

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV-2022-404-1927
[2023] NZHC 841**

BETWEEN

STEVEN MORRISON
Plaintiff

AND

BENJAMIN BRIAN FRANCIS
First Defendant

SIMON DALTON
Second Defendant

Hearing: On the papers

Appearances: N Tabb for Plaintiff
A Ho for Defendants

Judgment: 20 April 2023

**JUDGMENT OF LANG J
[on costs]**

*This judgment was delivered by me on 20 April 2023 at 10.30 am,
pursuant to Rule 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Date.....

Solicitors:
Natalie Tabb, Barrister & Solicitor, Auckland
Crimson Legal, Auckland

[1] In this proceeding the plaintiff, Mr Morrison, sought to establish that he was the rightful owner of a Scania truck. The defendants, who are the liquidators of a company that formerly owned the vehicle, maintained that it remained the property of that company.

[2] Mr Morrison filed an interlocutory application seeking return of the vehicle pending final determination of the proceeding. I commenced hearing this application on 8 December 2022 but adjourned the application part-heard after the parties reached an agreement that enabled the proceeding to be resolved. This involved Mr Morrison being able to regain possession of the vehicle in return for the payment of a specified sum to the liquidators. Mr Morrison was unable to fulfil his obligations under the agreement and it was therefore necessary to resume the hearing.

[3] When the interlocutory application resumed before me on 1 March 2023, I granted Mr Morrison leave to discontinue both the interlocutory application and the substantive proceeding.

[4] The parties have been unable to reach agreement regarding costs. I am therefore required to determine that issue based on the memoranda counsel have filed.

Submissions

[5] There can be no dispute that the liquidators were the successful parties because Mr Morrison ultimately discontinued its claim against them. In those circumstances he would generally be required to pay costs to the liquidators. This reflects the principle that the unsuccessful party in a proceeding should contribute to the costs of the successful party.¹ In the present case, however, Mr Morrison contends that costs should lie where they fall.

[6] Ms Tabb submits on Mr Morrison's behalf that her client is the innocent victim in an unfortunate series of events that began when he purchased a Scania truck in good faith from an associate, Ms Wolmerans, in July 2022. He only became aware of issues relating to the ownership of the truck after the liquidators uplifted it from his

¹ High Court Rules 2016, r 14.2(1)(a).

possession. Up until that point Mr Morrison believed he was the rightful owner of the vehicle.

[7] Ms Tabb also points out that Mr Morrison has made payments to Ms Wolmerans even though he no longer has possession of the vehicle. The removal of the vehicle from his possession means that he is now unable to earn sufficient income to cover his living costs. He also has nothing of value in exchange for the money he paid towards the purchase of the vehicle.

[8] For the defendants, Mr Ho points out that r 15.23 of the High Court Rules 2016 creates a presumption that, unless the defendant agrees or the Court otherwise orders, the plaintiff must pay costs to the defendant of and incidental to a proceeding up to and including the point at which it is discontinued. Mr Ho also points out that the onus is on the discontinuing plaintiff to establish grounds that justify the Court not making an award of costs against it.² This presumption may be displaced if there are just and equitable circumstances not to apply it.³ However, the presumption will not be displaced lightly.⁴

[9] Mr Ho also refers to several factors indicating that Mr Morrison did not enter into the transaction as an innocent party. He submits that significant questions still remain as to Mr Morrison's intentions and state of knowledge when he participated in the transactions surrounding the purchase of the vehicle.

Decision

[10] The factual circumstances on which Mr Morrison relies are highly contestable. Given the state of the evidence it is not possible to accept his version of events. Too many unanswered questions and inconsistencies remain. This is not a case in which it is possible to reach any concluded view regarding the overall merits of Mr Morrison's claim. As matters currently stand there must be real doubt as to whether he was an innocent party as Ms Tabb submits.

² *Earthquake Commission v Whiting* [2015] NZCA 144 at [68].

³ *Kroma Colour Prints Ltd v Tridonicato NZ Ltd* [2008] NZCA 150 at [12].

⁴ *Yarall v Earthquake Commission* [2016] NZCA 517; (2016) 23 PRNZ 765, at [12], [19] and [20].

[11] Further, the fact that a party may be subject to a financial hardship will not generally be sufficient to persuade the Court not to make an award of costs. Something more is required.

[12] Finally, Mr Morrison had the ability to retrieve the situation by entering into the settlement with the liquidators midway through the hearing on 8 December 2022. He was ultimately unable to fulfil his obligations under that agreement. This required the liquidators to return to Court at further expense to them. It was only at that point that Mr Morrison abandoned his claims.

[13] In those circumstances I have concluded that the usual principles should apply and that costs should follow the event. The liquidators are entitled to an award of costs calculated on a category 2B basis together with disbursements as fixed by the Registrar.

Lang J