IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2015-404-001925
[2016] NZHC 467

BETWEEN	LOW VOLUME VEHICLE TECHNICAL ASSOCIATION INCORPORATED First Plaintiff
	ANTHONY PETER JOHNSON Second Plaintiff
AND	JOHN BERNARD BRETT Defendant

Hearing: On the papers

Appearances: R J Gordon for the Plaintiffs
JB Brett (self-represented) for defendant

Judgment: 17 March 2016

JUDGMENT OF WOOLFORD J

This judgment was delivered by me on Thursday, 17 March 2016 at 10.00 am pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors: Minter Ellison Rudd Watts, Wellington, for plaintiffs

Counsel: RJ Gordon (Minter Ellison Rudd Watts), Wellington, for plaintiffs

Copy to: JB Brett

Introduction

[1] In a judgment dated 14 December 2015, I declined the plaintiffs' application for an interim injunction pending trial of the plaintiffs' defamation claim. In the judgment, I proffered the preliminary view that costs should lie where they fall and stated if the issue of costs could not be agreed, memoranda may be filed.

[2] Costs have not been agreed. Memoranda have been filed. Notwithstanding that they were unsuccessful, the plaintiffs seek costs of $9,477.50 in accordance with the scale of costs in the High Court Rules. The defendant represented himself at trial and is a lay litigant who is not generally entitled to recover costs, although the Court does have a discretion to allow disbursements to such litigants. The defendant seeks a total of $8,264.12, being the costs of legal advice from a barrister and travel costs from his home in Paeroa to the High Court at Auckland.

Discussion

[3] Having carefully considered the parties' memoranda, I confirm my preliminary view that costs should lie where they fall.

[4] Three principle rules apply to the present case:

(a) Unless there are special reasons to the contrary, costs on an interlocutory application should be determined when the application itself is determined;[1]

(b) The general principle that a party who fails with respect to a proceeding or an interlocutory application should pay costs to the party who succeeds;[2] and

(c) Ultimately, that all matters as to costs are at the discretion of the Court.[3]

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1 High Court Rule, r 14.8(1).
2 High Court Rule, r 14.2(a).
3 High Court Rule, r 14.1.

[5] On the face of it, the defendant has succeeded, but two major factors count against him. First, the defendant's conduct and, second, the principle that as a lay litigant, he is not generally entitled to recover his own costs.

[6] As to the defendant's conduct, the parties entered into a settlement agreement on 5 June 2014, prior to any proceedings being issued, in which the defendant bound himself to remove from publication and desist from publishing in the future statements that were incorrect or in any way defamatory of the plaintiffs. The defendant accepts that he breached the terms of that agreement, both by republishing what the plaintiffs claim to be defamatory material and by failing to engage in good faith negotiations to resolve the breaches, as was required in terms of the agreement.

[7] Proceedings (including the plaintiffs' application for an interim injunction) were issued on 19 August 2015. By his statement of defence and affidavit dated 24 August 2015, the defendant made it clear that he stood by all the allegedly defamatory statements. He also republished a number of them, including an allegation that the second plaintiff had perjured himself in proceedings before the District Court.

[8] It was only in the month before the hearing of the application for an interim injunction that the defendant offered to, and did remove, the allegedly defamatory statements. Furthermore, the defendant's undertaking concerning the removal of (and his promise not to repeat) the allegedly defamatory statements was only given on 26 November 2015, eight days after the hearing of the application for an interim injunction.

[9] As to the defendant's own costs, they are not generally payable as a lay litigant, but in some circumstances, disbursements consisting of a "possible partial indemnity for any fees [a lay litigant] pays by way of professional assistance" may be payable.[4] The defendant seeks reimbursement of the full amount he paid to an Auckland barrister. However, a Court has to have good reason to award full or indemnity costs to a party who is represented by counsel. Good reason should also be necessary if a lay litigant wants reimbursement of the full amount paid to counsel,

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4 *Lysnar v National Bank of New Zealand* (*No 2)* [1935] NZLR 557 at 562.

but none is advanced. Further, the invoices from the Auckland barrister attached to the defendant's memorandum do not provide any detail about the specific cost of the attendances by counsel which actually involved equipping the defendant to argue the interlocutory application.

[10] In those circumstances, I am of the view that the defendant is not entitled to an award of costs.

[11] Likewise, I am of the view that the plaintiffs are also not entitled to an award of costs. The major factor in my decision is that I refused the plaintiffs' application for an interim injunction. The plaintiffs say that is immaterial and submit that the outcome that they sought through their interlocutory application was that the defendant:

(a) Remove his allegedly defamatory statements from publication; and

(b) Keep to that removal (given the past history of broken promises/republication) pending the substantive trial of the matter.

[12] The plaintiffs' submit that this outcome has ultimately been achieved and as such it is appropriate to treat the plaintiffs as (in substance) the successful party. The defendant's contrary assumption that because an order for an interim injunction was no longer necessary, then the plaintiffs' case must have failed, is said to be simply wrong.

[13] The submissions made by counsel for the plaintiffs may have some attraction in other contexts. However, the threshold for an interim injunction in defamation cases is very high, in part because of the right to freedom of an expression. The *American Cyanamid Co v Ethicon Ltd*[5] test is not usually applied in defamation cases. Any prior restraint of free expression requires passing a much higher threshold than the arguable case standard.

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5 *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 (HL), [1975] 1 ALL ER 504.

[14] Moreover, the circumstances in this case are not clear and compelling and Mr Brett seeks to justify his statements. I was unable to conclude as Tipping J did in *Boyle v Nield*[6] that any defence of truth would be very hard to establish or that a successful defence of honest opinion was also very unlikely. I am therefore unable to treat the plaintiffs as the successful party.

[15] In those circumstances, costs are to lie where they fall.

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Woolford J

[6] *Boyle v Nield* HC Christchurch CP 93/89, 6 April 1989.