IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2009-485-2508

UNDER	Section 72 of the District Courts Act 1947
BETWEEN	TOURNAMENT PARKING LIMITED Appellant
AND	THE WELLINGTON COMPANY LIMITED Respondent

Hearing: 18 October 2010
(Heard at On Papers)

Counsel: B H Dickey for Appellant
P W Michalik for Respondent

Judgment: 19 October 2010

JUDGMENT OF MILLER J

---

[1] In my judgment of 30 June 2010 I allowed the appeal and held that the appellant was entitled to costs on a 2B basis. Both sides now move for costs.

[2] The central issue is the effect of a Calderbank offer made by the respondent, the plaintiff in the District Court. The appellant submits this offer is not relevant to costs in this Court. The respondent submits the District Court trial and the subsequent appeal are part of the same proceeding; if the appellant had accepted the Calderbank offer then neither the trial nor the appeal would have taken place. Therefore, the Calderbank is relevant to costs in this Court.

[3] Rules 14.10 and 14.11 of the High Court Rules provide for Calderbank offers. Rule 14.11 provides that, subject to the Court's discretion, a party who makes a Calderbank offer will be entitled to costs if the offer was for more money, or was more beneficial, than the judgment obtained by the other party. Otherwise, if

the offer is close in value or benefit to the judgment obtained, it may be taken into account in deciding costs. Such offers may be made by a party to a proceeding at any time.[1] However, rr 14.10 and 14.11 do not apply in this case. The Rules govern civil procedure in proceedings before the High Court and this offer was not made before this Court.[2]

[4] The general principle is that costs follow the event. As far as possible, costs should also be predictable and expeditious, but the Court has discretion. While rr 14.10 and 14.11 do not apply, I am satisfied the Calderbank offer can be taken into account in fixing costs. Calderbank offers are recognised for public policy reasons:[3]

> In summary, it is a requirement of fairness that litigants – particularly defendants – have some economic means of limiting their exposure to the risk of costs; and secondly the Court itself must ensure that a procedure of this character operates as an effective encouragement to settle.

These reasons apply equally to an offer made before the District Court hearing.

[5] On 25 September 2009, the respondent made the following offer to the appellant:

> The rent is set at $28,000 plus GST per annum as from the 19 April 2008 rent review date.
>
> Arrears of rent will be paid (within 10 working days of acceptance) to backdate this rent to the 19 April 2008 review date, but no further back.
>
> The lease would continue on foot, with the next review to take place on schedule as at 9 April 2011 to be based on the increase in ground rents for land in the vicinity of the air bridge over the three years prior to rent review date as set out in the lease.
>
> The proceedings will be discontinued.
>
> Each party will bear its own costs.

[6] The difficulty is that it is not clear whether this offer is better than the judgment the appellant secured. The proceedings concerned a lease that provided for

---

[1] Rule 14.10(1).
[2] Rules 1.3(1) and 1.4(1).
[3] *Moore v McNabb* (2005) 18 PRNZ 127 (CA) at [57].

rent reviews every three years. The issue in the case was whether time was of the essence for those rent reviews. The District Court Judge held that time was of the essence and a rent review could not be exercised once its triennial period ended. The appellant could not exercise its rent reviews of 2002 and 2005 in 2008, as it had purported to do. In this Court, I held that time was not of the essence but the lease contained an implied term that the rent review would be exercised within a reasonable time and the respondent may recover damages for the appellant's delay in exercising its rent review. I noted I would remit the case back to the District Court for further proceedings if either party wished me to.

[7] The appellant is able to exercise the 2002, 2005 and 2008 rent reviews, which would lead to the rent for the 2008-2011 period being $23,231.18 per annum plus GST annum. However, it may be liable for damages if it exercises the rent reviews after a reasonable time has elapsed. The practical effect of the judgment remains to be seen.

[8] The principle that costs should be predictable militates against speculation. It is not possible to compare the respondent's Calderbank offer to the judgment obtained by the appellant. The offer does not affect costs in this Court. The appellant won its legal point; time was not of the essence. Costs follow the event.

[9] The respondent accepted that if the appellant was the successful party it correctly calculated its 2B scale costs. The appellant will have costs of $2,720, with disbursements as claimed.

Miller J

Solicitors:
Meredith Connell, Auckland for Appellant
Knight Coldicutt, Wellington for Respondent