IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP 139/98

1685

| | |
|---|---|
| **BETWEEN** | **MILTON CHARLES WEIR** |
| | **First Plaintiff** |
| **A N D** | **KEVIN WAYNE ANDERSON** |
| | **Second Plaintiff** |
| **A N D** | **MURRAY BOYNE GALLAND** |
| | **Third Plaintiff** |
| **A N D** | **JOSEPH FRANCIS KARAM** |
| | **First Defendant** |
| **A N D** | **REED PUBLISHING (NZ) LIMITED** |
| | **Second Defendant** |
| **A N D** | **COLIN STUART WITHNALL** |
| | **First Third Party** |
| **A N D** | **SINCLAIR BLACK** |
| | **Second Third Party** |

**Date:** 13 December 2000

---

**JUDGMENT OF ANDERSON J
ON COSTS**

---

SOLICITORS

Tripe Matthews & Feist (Wellington) for Plaintiffs
Heaney & Co (Auckland) for Defendants
McElroys (Auckland) for First Third Party
Sinclair Black (Auckland) for Second Third Party

[1] Issues of costs arise following the entry of judgment in favour of the first and second defendant after a two week defamation trial in May and June this year and the disposal of applications by Mr Weir and Mr Anderson for new trial referred to in my judgment delivered on 20 September.

[2] Each of the third parties seeks costs against the second defendant. The defendants jointly seek as against Mr Weir and Mr Anderson orders for costs including by way of indemnity in respect of any liability they might have to either of the third parties.

[3] The various arguments have been put by way of memoranda, pursuant to a direction and leave in that respect. I do not find it necessary to hear oral argument.

[4] The defendants have informed the Court that their actual legal costs in respect of the trial amount to $277,133.77 and that post-trial costs, including in respect of the applications for new trial, amount to $32,540, indicating total costs for the litigation of about $310,000. Invoices supplied by the defendants amount, according to my calculations, to $311,382.87, but the difference is insignificant. Costs were incurred both before and after 1 January 2000 so that two different statutory prescriptions apply. The defendants, however, ask the Court to apply the current costs regime to the pre-2000 services. They say that on such approach the pre-2000 costs would be assessable at $106,780. However, even if the present scale applied, costs could not exceed $87,860 for pre-2000 work because, as counsel for the plaintiffs points out in paragraph 10 of his memorandum, the actual costs incurred for such work amount to that lesser sum and include costs in respect of third party matters. The analogy of current costs could not be applied without the constraint stipulated in R47(f) that "an award of costs should not exceed the costs incurred by the party claiming costs."

[5] As for costs incurred for services rendered after 1 January 2000 the second defendant claims $75,050 in respect of trial, by invoking the present scale with certain assumptions which will be referred to, and a further $25,431.93 by invoking the Court's discretion to exceed the current scale.

[6] Where the present scale applies or is invoked analogously by the defendants, they submit that pursuant to R48 the proceedings are category 3 and pursuant to R48B every step should be regarded as falling within band C. They also submit that the trial justified second counsel. It is on such basis that they computed the sums of $75,050 and $106,780 previously referred to. On the same basis the post-trial interlocutory attendances may be calculated as $6650, but as mentioned the defendants ask for almost $19,000 more than the scale would allow.

[7] The plaintiffs, by counsel, accept that category 3 is appropriate for the proceeding and that the trial justified second counsel. On this basis the plaintiffs accept the amounts claimed by the defendants for preparation and appearance at trial by two counsel. Issue is taken, however, with the way in which the defendants have claimed pursuant to the scale in respect of second amended statements of defence to the plaintiffs' amended statement of claim and also in respect of two interlocutory applications relating to admissibility. On a band C basis, eight days at the appropriate daily recovery rate of $1900 per day is claimed. The total, of course, on that approach is $15,200. Counsel for the plaintiffs submits that the amendments to the statements of defence occasioned by the plaintiffs' amended statement of claim would have taken a "comparatively small amount of time for the particular step" (see R48B(2)(a)) because the plaintiffs' amendments were minor and the response by each defendant would be identical. Once the amendments were settled, engrossing by way of word processor would take a minimal time. According to plaintiffs' counsel, .3 of a day is all that should be permitted rather than four days as claimed. In relation to the interlocutory matters for which the defendants each claim two days consistent with band C, the plaintiffs say that the appropriate band is B, that is .6 of a day, and that such should be allowed as for one defendant because of the identical interest of the defendants in the applications.

[8] In dealing with these disputed matters I must have regard to the general principles applying to the determination of costs, as elucidated in R47, of which paragraph (e) is especially pertinent to the disputed items. It was, of course, reasonable for each defendant to take the step of amending the pleadings in response to an amended statement of claim and even if in the case of one a word processing alteration would have achieved the change, nevertheless work is involved in

effectuating that change, producing the requisite document and causing the same to be filed and served. A lesser rate might apply than in respect of the notional first document but a step, reasonably taken, is identifiable. I also take a realistic view of the careful and professional input required in complex and intensely litigated proceedings before the manifestation of a step occurs. The strategic justification for and scope of a particular step may be more obvious in the aftermath of battle than in the throes of it. Nevertheless, the submissions of counsel for the plaintiffs are partially justified. As to the first defendant's second amended defence I allow band B, and as to the second defendant's second amended defence I allow band A. However, as for the interlocutory applications, where there is no duplication as between the defendants, I allow band C for each application as claimed. The result is a reduction in time of 3.1 days and a consequential reduction in cost to $69,160. I allow disbursements of $425.53 and, for the reasons given by the defendants concerning Mr Rowe's evidence, I allow $2132.95. The total allowed for steps taken in 2000 is accordingly $71,718.32.

[9] I turn now to the pre-2000 costs which, it will be recalled, actually amounted to $87,860 inclusive of some unspecified amount in respect of the third parties.

[10] Defamation proceedings are often difficult and complex. This proceeding certainly had those features. The book in question, as a whole, was relied on by the plaintiffs, although of course certain passages were emphasised. The plaintiffs' allegation that exemplary damages were warranted because of alleged deficiencies in Mr Karam's research for the book expanded the scope of the proceedings, both unnecessarily and untenably. In my view, costs actually incurred in respect of the plaintiffs' claims, as distinguished from the third party claims, must have been in the order of $80,000 and I intend to allow the defendants a reasonable contribution from the plaintiffs in respect of those costs. I fix a reasonable contribution as $55,000. Disbursements of $610.66 are also allowed.

[11] I turn now to the question of costs on the application for new trial. Again R47(e) is especially pertinent. In seeking almost four times the band C allowance, the defendants submit that the scale costs "do not reflect the substantial preparation time required for such difficult applications." Of course the defendants need to

invoke R48C(3). I find no factors within the ambit of that rule justifying a departure from scale and accordingly I am not prepared to allow more than the S6650 claimed together with disbursements of $431.93.

[12] In summary, I allow the defendants costs against the plaintiffs, Mr Weir and Mr Anderson, made up as follows:-

| | S |
|---|---|
| Pre-2000 costs | 55,000.00 |
| Pre-2000 disbursements | 610.66 |
| 2000 costs | 69,160.00 |
| 2000 disbursements | 425.37 |
| Mr Rowe's fees | 2132.95 |
| New trial application | 6650.00 |
| New trial application disbursements | 431.93 |
| **Total** | **134,410.91** |

**Third Parties' Costs**

[13] The plaintiffs issued this proceeding in April 1998. In November of that year the second defendant applied to join the third parties and they were joined in December. The first third party is a Queen's Counsel in practice as a barrister and the second third party is a firm of solicitors. The second defendant sought an opinion from each of the third parties concerning possible defamatory material in Mr Karam's book and it alleges in contract, tort and equity that each third party owed a duty of care in tendering advice to it. The second defendant pleaded that if the plaintiffs were to succeed in their defamation action, the third parties were liable to the second defendant for not identifying the defamation. Given the factual complexity of the subject matter of the book and the significant plea of honest opinion, the joinder of the third parties may have been more tactical than convincing but the implications for the third parties could not, of course, be shrugged off. Their professional ability was being targeted even if the bow was being drawn long.

[14] Presumptively the costs of the third parties, if payable, should be paid by the litigant who brought them into the case, that is the second defendant. Counsel for the second defendant submits that the nature of a plaintiff's claim often makes it

reasonable, if not necessary, for a defendant to bring third party proceedings and that in the United Kingdom and Australia awards of costs have been made against an unsuccessful plaintiff in favour of a third party. In *Lombard Insurance Company (Australia) Limited v Mara Pastro and Others*, SCGRG 93/1687, 30 March 1994, the Supreme Court of South Australia held that where the nature of a plaintiff's claim or allegations in support of it render it reasonable, having regard to the purposes of third party procedure, to bring in the third party, and the third party claim is unsuccessful solely by reason of the failure of the plaintiff to sustain its claim or the relevant allegations, the defendant should ordinarily recover from the plaintiff the costs of the third party claim, including those which the defendant is ordered to pay to the third party. The Court noted, however, that there is emphasis on the word "ordinarily" and the discretion is unfettered. A variety of factors may properly enter into the exercise of it.

[15] An essential feature of the third party procedure is that it permits an issue estoppel to be created, not only as between a plaintiff and a defendant but also as between a defendant and a third party, so as to obviate the need for a defendant seeking contribution or indemnity to re-litigate the issues relative to the plaintiff. It is, therefore, convenient for defendants, although additional cost might be incurred by even successful plaintiffs, if third parties actually participate in the trial. Often the situation is met, as it was in the present case, by an order severing for later trial the *lis* between a defendant and a third party. It follows that where there is a tenable claim by a defendant for contribution or indemnity from a third party, it would be reasonable for the third party procedure to be invoked. Whether that would make it reasonable for the plaintiff to carry the costs of the defendant's ancillary litigation is another matter. Where there are alleged joint tortfeasors, as, for example, various drivers involved in a motor vehicle accident, the joinder of one alleged tortfeasor by another would be prudent and reasonably foreseeable. It is otherwise where the causes of action are quite disjunctive. Examples would be a defendant motor vehicle owner whose insurer has declined a claim based on the incident on which the plaintiff sues. The present case is also exemplary.

[16] I would think it unusual at the time this proceeding commenced for a New Zealand publisher to join a barrister and a firm of solicitors on an allegation of

deficient advice by those third parties in connection with the published work complained of by the plaintiffs.

[17] If the jury had found for the plaintiffs, or either of them, the third parties' vulnerability, if there had been deficient advice and it could be sued upon, would be conditioned not by the fact that the jury had found words were defamatory but because as a matter of law the words were capable of being defamatory and that accordingly there was a risk that the jury might find them so in fact. The issues upon which an estoppel might therefore be convenient would relate essentially to questions of law rather than fact. Accordingly, although the second defendant might have felt reassured by the joinder of the third parties in the particular proceeding, there was no real disadvantage to it in waiting and seeing what the outcome of the plaintiffs' claims was before embroiling the third parties in litigation.

[18] A perusal of the memoranda filed on behalf of the third parties suggests to me that the result of the third party notices was to involve them in laborious and time consuming paperwork such as re-reading manuscripts, identifying and cross-referencing passages from the book, perusing the trial transcript of *R v Bain* and examining exhibits – all matters which could have waited until the outcome of the plaintiffs' proceeding was known.

[19] I have a wide discretion in relation to costs incurred pre-2000 and as a matter of discretion I determine, for the reasons mentioned in paragraphs [13] to [18] inclusive hereof, that the second defendant and not the plaintiffs should carry the burden of the costs incurred by the third parties at the suit of the second defendant.

[20] The actual costs of the first third party amounted to $44,178.44 inclusive of disbursements. The second defendant ought make a reasonable contribution towards those costs and the first third party submits that a reasonable sum would be $30,000. That figure is near enough to two thirds of actual costs and disbursements and I consider it reasonable in all the circumstances that the second defendant should pay that sum to the first third party.

[21] As to the second third party, a matter for consideration is that the interest of the firm in the litigation was attended to by a member of the firm itself. Accordingly no costs except disbursements were actually incurred, but it is possible to value the firm's professional services to itself. These have been assessed, exclusive of GST, at a little over $13,000. There are also disbursements of $263.

[22] Mr Sinclair submits that a solicitor suing in person is entitled to the same costs as if acting for a client and that by the same token a firm of solicitors defending in person should be entitled to the costs incurred by reason of such defence. Mr Sinclair refers to the decision of Tompkins J in *Buddle Findlay v Bruns*, CP 1316 & 7/90, delivered on 17 December 1991. Tompkins J referred to *Hanna v Ranger* (1912) 31 NZLR 159 where Edwards J held that a solicitor in practice succeeding on an action brought personally on a dishonoured promissory note was entitled to costs according to scale. Edwards J referred to longstanding English authority which Tompkins J himself invoked in support of an order requiring security for costs on appeal to be paid by Mr Bruns. Of course the fact that the plaintiff firm was acting for itself at that point in the appeal process did not preclude it from briefing other solicitors or outside counsel to appear on the appeal itself. It would have been perfectly entitled to do so and that would justify security for costs on appeal. But the English line of authority which Edwards J decided to follow is inconsistent with the view of the Court of Appeal expressed in *Lysnar v National Bank of New Zealand Limited (No.2)* [1935] NZLR 557, which Tompkins J also adverted to. In that case the Court of Appeal noted the relevance of the distinction between the English practice of indemnifying a successful party and the New Zealand practice of indemnifying for disbursements but applying a scale in the nature of a commission in respect of solicitor/client costs. The Court of Appeal observed that in New Zealand nothing is allowed to a litigant for the time and trouble associated with litigation and the Court of Appeal was not prepared to afford "special preferential treatment" to the litigant in person.

[23] I consider myself bound by the principles enunciated in *Lysnar* in that despite the personal trouble and inconvenience to which the second third party has been put, only actual disbursements may be recovered. The disbursements amount to $263

and the second third party will have judgment for that sum against the second defendant.

**Conclusion**

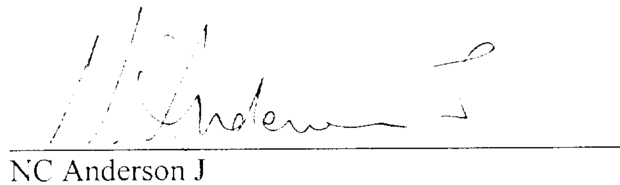
[24] For the above reasons, the following costs orders are made –

[a] The defendants will have costs against the plaintiffs, Mr Weir and Mr Anderson, in the total sum of $134,410.91, made up as follows:-

| | $ |
|---|---|
| Pre-2000 costs | 55,000.00 |
| Pre-2000 disbursements | 610.66 |
| 2000 costs | 69,160.00 |
| 2000 disbursements | 425.37 |
| Mr Rowe's fees | 2132.95 |
| New trial application | 6650.00 |
| New trial application disbursements | 431.93 |

[b] The first third party will have costs against the second defendant in the total sum of $30,000.

[c] The second third party will have costs against the second defendant in the sum of $263.



NC Anderson J

Signed at 9.39 am/~~pm~~ on the 13th day of December 2000