IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2010-404-006349
[2013] NZHC 1119

BETWEEN	FRANCISC CATALIN DELIU Plaintiff
AND	BOON GUNN HONG Defendant

Hearing: 4 & 5 October 2012
(with submissions on costs filed 23 April 2013 and 2 May 2013)
(Heard at Auckland)

Appearances: F C Deliu (Plaintiff/Applicant) in person
A D Banbrook for Defendant/Respondent at hearing but B G Hong in person on costs issues

Judgment: 16 May 2013

INTERIM JUDGMENT OF ASSOCIATE JUDGE OSBORNE
[as to costs]

Introduction

[1] On 12 April 2013 I delivered two judgments in this proceeding, one in relation to the defendant's application to strike out the claim and the other in relation to the plaintiff's application for a strike out order or further particulars.[1]

[2] The defendant's strike out application was unsuccessful. The plaintiff's strike out application was also unsuccessful, but his application for an order as to further and better particulars was successful. Costs were reserved.

[1] *Deliu v Hong* [2013] NZHC 735; *Deliu v Hong* [2013] NZHC 736.

The entitlement to costs

Lawyers acting for themselves

[3] Mr Deliu is a practising barrister.

[4] He invites me to apply the approach which has been taken by courts in relation to costs in numerous cases in which he has been a litigant. In addition to the cases cited by Mr Deliu, Mr Deliu's application for costs is supported by the judgment of the Court of Appeal in *Brownie Wills v Shrimpton.*[2] In the judgment of Gault and Blanchard JJ, it is stated:[3]

> The long-established rule is that, as an exception to the general rule denying costs to a litigant in person, a practising barrister and solicitor who brings or defends a proceeding in person or by a partner or employee of the firm is entitled to the same costs as when acting on behalf of a client.

[5] Their Honours referred to English and New Zealand cases which had upheld that rule. They then referred to a decision of the High Court of Australia in which the majority had demurred from the exception, viewing the old English authority which the New Zealand Court of Appeal had adopted as being "somewhat anomalous".[4] Gault and Blanchard JJ said in relation to that:[5]

> The High Court of Australia has cast some doubt on this exception (*Cachia v Haynes* (1994) 179 CLR 403 at p 412) but, not having been asked to reconsider the question, we do not depart from the practice of allowing costs to a solicitor/litigant.

[6] The observations in the Court of Appeal indicate that that Court may be open to reconsidering the costs position in a later case, upon full argument.

[7] There may also be argument as to the scope of the self-represented lawyer rule. The references in *Brownie Wills v Shrimpton* are to a "practising barrister and solicitor" and to a "solicitor/litigant". The references do not directly refer to the position of a barrister sole. A policy distinction may exist between barristers sole

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2 *Brownie Wills v Shrimpton* [1998] 2 NZLR 320.
3 At 327.
4 *Cachia v Haynes* (1994) 179 CLR 403 at 411.
5 *Brownie Wills v Shrimpton*, above n 2, at 327.

and those lawyers who also practise as solicitors. The barrister sole, for instance, continues to be bound by the intervention rule so that (subject to some specific exceptions) he or she must not accept instructions to act for another person other than from a person who holds a practising certificate as a barrister and solicitor.[6] This, however, is not the appropriate forum to revisit the rule as to lawyers' costs. It is clear from the cases cited by Mr Deliu that the rule has with some consistency been applied to barristers and, in particular, to him in recent years, both in this Court and in others.

[8] I accordingly proceed on the basis that Mr Deliu's self-representation does not disentitle him to an award of costs.

Costs in defamation cases

[9] Mr Hong refers me to the specific costs provisions of the Defamation Act 1992. In particular, s 43 of the Act provides:

> **43 Claims for damages**
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> (1) In any proceedings for defamation in which a news medium is the defendant, the plaintiff shall not specify in the plaintiff's statement of claim the amount of any damages claimed by the plaintiff in the proceedings.
>
> (2) In any proceedings for defamation, where—
>
> (a) Judgment is given in favour of the plaintiff; and
>
> (b) The amount of damages awarded to the plaintiff is less than the amount claimed; and
>
> (c) In the opinion of the Judge, the damages claimed are grossly excessive,—
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> the Court shall award the defendant by whom the damages are payable the solicitor and client costs of the defendant in the proceedings.

[10] The importance of a statutory provision such as s 43 is reinforced by r 14.1 High Court Rules, and in particular, by r 14.1(3). Rule 14.1 in its entirety provides:

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6 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 14.4.

14.1 Costs at discretion of court

(1) All matters are at the discretion of the court if they relate to costs—

(a) of a proceeding; or

(b) incidental to a proceeding; or

(c) of a step in a proceeding.

(2) Rules 14.2 to 14.10 are subject to subclause (1).

(3) The provisions of any Act override subclauses (1) and (2).

[11] Thus, the provisions of s 43 Defamation Act, as they directly affect the awarding of costs in a defamation proceeding, override sub-clauses (1) and (2) of r 14.1. Where the events identified in s 43(2) Defamation Act come together (that is to say the plaintiff obtains judgment for a lesser amount than that claimed and the Judge is of the opinion that the damages claimed were grossly excessive) the Court must award the defendant the solicitor and client costs of the defendant in the proceedings. Parliament has expressly removed the Court's discretion as to the costs of the proceedings. The reference is clearly to the proceedings as a whole and not to steps in the proceedings.

[12] Mr Hong submitted that I should apply the Defamation Act in such a way that, moving towards the hearing of substantive claims, the costs of all interlocutory applications should be reserved so that they can be dealt with at the hearing in the light of the plaintiff's degree of success or otherwise. He submitted that surely the costs of such interlocutory applications must be reserved to follow the event and the outcome of adjudication.

[13] Mr Hong's submission would have substantial weight but for the provisions of r 14.8 High Court Rules. Rule 14.8 provides:

14.8 Costs on interlocutory applications

(1) Costs on an opposed interlocutory application, unless there are special reasons to the contrary,—

(a) must be fixed in accordance with these rules when the application is determined; and

(b) become payable when they are fixed.

(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.

(3) …

[14] Rule 14.8(2) aptly deals with the situation which arises in relation to interlocutory applications in a defamation proceeding. The events identified in s 43(2) of the Defamation Act are events which will be known only when judgment is finally given on the plaintiff's claim. If the criteria of s 43(2) are then satisfied, the position will be that any interlocutory costs orders in favour of the plaintiff may be reversed or discharged.

[15] The appropriateness of that approach in this particular case is reinforced by the fact that, in this case, the plaintiff also pursues other causes of action (not in defamation). Mr Hong did not address submissions as to how the Court would approach the provisions of s 43 Defamation Act if, despite the criteria of s 43(2) having been satisfied, Mr Deliu has in the meantime been wholly successful on one or more of the other causes of action. The Court's powers under r 14.8(2) will give it the means to properly resolve or revisit the costs position.

Mr Hong's other submissions

Special circumstances

[16] Mr Hong submits that costs should either be reserved until trial or should lie where they fall by reason of a special circumstance, namely that he has done what he has done to protect others and the public.

[17] The altruism (or otherwise) of Mr Hong cannot be determined in this interlocutory setting. In relation to certain causes of action, Mr Deliu pleads malice, a matter which will be for the Judge or jury at trial.

[18] At present, this proceeding is to be treated as civil litigation between adversaries in the ordinary way. Costs should normally follow the event for the unsuccessful litigant.

The merits of the plaintiff's claims

[19] Mr Hong draws on conclusions reached in earlier interlocutory proceedings and also by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal. Mr Hong expresses "total confidence" that Mr Deliu's claims will be ultimately unsuccessful.

[20] Mr Hong's submission comes close to, if not constituting, an invitation to me to revisit the interlocutory decisions and to find Mr Deliu's causes of action untenable. There is no basis for me to do so. Mr Hong failed on his strike out application for the reasons given in my judgment on his application. Mr Hong similarly failed in his opposition to the application for further and better particulars.

[21] The usual rule as to costs following the event should apply.

Enrichment of plaintiff

[22] Mr Hong submits that the outcome of the interlocutory applications should not be an enrichment of Mr Deliu. In essence, Mr Hong invites the Court to find that Mr Deliu has not incurred any costs.

[23] For the reasons I have given, I am applying the practice as identified in *Brownie Wills v Shrimpton.*[7] That line of authority does not invite an analysis as to whether the lawyer will in fact be paying anything to him or herself or to his or her firm. The rule is quite simply that the lawyer is entitled to the same costs as if another lawyer had been attending. Implicitly, the authorities do not recognise that situation as involving an inappropriate enrichment.

Outcome

[24] It is appropriate in relation to both applications that costs follow the event in favour of the plaintiff.

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[7] *Brownie Wills v Shrimpton*, above n 2.

[25] It is also appropriate that the costs be awarded on a 2B basis.

[26] Mr Deliu invites the Court to simply make an order in those terms and to leave the Registrar to attend to the details including steps and disbursements allowed.

[27] I do not view this as an appropriate case in which to leave the Registrar to identify the appropriate items of costs or of disbursements. I have, in a previous judgment, referred to the fact that there will be a need to observe the disciplines of proportionality required by the High Court Rules.[8] Proportionality applies to both interlocutory and trial resources. Some attendances and disbursements in relation to these applications may not be allowed as separate items. Some hearing time actually taken will not be allowed. In relation to disbursements, r 14.12(3) will be considered. There will also be decisions to be made in relation to items to be allocated to one application or the other. These decisions are appropriately to be dealt with by me, as the Judge who heard the applications, rather than by the Registrar.

Orders

[28] I order:

(a) The plaintiff is to have the costs of both the applications, namely the plaintiff's application for a strike out order and further particulars and the defendant's application for an order striking out the plaintiff's claim;

(b) The costs are to be on a 2B basis;

(c) The plaintiff is to have his disbursements under r 14.12 but subject to r 14.12(3) on both applications;

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8 *Deliu v Hong* [2013] NZHC 735 at [194]-[199].

(d) I reserve my decision as to the items to be allowed in relation to each application for further submission by the parties;

(e) Mr Deliu is within 10 working days to file and serve in relation to each application a Schedule of the items claimed and the quantums and may accompany each Schedule by a memorandum (maximum three pages) explaining the allowances. Details of any disbursements claimed are to be included in the memorandum;

(f) Within five working days after receipt of the plaintiff's memorandum or memoranda, Mr Hong, if he disagrees with any element in the plaintiff's costs or disbursements calculations, is to file and serve his suggested amended Schedule or Schedules together with a memorandum or memoranda (three pages maximum in relation to each application) explaining the allowances for which he contends.

[29] Upon receipt of the party's submissions on the appropriate items, I will fix costs and disbursements on the papers.

Associate Judge Osborne

Solicitors:
F C Deliu, PO Box 68559, Newton 1145, Auckland
B G Hong Law Firm, PO Box 233, Shortland Street, Auckland 1010
Counsel: A D Banbrook, PO Box 105870, Auckland 1140