 2B basis in the sum of \$14,448. This sum is calculated on all of the steps taken in the proceeding. The plaintiff's case for costs, despite the history I have referred to above, is based on its position that it was successful at the arbitration in that the first defendant was ordered to pay the plaintiff \$200,000 in damages and \$61,265.78 for "product". Therefore, the plaintiff submits, it was justified in filing the proceedings, has been substantially successful, and is entitled to costs in the normal way.

[10] The defendants argue that the plaintiff is not entitled to any costs because:

- (a) The franchise agreement contained a compulsory arbitration clause. Therefore, although the plaintiff was entitled to seek injunctive relief, it was not entitled to seek substantive relief in a Court proceeding;
- (b) The second defendant was not a party to the franchise agreement and no order was made against it by the arbitrator;
- (c) The plaintiff did not succeed at arbitration on the basis sued for in this Court.

[11] The defendants seek costs of \$5,572 on a 2B basis.

[12] The starting point for this costs determination is r 15.23 of the High Court Rules, which provides:

Unless the defendant otherwise agrees or the court otherwise orders, a plaintiff who discontinues a proceeding against a defendant must pay costs to the defendant of and incidental to the proceeding up to and including the discontinuance.

[13] I treat the notice of intention to discontinue proceedings as discontinuance for costs purposes. Accordingly, it is for the plaintiff to establish that the circumstances are such that it is just and equitable that an award of costs should not be made against it.¹ Two factors point to such circumstances existing. Firstly, the Arbitration Act 1996 specifically provides that it is not incompatible with the arbitral process to seek interim relief from the Court.² There can be lengthy delays before an arbitral process is fully engaged and there is nothing to prevent a party from preserving its position before that process is engaged.³ Secondly, the plaintiff was substantially successful in the Arbitration from which I conclude that there was merit in the decision to seek interim relief.

[14] Against that I must consider the fact that the plaintiff not only sought injunctive relief, but filed proceedings for substantive relief despite the provision in the franchise agreement that the parties must settle their disputes at arbitration.

Decision

[15] In all the circumstances, I am tempted to exercise my ultimate discretion to determine costs⁴ by letting costs lie where they fall. However, because of the position of the second defendant, I do not think that would be equitable. Accordingly, I make the following directions:

¹ *Paul v Raklander* HC Auckland CIV-2006-404-3811, 20 June 2008 at [6].

² Arbitration Act 1996, schedule 1 article 9(1).

³ *Pathak v Tourism Transport Ltd* [2002] 3 NZLR 681 at [40].

⁴ High Court Rules 2008, r 14.1.

- (a) The plaintiff is entitled to costs on a 2B basis on its interlocutory application for interim injunction. It is not entitled to costs in respect of the substantive pleading. It is not entitled to costs subsequent to the acceptance by it of the defendant's interim undertaking; and
- (b) The second defendant is entitled to its costs on a 2B basis.

[16] The parties are to agree upon the calculations necessary to give effect to the above rulings. If they disagree, costs will be settled by the Registrar.

Brewer J