IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2014-485-11493
[2015] NZHC 2482

BETWEEN	STRATHBOSS KIWIFRUIT LIMITED First Plaintiff
	SEEKA KIWIFRUIT INDUSTRIES LIMITED Second Plaintiff
AND	ATTORNEY-GENERAL Defendant

On papers

Judgment: 9 October 2015

COSTS JUDGMENT OF DOBSON J
(Issues as to standing, litigation funding arrangements and security for costs)

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[1] I delivered an interlocutory judgment in these proceedings on 8 July 2015, in which I:

- granted the plaintiffs leave to bring the proceedings as a representative action on a funded basis;
- approved the terms of the funding arrangements;
- set a deadline for additional claimants to opt in to the proceedings;
- set the terms for security for costs for the initial stages of the proceedings; and
- directed further particulars to be provided of the individual claimants' circumstances.

[2] My judgment concluded with the following observation as to costs:[1]

> [95] My provisional view is that I should settle the quantum of costs on these applications, and make them costs in the cause, so that they are payable to the party that is successful in the substantive action. I invite counsel to confer on that issue, and to file memoranda if they would urge a different course, and in any event as to quantum.

[3] Since then, the parties have agreed the quantum of costs at $37,044, together with disbursements of $6,792.47. However, the parties take opposing views as to whether this ought to be payable to the plaintiffs now or, as I provisionally suggested, become the quantification of costs and disbursements for the preliminary stages to which the successful party in the litigation would subsequently become entitled.

[4] The starting position is r 14.8 of the High Court Rules, which provides:

> **14.8 Costs on interlocutory applications**
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> (1) Costs on an opposed interlocutory application, unless there are special reasons to the contrary,—
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> (a) must be fixed in accordance with these rules when the application is determined; and
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> (b) become payable when they are fixed.
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> (2) Despite subclause (1), the court may reverse, discharge, or vary an order for costs on an interlocutory application if satisfied subsequently that the original order should not have been made.
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> (3) This rule does not apply to an application for summary judgment.

[5] The provisional view I expressed in my July judgment was on the basis that special reasons might exist, because of the nature of the applications brought by the plaintiffs, that would justify deviating from the usual rule. The plaintiffs have submitted that there are no sufficiently special reasons, so their entitlement to the agreed quantum of costs should apply forthwith.

[6] The plaintiffs' memorandum cited two decisions where an exception to the

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1 *Strathboss Kiwifruit Ltd v Attorney-General* [2015] NZHC 1596.

standard position provided for in r 14.8 had applied.[2] Both decisions related to costs on applications for an interim injunction where the application had been abandoned, but the substantive proceedings remained unresolved. That is a context in which it may be impracticable to expect the Court to assess the merits as between the parties, so that subsuming the costs' entitlement for steps on an abandoned application for interim relief may be appropriate.

[7] I agree with the plaintiffs' submission that the different circumstances in which an immediate or deferred costs' entitlement was to be considered in those cases are not helpful in the present circumstances.

[8] The essence of the plaintiffs' argument was that they had succeeded on each of their applications. The outcome on security for costs required a larger amount than they had offered, but that did not render their position on the provision of security unreasonable. Accordingly, that aspect of my judgment should not be seen as lessening the overall outcome as a success for the plaintiffs.

[9] Further, the plaintiffs argued that the adverse costs consequences flowing from unsuccessful opposition to all types of application should be consistent, so as to be predictable. That principle underlying the costs rules should operate to dissuade parties from unmeritorious opposition, as well as rewarding the party that has prevailed. If the adverse consequence of losing is predictable, it will incentivise parties to resolve their differences so as to avoid those consequences.

[10] In addition, the plaintiffs suggested that the defendant's challenge to the tenability of the causes of action constituted a very thorough testing and required an extensive response. There was also fully contested argument on most other points, contributing to a total of two days' hearing.

[11] The defendant advanced four arguments for costs being allocated to the party that ultimately succeeds substantively.

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[2] *Kenealy v Morton-Jones* [2015] NZHC 297; *Commercial Factors Ltd v Veda Advantage (NZ) Ltd* HC Auckland CIV-2010-404-6798, 21 June 2011.

[12] First, that the main component of the plaintiffs' applications, for approval to bring the proceedings on a representative funded basis, were not conventional applications because they did not seek any relief against the opposing party, but rather the Court's approval as to the manner of conducting the plaintiffs' case. Arguably, because the plaintiffs required the Court's approval before pursuing the action on the basis they intend to, obtaining that approval is simply a cost they have to absorb in getting the proceedings underway. The defendant's opposition assists the Court in testing whether it is appropriate to grant the approval the plaintiffs required.

[13] Secondly, the defendant argued that both parties enjoyed a measure of success. The opt-in period ordered was half the length of time sought on behalf of the plaintiffs.[3] The initial stage of security for costs was some 20 per cent higher than the plaintiffs had offered, and addressed one additional stage in the proceedings. In addition, I ordered further particulars of the circumstances of individual claimants despite the plaintiffs' opposition to that course.

[14] Thirdly, the defendant argued that the assessments in considering whether to approve a representative action, and the terms of funding arrangements on which it could proceed, are linked to the substantive outcome. Whether the approvals given were ultimately justified is reflected in whether there is substantive success or not. Arguably, the provisional context in which approval has been given makes it appropriate for the costs' entitlement to be deferred until it is determined whether the plaintiffs' decision to proceed as they have is ultimately vindicated.

[15] Finally, the defendant submitted that it was in the interests of justice to defer the costs' entitlement because there was no financial need to partially reimburse the plaintiffs for the costs incurred when they were resourced by a commercial litigation funder. Nor is there a credit risk on the Crown if it ultimately transpires that it should be liable for the costs of its opposition on these preliminary points.

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[3] Three months instead of six months.

Analysis

[16] I do not accept the defendant's proposition that both sides achieved a substantial measure of success out of the arguments. The plaintiffs more or less obtained what they sought. Offering somewhat less for security for costs than the Court is persuaded is appropriate cannot be criticised in this context. The shorter opt-in period I directed reflected a value judgement and no criticism could be made of the plaintiffs for pressing for a longer period than I ultimately ordered. The mode of disclosing the contractual arrangements for pursuing a funded class action was done responsibly from the outset, and made the task of vetting those arrangements easier than it might have been. Overall, in terms of the competing aspirations of the parties as reflected in the applications and notices of opposition to them, my orders reflect a substantial success for the plaintiffs.

[17] I do not treat the presence of a commercial funder, and the consequent implied lack of immediate need for reimbursement, as a factor relevant to whether a costs' entitlement should be postponed. Nor is the assurance of the Crown's on-going solvency relevant to the existence of special reasons for deviating from the normal rule on interlocutory costs orders.

[18] The primary factor in considering whether special reasons exist to vary the usual rule is the nature of the applications that were determined. In the absence of class action rules, and acknowledging the prospect of the involvement of litigation funders, the Court is evolving a practice for supervising the conduct of such cases. It is generally accepted that class actions funded by third parties have a place but, depending on how they are conducted and the extent of control that passes to litigation funders, they can risk undue pressure on defendants, and other possible abuses of process.

[19] In this case, I was assisted in considering whether approval of the proposed arrangements was appropriate by the nature and scope of the defendant's opposition to them. The proceedings are potentially a substantial undertaking, and are likely to involve relatively complex issues, both of law and fact. The terms, if any, on which

the Court should approve a funded representative action were certainly more than a matter of form.

[20] However, there was also an element of self-interest in the defendant's opposition. If it could persuade the Court to decline the approvals that were sought then tactically the defendant would make it much more difficult for significant numbers of growers or post-harvest operators to pursue the claims pleaded in the statement of claim.

[21] I am satisfied that facilitating a thorough testing of the considerations relevant to granting approval was a material factor in the opposition advanced, and can contribute to special reasons for deviating from the usual rule.

[22] An associated consideration is whether the applications were opposed on unnecessarily extensive or unmeritorious grounds and, if so, whether that should diminish any special reasons that otherwise exist for not following the usual rule on costs. I do not consider that the arguments advanced in opposition to the applications were unreasonable. The Court is still developing how it undertakes the preliminary assessment of the merits of claims that plaintiffs intend to pursue by a funded class action. During argument, Mr Dunning QC for the plaintiffs criticised the scope of the challenge as turning the argument into a de facto strike out. However, in the circumstances of this case I am not concerned, when considering the cost consequences, that the tenability of the plaintiffs' causes of action were tested in other than an appropriate way.

[23] Accordingly, I recognise the relative importance of the unusual nature of the applications, and the interest the Court has in the assistance it can gain from reasoned and constructive challenges to such applications in the process of assessing whether to approve them. I am concerned that defendants to proposed funded class actions should not be dissuaded from testing the proposed terms for such claims by opposing the preliminary applications such plaintiffs have to pursue. In a range of circumstances, the Court's task would be more difficult if relevant arguments were not raised to test the plaintiffs' entitlement to approval.

[24] Contrary to the defendant's contention, I do not accept, as a general rule, that there is any direct link between the merit of the plaintiffs' applications, and any subsequent substantive success, to justify deferring their entitlement to costs at this stage. That approach would be inconsistent with the general rule that the party succeeding on an interlocutory application is entitled to costs awards for doing so, irrespective of whether they succeed substantively. The difference here is that resort to the class action procedure, and the involvement of a commercial litigation funder, are features of the litigation that are out of the ordinary, and which the plaintiffs have needed approval for, before they proceed with the action. They have necessarily involved the defendant in those additional steps. If the defendant subsequently prevails in the litigation, it might legitimately complain that it ought not to have met an adverse costs award for responding to preliminary steps that were only required because of the unusual form in which the plaintiffs elected to proceed. Accordingly, in that limited sense there is a connection between entitlement to costs on these preliminary steps, and the substantial outcome.

[25] In combination, these two factors persuade me that there are special reasons for deferring the costs' entitlement on these applications and making them costs in the cause. I so order.

[26] There will be no costs order on this determination.

Dobson J

Solicitors:
Lee Salmon Long, Auckland for plaintiffs
Crown Law, Wellington for defendant