IN THE DISTRICT COURT
AT NAPIER

CIV 2011-441-825
[2017] NZDC 6466

BETWEEN	FRESHMAX NZ LIMITED Plaintiff
AND	SANTA ROSA ORCHARDS LIMITED First Defendant
AND	OLIVER THOMAS RYAN Second Defendant

:

Appearances: Mr M Keall for Plaintiff
Mr D Kerr for both Defendants

Date of Decision: 29 March 2017

COSTS DECISION No. 1 OF JUDGE G A REA
Re: DISCOVERY

---

[1] On 7 March 2017 I made an order excusing the Plaintiff from providing further discovery to the Defendants following exercises in what can be described as "sample discovery" and "truncated discovery" which had previously been ordered.

[2] In paragraph [18] of a Ruling given on 7 July 2016 I made it clear about the circumstances in which I was prepared to make a costs order in relation to discovery prior to the completion of the substantive proceedings. I consider the position has been reached where an order should be made in favour of the Plaintiff against the Defendants for costs in relation to discovery. Mr Keall at paragraph [4] of his Memorandum of 16 March 2017 comments that the controversy over discovery has dogged the Plaintiff from the time the third amended counter-claim was filed in November 2013. I consider that comment accurately reflects the circumstances in this case.

[3] The "sample discovery" showed some contractual breaches by the Plaintiff but far more importantly also showed that the Defendants had suffered no loss.

[4] The Defendants were not prepared to accept that outcome and insisted on further discovery. It was obvious that the "sample discovery" had involved the Plaintiff in a considerable amount of time and work and further discovery would clearly be an onerous burden for the Plaintiff.

[5] Thereafter what can be described as "truncated discovery" was directed by the Court. The result of that process seems to be identical to the result of the "sample discovery" process. In other words there may have been some contractual breaches by the Plaintiff but the Defendant suffered no losses as a result of them.

[6] On the face of it the results of both forms of discovery would seem to place the Defendants' set off and counter-claim at some jeopardy. I acknowledge the point made by Mr Kerr in his submissions that that issue can only really be determined at trial but on the face of the discovery process it is difficult to see how the Defendants will establish any loss.

[7] I am advised by Mr Keall that there is a contractual provision making the Second Defendant liable for costs on an indemnity basis. That contractual provision is disputed by Mr Kerr and I am in no position to resolve it at the present time.

[8] I do, however, consider that I am in a position to set costs in accordance with the Rules and I propose to do so.

[9] Mr Kerr submitted that costs should not be awarded against the Defendants in relation to the "sample discovery" exercise because that exercise predated the Plaintiff's formal discovery application. Mr Keall accepts that ordinarily that submission would be correct, however, he points that in this case the "sample discovery" and "truncated discovery" exercises were connected parts of the same process, namely a compromise arrangement designed to gauge the existence of any viable foundation for the counter-claim allegations without subjecting the Plaintiff to the expense of full discovery.

[10] I accept Mr Keall's submissions in that regard. It is an artificial exercise to draw a line and say that costs should only follow what happened after the filing of a formal application without assessing the reality of what was actually happening to try and facilitate the Defendants' requirements for discovery.

[11] In paragraphs [14] – [18] of his Memorandum of 16 March 2017 Mr Keall sets out the basis for his claim under the Rules. He provides the number of hours (or days) involved in both the "sample discovery" and "truncated discovery" exercises and seeks a category 2B Band C award with Band C being a 50% uplift on Band B. As result he seeks costs in the sum of $24,150.00 inclusive of GST and disbursements of $762.50 also inclusive of GST.

[12] A Court may order a party to pay increased costs if the nature of the proceeding or the step in the proceeding is such that the time required by the party claiming costs would substantially exceed the time allocated under the appropriate band. I am satisfied that is clearly the case here and I accept the 50% uplift requested by Mr Keall.

[13] In his submissions Mr Keall asserts that such a calculation relates only to the First Defendant because of the indemnity costs provision against the Second Defendant. As I have already indicated I am in no position at the present time to resolve that issue. I consider the appropriate course at this stage is to order both the First and Second Defendants to pay the Plaintiff's costs in the sum of $24,150.00 and disbursements in the sum of $762.50. That order is against both Defendants jointly and severally.

[14] The issue of whether the Plaintiff will be entitled to the balance of its actual costs incurred in the discovery processes from the Second Defendant will be reserved and dealt with once the issue of the Second Defendant's liability for indemnity costs has been resolved.

G A Rea

G A Rea
District Court Judge