

**IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY**

CIV 2004-454-756

BETWEEN	CHRISTINE ELIZABETH BARBER Plaintiff
AND	SUZANNE LYNNE COTTLE First Defendant
AND	ROBIN STEWART COTTLE Second Defendant
AND	ALAN MERVYN HERBERT Third Defendant
AND	SUSAN VILORA HERBERT Fourth Defendant
AND	PAPAITONGA SPRINGS LIMITED Fifth Defendant
AND	PETER THOMAS FAHEY Sixth Defendant
AND	QUOTABLE VALUE LIMITED Seventh Defendant

On the papers:

Counsel: Mr Reardon for First to Fifth Defendants
Mr Hunter for Seventh Defendant

Judgment: 17 September 2008 at 2 pm

JUDGMENT OF MALLON J

[1] This proceeding concerned the sale of a property owned by the plaintiff and purchased by the fifth defendant, whose shareholders were the first to fourth defendants. The first defendant was the real estate agent on the sale. The seventh defendant's valuation was requested by the first defendant and provided by her to the plaintiff before the sale proceeded. There were five causes of action. The first cause of action was against the first defendant for breach of fiduciary duty. The second cause of action was against the first to fourth defendants for deceit. The third cause of action was against the first to fifth defendants for breach of trust. The fourth cause of action was against the first to fourth defendants and concerned obligations under the Real Estate Agents Act. The fifth cause of action was against the seventh defendant for negligence.

[2] On all the causes of action the loss claimed was the undervalue at which the plaintiff says she sold the property. The commission paid on the sale was also claimed. The plaintiff was substantially unsuccessful. The only relief awarded was against the first defendant requiring her to repay the amount of the commission that she received on the sale. The first to fifth and seventh defendants now seek costs. The claim against the sixth defendant was discontinued prior to trial and no costs issue arises in respect of that claim.

[3] There are no submissions from the plaintiff. Counsel for the seventh defendant advises that the solicitors and counsel for the plaintiff have no instructions from the plaintiff. The plaintiff has had an opportunity to make any submissions she wishes to make on costs and accordingly I propose to deal with costs on the material before me.

[4] The general principle is that the party who fails with respect to a proceeding should pay costs to the party who succeeds (r 47(a) of the High Court Rules). Given the very limited success of the plaintiff's claim I consider that the successful parties were the first to fifth defendants and the seventh defendant and that they are entitled to costs from the plaintiff.

[5] I have reviewed the costs and disbursements claimed by the first to fifth defendants. I allow the claim except as follows:

- a) The first to fifth defendants have claimed category 2C costs for the list of documents, the preparation of briefs of evidence and the preparation of lists of issues, authorities, submissions and contribution to the common bundle. I consider that a normal amount of time was involved in these steps, and that category 2B is appropriate;
- b) The first to fifth defendants have claimed for memoranda and attendances at case management conferences on 17 October 2005, 14 March 2006, 9 and 25 May 2006. According to the seventh defendant's memorandum, costs orders have already been made in relation to these case management conferences and the costs paid. I therefore disallow the 2.8 days in total claimed in respect of these conferences;
- c) The first to fifth defendants have claimed for an application for security for costs, and preparation for and attendance at the hearing of that application. This application was not pursued because of an affidavit from the plaintiff providing information about the plaintiff's assets which the first to fifth defendants now says is false. The first to fifth defendants say that, in light of the true position, they were justified in bringing the application. However, whether it was justified or not is a separate question from whether the application would have been granted. The plaintiff's evidence was that she would have no difficulty meeting a costs order and the sale of the farm property is not evidence in and of itself that she could not. It is therefore not clear that the application would have been granted. I do not allow the defendants' costs in relation to the security for costs application;
- d) The first to fifth defendants have claimed for all steps at the daily rate of \$1,600. However the steps taken before 1 June 2006 should be at

the daily rate of \$1,450. I allow costs for pre-1 June 2006 steps at the \$1,450 rate only and steps from 1 June 2006 are allowed at the \$1,600 rate;

- e) Apart from the photocopying for discovery, I do not allow the unspecified claim for photocopying or for tolls as I see these as part of the solicitor's overheads;
- f) The claim for an expert witness fee for Mr Atwell is disallowed. Mr Atwell gave brief evidence of fact, not expert evidence; and
- g) The fact witness fees are disallowed. They appear to be based on the rates set out in the Witnesses and Interpreters Fees Regulations 1974. Those Regulations no longer apply to civil costs recovery: see *Air New Zealand v Commerce Commission* (2006) 18 PRNZ 406 at [49] and [54].

[6] I have also reviewed the costs and disbursements claimed by the seventh defendant. I allow the items claimed as costs on a category 2B basis. I also allow the disbursements claimed.

[7] The seventh defendant seeks a 50% uplift on category 2B costs in respect of trial and preparation costs. This is because it made a *Calderbank* offer shortly before trial under which it offered to settle on the basis that each party would bear its own costs. In support of this submission the seventh defendant cites *Kolmar Investments Ltd v R Hannah & Co Ltd* HC AK CIV 2002-404-1861 24 November 2004 and *Holdfast NZ Ltd v Selleys Pty Ltd* (2005) 17 PRNZ 897.

[8] The effect, if any, of a "without prejudice except as to costs" offer is set out in r 48GA of the High Court Rules. The starting point is the principle that, if party A (the seventh defendant) makes an offer that would have been more beneficial to party B (the plaintiff) than the judgment obtained by party B (the plaintiff), then party A is entitled to costs on the steps taken in the proceeding after the offer is made. That is the case here in that the plaintiff was unsuccessful against the seventh

defendant and so is to pay costs to the seventh defendant which is a worse position than the walk away offer the seventh defendant made. This principle is subject to the Court's discretion. It also does not limit rules 48C and 48D concerning grounds on which costs may be increased or reduced from the scale.

[9] However, the seventh defendant seeks not just costs, but increased costs. Rule 48C permits the Court to order increased costs if (amongst other things) a party has contributed unnecessarily to the time or expense of the proceeding by failing, without reasonable justification, to accept an offer of settlement. I consider that costs should not be increased. The offer was made late. At that time the plaintiff's expert valuer considered the value of the property to have been well above the valuation provided by the seventh defendant. There were also a number of issues of fact between the parties (arising from different perceptions genuinely held) that had not been determined and which were relevant to the claim against the seventh defendant. The offer was also subject to the other defendants releasing the seventh defendant from any claim. It is apparent that this release would not have been forthcoming. That is because when, in the course of the trial, the seventh defendant sought judgment under r 292 of the High Court Rules, counsel for the first and fifth defendants opposed the application because it wished to keep open the option of a cross claim against the seventh defendant. I consider that in all the circumstances it was not unreasonable for the plaintiff to proceed with its claim against the seventh defendant in light of the walk away offer that was made.

Mallon J

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