IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2009-404-005756

UNDER	PART 18 OF THE HIGH COURT RULES
AND UNDER	THE DECLARATORY JUDGMENTS ACT 1908
AND UNDER	THE UNIT TITLES ACT 1972
BETWEEN	CHUAN WU Plaintiff
AND	BODY CORPORATE 366611 First Defendant
AND	THETA MANAGEMENT LIMITED Second Defendant

Hearing: On the papers

Counsel: B Rooney for Plaintiff
N Davidson QC for Second Defendant

Judgment: 4 October 2011

JUDGMENT OF ASHER J
(Costs and interest)

This judgment was delivered by me on Tuesday, 4 October 2011 at 1pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
B Rooney, DX CP20546, Auckland. Email: brian@rooney.co.nz
N Davidson QC, PO Box 9344, Tower Junction, Christchurch. Email: Nicholas@davidsonqc.co.nz

Introduction

[1] On 30 May 2011 I delivered a judgment in favour of the plaintiff and others whom he represented awarding them damages in the sum of $283,663.64 and $3,121.56 against the first and second defendants, based on the first cause of action in nuisance. The plaintiff also succeeded on the second and third causes of action which related to declarations as to the validity of certain rules and actions of the Body Corporate that were ultra vires. The plaintiff failed on the fourth cause of action seeking a declaratory judgment under the Declaratory Judgments Act 1908 as to the validity of certain proxies to which he was not a party.

Costs

[2] The plaintiff seeks the cost of the proceeding as the successful party, and in addition an allowance for costs on an earlier hearing before Heath J on 9 June 2010. Scale costs on the hearing come to $65,604 with disbursements of $6,082.85. This includes costs for appearing before Heath J in the interlocutory application, $7,824 being allocated for those attendances.[1] Interest is sought on the judgment sum from the end of the agreed claim period, 1 December 2009, until the date of judgment. The plaintiff seeks the statutory rate of interest at 8.4 per cent which was the maximum rate applicable under s 87 of the Judicature Act 1908 at the relevant time. In addition, the plaintiff seeks a significant uplift over the scale to reflect the high costs of the litigation, and because the proceeding involved a matter of general importance that had to be resolved in the litigation. An uplift of 75 per cent is sought.

[3] The first defendant argues that rather than the plaintiff getting costs for the interlocutory application before Heath J, a costs order should be made on that application in favour of the defendants. The first defendant submits that costs on the trial should be reduced by 25 per cent to reflect the plaintiff's failure on one of its major causes of action, trespass, and that the plaintiff should pay the first defendant's costs on the application before Heath J of $9,104 plus disbursements. It submits that

---

1 *Wu v Body Corporate 366611* HC Auckland CIV-2009-404-5756, 30 July 2010.

if costs are awarded to the plaintiff, an uplift is not appropriate and that disbursements should be reduced by $292 to reflect the cost of filing the enforcement application and the filing fee for amending the statement of claim so that it included the ultimately successful cause of action for nuisance.

[4] The second defendant argues that the parties had similar success in the litigation to the plaintiff and that costs should lie where they fall. It submits that costs should be awarded to it in relation to the interlocutory application before Heath J. It submits that if costs are ordered against it there is no basis for an uplift over the scale. The second defendant also submits that the interest rate of 8.4 per cent is too high and that an interest rate of 4.5 per cent would be appropriate.

Discussion

Costs on the main hearing

[5] The original cause of action relied on by the plaintiff was trespass. It did not succeed on this cause of action, although the question might have arisen whether it could call further evidence, had it not succeeded on the nuisance claim.

[6] It did succeed on the claim for nuisance. Notice of this head of claim was only given two working days before the hearing. Leave was granted without opposition and an amended statement of claim was filed after conclusion of the hearing.

[7] I do not regard this late amendment as particularly significant in the assessment of costs. The facts relied on in relation to both causes of action were much the same. While I accept that there would have been some additional costs for the defendants in preparing submissions on legal aspects of the trespass claim, the core issues had to be traversed in any event. This change gave rise to little extra cost or delay.

[8] It is correct that the plaintiff while succeeding on three of the heads of claim failed on the fourth. That fourth cause of action did not take a great deal of time at

the hearing. If involved little evidence and quite short submissions, and took about seven per cent of the hearing time at most.

[9] I cannot accept the second defendant's submission that costs should lie where they fall. On an overview the plaintiff was successful, and costs should follow the event. Nor can I accept the first defendant's suggestion that a 25 per cent deduction would be appropriate. That would be too much. The amount of time wasted by the parties on evidence and submissions on which the plaintiff was unsuccessful was relatively small; all up it was 10 per cent at most.

[10] Therefore I am not persuaded that the percentage of wasted time was sufficiently high to warrant any deduction in scale costs in favour of the plaintiff and I decline to make any such deduction.

[11] However, I do not see any basis for an uplift over the scale. It is not clear that the costs of the proceeding were as high as initially suggested in costs submissions on behalf of the plaintiff. There was no particular point of public interest and the plaintiff certainly could not be regarded as a public interest group. So costs will be awarded on a 2B basis.

The interlocutory application

[12] The plaintiff failed on its interlocutory application before Heath J where it was seeking enforcement orders. Those were orders to enforce a decision of Lang J where he held that the Body Corporate had acted in excess of its powers under the Unit Titles Act 1972 in resolving to amend one of its rules. The Judge specifically reserved costs at the end of that application and stated:

> [35] I did not hear from counsel on costs. If Mr Wu's view of the facts and law is correct, then he has been put to much inconvenience and may have suffered financial loss due to the actions of the Body Corporate and Theta. In contrast, if the Body Corporate's and Theta's view of the facts and law is correct, Mr Wu's stance might be regarded as unreasonable.
>
> [36] In those circumstances, my strong preliminary view is that costs should be reserved on the enforcement application, to follow the outcome of the substantive proceeding itself.

> [37] If, despite that indication, counsel wish to make any contrary submissions on costs, they may raise those with Lang J, at the case management conference. He can make directions as to the filing of memoranda, with which I can deal. I am conscious that my preliminary view could be based on incomplete information.

[13] I agree with Mr Rooney's submission that a reading of these paragraphs indicates that Heath J anticipated that the costs on that hearing would follow the event. If that was so, the costs should be awarded in favour of the plaintiff. However, I now have the benefit of an overview of the proceedings and my discretion as to costs must take into account all factors. In hindsight the application to enforce the judgment of Lang J was misconceived and the plaintiff would have been better to have sought an early fixture as soon as possible. The plaintiff was unsuccessful in the hearing before Heath J, although I accept that it resulted in directions being made which helped bring the case on for hearing. In making my assessment on an overview I also take into account the fact that the plaintiff failed on the fourth cause of action. In my general discretion I determine that costs will lie where they fall on that interlocutory hearing.

[14] There will therefore be no order for costs under this head.

Interest

[15] The plaintiff has filed a helpful summary of interest rates from January 2008 to June 2011. These show that the floating first mortgage new customer housing rate has varied from a high of 10.57 percent in January 2008 to 5.9 per cent in June 2011, the business base lending rate from 12.24 per cent in January 2008 to 10.06 per cent in June 2011 and the six-month term deposit rate from 8.23 per cent in January 2008 to 4.21 per cent in June 2011. The most helpful indication as to the appropriate rate under the Judicature Act is the latter, the six month term deposit rate, which reflects conservative investment returns. The relevant period runs from the conclusion of the claim period, 30 November 2009. The rates are lower for that period. I note however that this is generous to the defendants in that monies were incrementally accruing in the months prior to that date, but no interest is claimed for that time.

[16] In all the circumstances I consider that the fair rate is seven per cent.

Result

[17] The plaintiff will have costs in the action against the first and second defendants on a 2B basis plus reasonable disbursements.

[18] There is no order for costs in relation to the hearing of 9 June 2010.

[19] The plaintiff is awarded interest on the judgment sums from 1 December 2009 to 30 May 2011 at a rate of seven per cent.

Costs on this application

[20] Both parties have had a measure of success and failure and costs will lie where they fall.

……..

Asher J