IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2008-409-348
[2013] NZHC 3452

BETWEEN	ERIC MESERVE HOUGHTON Plaintiff
AND	TIMOTHY ERNEST CORBETT SAUNDERS, SAMUEL JOHN MAGILL, JOHN MICHAEL FEENEY, CRAIG EDGEWORTH HORROCKS, PETER DAVID HUNTER, PETER THOMAS and JOAN WITHERS First Defendants
	CREDIT SUISSE PRIVATE EQUITY INC (FORMERLY CREDIT SUISSE FIRST BOSTON PRIVATE EQUITY INC) Second Defendant
	CREDIT SUISSE FIRST BOSTON ASIAN MERCHANT PARTNERS LP Third Defendant
	FIRST NEW ZEALAND CAPITAL Fourth Defendant
	FORSYTH BARR LIMITED Fifth Defendant

On papers

Judgment: 18 December 2013

JUDGMENT OF DOBSON J
(Defendants' costs claims for interlocutory hearings, July-September 2013)

Introduction

[1] The defendants have applied for costs on a category 3B basis in respect of the steps taken for the hearing of interlocutory arguments in July, August and September 2013. The main areas of dispute are:

(a) the extent to which the defendants were successful in relation to the orders sought;

(b) the level of costs claimed by each defendant, including the choice of 3B instead of 2B scale for all steps, and the likelihood of duplication amongst defendants.

The extent to which the defendants were successful

[2] The general principle governing costs is that costs should follow the event, and be awarded to a successful party against an unsuccessful party.[1] All matters regarding costs are at the Court's discretion,[2] and departures from the normal range should be accompanied by reasons.[3]

[3] The majority of the interlocutory orders sought by the defendants were granted, and the plaintiff's application to have Hunter Hall's claims heard at the first stage of the trial was not granted. However, each of the applications needs to be dissected in more detail to determine the extent to which the defendants were successful.

[4] The plaintiff disputed the extent of duplication, both in preparation for, and appearances on, the various applications. My overall impression was that the applications reflected the defendants dragging a somewhat reluctant plaintiff to the barrier on the various obligations for interlocutory progress with the proceedings. The extent of opposition on behalf of the plaintiff to some of the defendants' applications tended to lessen shortly before, or during, hearings. That was certainly

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1 High Court Rules, r 14.2(a).
2 High Court Rules, r 14.1.
3 *Manukau Golf Club Inc v Shoye Venture Ltd* [2012] NZSC 109, [2013] 1 NZLR 305 at [16].

the case in relation to applications for further particulars of the plaintiff's statement of claim.

Application for further discovery

[5] My relevant judgment identified three categories of documents that were still disputed: the opt-in forms, the electronic data, and the JAFL documents.[4] The applications were pursued by the first, second and third defendants.

[6] Discovery of the opt-in forms and the JAFL documents was ordered, but the plaintiff was not required to pay for transforming the electronic data it had provided to the defendants into a readable format. The defendants were therefore successful in respect of two out of three categories of documents they sought discovery of and should be entitled to costs in respect of them.

[7] The plaintiff submits that the costs should be reduced to reflect the fact that the discovery of JAFL documents is third party discovery, to be completed by Mr Gavigan, and not the plaintiff. However, it is the plaintiff's responsibility to ensure all relevant discoverable documents are indeed discovered, regardless of whose possession they are in. Given that Mr Gavigan has either a measure of control over the proceedings, or at the least substantial involvement in managing them, the plaintiff should be subject to an adverse costs award for his failure to discover relevant documents.

[8] The plaintiff also asserts that the award of costs on the discovery of the opt-in forms should be reduced to reflect the time and resource expended by the plaintiff to review, collate and copy 3,281 forms for provision to the defendants. However, this exercise would not only benefit the defendants. The steps taken to review and collate the opt-in forms would likely make them more accessible and usable for the plaintiff as well, and they may have had to expend the time and resources on this task in any event. I am not persuaded by the plaintiff's submissions that he is acting as an agent for the Court in performing this task, as it is the responsibility of a representative plaintiff to organise its class of claimants, not the Court's.

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4 *Houghton v Saunders* [2013] NZHC 1824.

[9] On the basis that two out of three categories of documents sought by the defendants were ordered to be discovered, I consider the defendants who pursued the applications are entitled to recover 66 per cent of the costs that would be awarded, had they succeeded completely on this application. A reduction is appropriate for the first defendants, who took a lesser role.

Application to determine privilege in certain documents

[10] The first defendants and the second and third defendants provided separate bundles of documents in respect of which privilege was claimed. My 19 July 2013 judgment held that the first defendants were entitled to assert privilege in respect of the documents at tabs 2-8 of their bundle. The plaintiff says that privilege in respect of most of these documents was conceded, and that only 26 out of 32 documents were recognised as being privileged.

[11] My 19 July judgment also held that the second and third defendants were entitled to claim privilege in respect of minutes of meetings at tabs 11-18 of their bundle, and in respect of the components of the document at tab 9 that reflect legal advice. Documents contained in nine other tabs were held not to be privileged. Therefore, unlike the first defendants, the second and third defendants were only partially successful in their claims to privilege in their documents.

[12] One other area where the second and third defendants were unsuccessful was in seeking orders that the privileged documents obtained by the plaintiff from Godfrey Hirst should be destroyed or returned to the plaintiff. My judgment held that Feltex had waived any privilege it had in the documents, and therefore they were legitimately in the plaintiff's possession.[5]

[13] The first defendants are entitled to costs, and the second and third defendants are entitled to half of the otherwise appropriate costs award to reflect the extent of their success.

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5 At [34].

Application for security for costs

[14] All defendants were successful in this application, as the plaintiff was ordered to give a bank guarantee or similar form of security by January 2014. The defendants seek costs in respect of both hearings for security for costs and the argument on the form of security heard on 16 September 2013.

[15] The plaintiff was successful in resisting a variation to the confidentiality orders over the affidavit of Susan Dunn. I rejected the plaintiff's argument that the general nature of funding arrangements was commercially sensitive, and that the defendants would gain an unfair tactical advantage by seeing a redacted version of the documents.

[16] However, I have continued to respect the confidentiality of some specific details of the funding arrangements, thus far at least,[6] and therefore the confidentiality orders were not varied. The judgment recognised the prospect of revisiting those orders, depending on the form of security for costs the plaintiff provides.

[17] I do not think this matter detracts from the defendants' entitlement to costs on their security for costs applications. The plaintiff was not successful in his substantive arguments that the redacted agreement was commercially sensitive or that the defendants would gain an unfair advantage. Rather, the orders for continued confidentiality were made for more practical reasons, so that any variation could respond to the shape the security would take.

[18] As to the substance of the analysis on the justification for increased orders for security for costs, the defendants prevailed over various grounds argued in opposition for the plaintiff. Therefore, the defendants are entitled to costs on their security for costs applications, subject to considerations of overlap. The issues on security for costs were relatively more extensive than might ordinarily arise, and I will reflect that in the band allocated as appropriate.

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[6] My expression of unease about circumstances in which the Court knows more of such arrangements than defendants' counsel preceded the Supreme Court's negative view of that in *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89.

Application for further and better particulars of the second amended statement of claim

[19] My 19 July judgment ordered further particulars on some aspects of the second amended statement of claim. A third amended statement of claim was prepared and filed on 3 September 2013. After a hearing on 16 September 2013, two aspects of the third amended statement of claim were found to be inadequate and steps were taken to review it and make the necessary amendments.

[20] The scope and manner of pleading of the allegations in the statements of claim are relatively complex. That is not a criticism of them, rather a measure of the substantial task in analysing the gaps necessarily addressed in preparing full responses.

[21] The defendants seek costs in respect of both the July and the September hearings.

[22] Of the requests for further and better particulars, the following were not ordered:

(a) particulars of individual sales relating to the allegations of manipulation of earnings;

(b) details of each shareholder claiming loss;

(c) reliance on post-facto comments to substantiate claims of failing to disclose the state of affairs at the relevant time (although these particulars were sought only by the second and third defendants).

[23] In the scheme of all the particulars sought, these are only a small proportion. In addition, the necessity for a third amended statement of claim gives some indication of the inadequacy of the pleadings at the stage that the defendants were arguing for further and better particulars. Therefore I consider they are entitled to costs on this step. The scale of the task warrants consideration of a higher than usual band.

Plaintiff's application to amend the scope of the first trial

[24] This application was thoroughly argued, and was lost. All defendants contributed to opposing it, although the fifth defendant did not file written submissions. All are entitled to costs on successfully doing so, proportionate to their contributions to the arguments.

Level of costs

Is 3B or another the appropriate scale?

[25] The defendants have claimed category 3B costs in respect of all these interlocutory steps.

[26] Rule 14.3 of the High Court Rules defines category 3 proceedings as:

> Proceedings that because of their complexity or significance require counsel to have special skill and experience in the High Court.

[27] A proceeding can generally only have one categorisation as category 1, 2 or 3. The categorisation applies to the whole proceeding, as the proceeding cannot be considered partly complex and partly straightforward.[7]

[28] However, different time bands (A, B or C) may be used for different steps in the proceedings. The appropriate time band for each interlocutory step is fixed by the Judge or Associate Judge who deals with that step, and will depend on the amount of time that is considered reasonable for that step. Logically, the bands may differ at each step. A blanket order of time band A or C is seldom made or considered appropriate.

[29] The range of time allowances for each band is necessarily somewhat crude, where the difference between bands B and C for many steps is up to three times. An element of the Court's discretion in cases where it is warranted is to use those different time allowances as a guide, and set a case-specific time allocation, reflecting the range between bands B and C. I am minded to do that here.

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7 *McGechan on Procedure* (online looseleaf ed, Brookers) at [HR14.3.01].

[30] Contrary to the plaintiff's submission, a blanket classification of the proceeding as category 3 is not necessarily objectionable. The difficulty in this case is that the proceeding has already been treated (although not formally classified) as a category 2 proceeding, of average complexity, as orders for costs in earlier interlocutory hearings before French J and the Court of Appeal were made on this basis.[8]

[31] Rule 14.3(2) of the High Court Rules provides:

> The court may at any time determine in advance a proceeding's category, which applies to all subsequent determinations of costs in the proceeding, unless there are special reasons to the contrary.

[32] Although a formal determination of the category has not yet been made, it has been implicit in addressing costs on previous interlocutory steps that category 2 was appropriate. It also seems unfair to the plaintiff if he was awarded category 2 costs on earlier interlocutory applications and appeals in which he was successful, yet the defendants are claiming category 3 costs on these applications. I do not think that is justified unless these interlocutory applications are materially more complex than those argued before French J and the Court of Appeal.

[33] *McGechan on Procedure* states that special reasons are required for re-categorising a proceeding, as the costs categorisation is likely to have influenced the parties' conduct of the proceeding up until that point. The fact that an earlier skill classification proved inadequate is unlikely of itself to be a "special reason" for re-categorising.[9]

[34] The defendants rely on the "above-average" complexity and significance of these proceedings, and the fact that they have not been formally classified to support a category 3 classification. Although there has been no formal determination of the correct category, the policy reasons for not altering the category part way through a proceeding should still apply. In the absence of special reasons, I do not think category 3 is justified.

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8 *Houghton v Saunders* [2012] NZHC 1828 and *Saunders v Houghton (No 2)* [2012] NZCA 545, [2013] 2 NZLR 652.

9 *McGechan on Procedure*, above n 7, at [HR14.3.01]; *Tindall v Far North District Council* HC Auckland CIV-2003-488-0135, 25 May 2007 at [11]–[12].

Costs with multiple defendants

[35] Rule 14.15 of the High Court Rules provides:

> The court must not allow more than 1 set of costs, unless it appears to the court that there is good reason to do so, if—
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> (a) several defendants defended a proceeding separately; and
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> (b) it appears to the court that all or some of them could have joined in their defence.

[36] Although all defendants were applicants in respect of most of the interlocutory issues, the same approach to costs in favour of multiple parties should apply. This rule reflects the policy requiring the Court to exercise some caution before awarding costs in favour of multiple parties, particularly when there is some overlap or community of interest in the litigation position of those parties.[10] In exercising this discretion the Court will consider whether parties have common or overlapping interests and, if so, to what extent; and the extent to which one party did or could have relied upon the evidence or submissions of another.[11] This approach should apply discretely to interlocutory steps, even where it is clear that separate representation of the defendants is appropriate on the substantive issues. The need for separate representation substantively is likely to impact on the extent to which defendants would otherwise be expected to share the burden on interlocutory steps.

[37] In these applications, the first defendants led the submissions on behalf of all defendants, with the exception of discovery, which was led by the second and third defendants.

[38] The discovery application was materially similar for the first defendants and the second and third defendants. The application for further and better particulars, the application for security for costs, and the opposition to Hunter Hall's claims being heard at stage one was the same for all defendants. There should have been a considerable degree of overlap in the work required for filing the applications and preparing the submissions. (A clear instance is the fourth and fifth defendants'

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10 *Norfolk Trustee Co Ltd v Tattersfield Securities Ltd* HC Auckland CIV-2004-404-3668, 30 March 2005 at [51].

11 *McGechan on Procedure*, above n 7, at [HR14.15.02].

submissions on security for costs, which were two and a half and two pages respectively).

[39] The directions sought for privileged documents were different for the first defendants and the second-third defendants, and the nature of the privilege claimed was different with respect to the different defendants. They each prepared separate bundles of privileged documents for consideration, suggesting there was minimal duplication, and they are entitled to separate costs in respect of those applications.

Hearing time

[40] The plaintiff submits that appearances by counsel for all defendants were not necessary for the entirety of the hearings.

[41] The first defendants claim 4.5 hearing days for principal counsel and 1.75 days (half of 3.5 days) for second counsel. They also claim two days for Mr Magill's separate representation by Mr Weston QC. The second and third defendants claim 4.5 days for principal counsel and two days (half of four days) for second counsel. The fourth defendant claims four days for principal counsel and the fifth defendant claims 4.5 days.

[42] As to second counsel, I will allow one day for both of the first defendants and the second and third defendants.

[43] So far as Mr Weston's separate representation of Mr Magill is concerned, Mr Weston's discrete contribution to the argument was certainly modest. Mr Weston had been relatively recently briefed. I gained the impression that a material rationale for his appearance during the relevant argument was as much to bring himself up to speed with the interlocutory issues as it was to advance any discrete consideration for Mr Magill that could not have been articulated, in relation to these issues, within the submissions for the remaining first defendants. I will allow one day for his separate representation.

Disbursements

[44] Those sought are appropriate, and are allowed.

Summary

[45] I consider the defendants' entitlement to costs should be calculated as follows:

(a) *Application for further discovery*:

(i) Category 2B costs reduced to reflect the extent of the defendants' success (only two out of three categories of documents, excluding the electronic data): $4,179 x 66% = $2,758.14.

(ii) First defendants: should be reduced, to reflect the duplication of the work done by the second and third defendants: $2,758.14 x 75% = $2,068.60.

(iii) Second and third defendants: no duplication, effectively led the argument so $2,758.14.

(b) *Applications for directions for privileged documents*:

(i) First defendants: entitled to costs on 2B basis: $4,179.

(ii) Second and third defendants: entitled to costs on 2B basis, reduced by half to reflect the extent of success: $2,089.50.

(c) *Application for security for costs*:

(i) First defendants: entitled to costs on a basis half way between categories 2B and 2C - $5,771 and $11,542 – ie 50% uplift on category 2B: $8,656.50.

(ii) Second and third defendants: reduced to reflect the duplication of the work done by the first defendants - 66% of first defendants' entitlement: $5,713.29.

(iii) Fourth defendant: reduced to reflect the duplication of the work done by the first defendants and, to a lesser extent, the second and third defendants – 50% of first defendants' entitlement: $4,328.25. Not entitled to costs on additional interlocutory application and submissions to enforce security for costs.[12]

(iv) Fifth defendant: reduced to reflect the duplication of the work done by the first defendants and, to a lesser extent, the second and third defendants – 50% of first defendants' entitlement: $4,328.25.[13]

(d) *Application for further and better particulars*:

(i) First defendants: entitled to costs on 2C basis for first hearing steps but not further submissions: $19,502.

(ii) Second and third defendants: entitled to costs on 2C basis, reduced to reflect the duplication of the work done by the first defendants: $19,502 x 66% = $12,871.32.

(iii) Fourth defendant: entitled to costs on 2C basis, reduced to reflect the duplication of the work done by the first defendants, and, to a lesser extent, the second and third defendants: $19,502 x 50% = $9,751.[14]

(iv) Fifth defendant: entitled to costs on 2C basis, reduced to reflect the duplication of the work done by the first defendants,

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12 The fourth and fifth defendants did not make written submissions on further security for costs issues on 12 and 25 September 2013, and that is reflected in the extent of deduction.

13 See n 12 above.

14 N 12 above also applies here.

and, to a lesser extent, the second and third defendants: $19,502 x 50% = $9,751.[15]

(e) *Opposition to plaintiff's application to have Hunter Hall's claim heard at stage one hearing*:

(i) First defendants: entitled to costs on 2B basis: $4,179.

(ii) Second and third defendants: entitled to costs on 2B basis, reduced to reflect the duplication of the work done by the first defendants: $4,179 x 75% = $3,134.25.

(iii) Fourth defendant: entitled to costs on 2B basis, reduced to reflect the duplication of the work done by the first defendants, and to a lesser extent the second and third defendants: $4,179 x 50% = $2,089.50.

(iv) Fifth defendant: entitled to costs on 2B basis, reduced to reflect the duplication of the work done by the first defendants, and to a lesser extent the second and third defendants: $4,179 x 50% = $2,089.50.

(f) *Hearing time*:

(i) The first defendants are entitled to one day for preparation of the bundle. (Given its complexity, that comparatively large amount of time is considered reasonable.) The first defendants are also entitled to 4.5 days for principal counsel, one day for principal counsel for Mr Magill and one day for second counsel, on 2B basis: 7.5 x $1,990 = $14,925.

(ii) The second and third defendants are entitled to one day for preparation of the bundle. (Given its complexity, that comparatively large amount of time is considered reasonable).

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[15] N 12 above also applies here.

The second and third defendants are also entitled to 4.5 days for principal counsel and one day for second counsel, on 2B basis: 6.5 x $1,990 = $12,935.

(iii) Fourth defendant: entitled to four days for principal counsel, on 2B basis: $7,960.

(iv) Fifth defendant: entitled to 4.5 days for principal counsel, on 2B basis: $8,955.

[46] Accordingly, the totals of the respective defendants' costs entitlements on the relevant interlocutories are as follows:

First Defendants	Further discovery	$2,068.60
	Privilege claims	4,179.00
	Security for costs	8,656.50
	Further and better particulars	19,502.00
	Opposition to Hunter Hall	4,179.00
	Hearing time	14,925.00
	Disbursements	5,808.15
	Total	**$59,318.25**

Second and Third Defendants	Further discovery	$2,758.14
	Privilege claims	2,089.50
	Security for costs	5,713.29
	Further and better particulars	12,871.32
	Opposition to Hunter Hall	3,134.25
	Hearing time	12,935.00
	Disbursements	1,733.96
	Total	**$41,235.46**

Fourth Defendant	Security for costs	$4,328.25
	Further and better particulars	9,751.00
	Opposition to Hunter Hall	2,089.50
	Hearing time	7,960.00
	Disbursements	4,476.77
	Total	**$28,605.52**

Fifth Defendant	Security for costs	$4,328.25
	Further and better particulars	9,751.00
	Opposition to Hunter Hall	2,089.50
	Hearing time	8,955.00
	Disbursements	3,181.88
	Total	**$28,305.63**

[47] Costs on this application for orders on costs will lie where they fall.

Dobson J

Solicitors:
Wilson McKay, Auckland for plaintiff
Bell Gully, Auckland for first to third-named and fifth to seventh-named first defendants
Clendons, Auckland for fourth-named first defendant
Russell McVeagh, Wellington for second and third defendants
Jones Fee, Auckland for fourth defendant
McElroys, Auckland for fifth defendant