

1580
IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

CP19/00

BETWEEN

AR KENNEDY, AK GOODE & SP TODDD
Plaintiffs

A N D

RG FOOTE & IF FOOTE
Defendants

A N D

CP27/00

BETWEEN

AR KENNEDY, AK GOODE & SP TODDD
Plaintiffs

A N D

BR BARNETT & DK BARNETT
Defendants

A N D

CP28/00

BETWEEN

AR KENNEDY, AK GOODE & SP TODDD
Plaintiffs

A N D

BA BAIGENT & WS WAKELIN
Defendants

Counsel:

SJ Brown for the plaintiffs
PD Green and AS Vane for the defendants

Judgment:

17 January 2002

(COSTS) JUDGMENT OF MASTER KENNEDY-GRANT

Distribution:

Stephen Brown PO Box 11 586 Wellington for the plaintiffs
Le Pine & Co PO Box 140 Taupo for the defendants
PD Green PO Box 2422 Wellington

Introduction

[1] In 2000 the plaintiffs commenced defamation actions against each of the defendants.

[2] In late 2001 the plaintiffs discontinued each of the proceedings.

[3] The defendants now seek costs.

[4] In support of their costs applications the defendants, who have been jointly represented by the same solicitors and counsel, have filed the following documents:

[a] solicitor's memorandum dated 1 October 2001

[b] affidavits by RG Foote (in CP19/00), BR Barnett (in CP27/00) and BA Baigent (in CP 28/00)

[c] solicitor's supplementary memorandum dated 2 November 2001

[5] In response the plaintiffs have filed:

[a] A memorandum dated 15 October 2001

[b] An affidavit of the third-named plaintiff dated 16 November 2001

[6] Neither the plaintiffs nor the defendants have sought an oral hearing in respect of the defendant's application for costs.

The key points in the defendants' case on costs

[7] The defendants seek their actual costs of \$46,715.96.

[8] They justify an order for the payment of this sum by referring to the following factors:

[a] In a conference held before me on 22 November 2000 it was agreed, and I ordered, that:

Subject to further order of the Court, the costs categorisation and banding of these proceedings will be on a 3B basis

[b] That, on a 3B basis, the costs to which the defendants would be entitled, were it not for the fact that their actual costs were less, would be \$49,849.87;

[c] That the instruction of a single firm of solicitors and counsel has meant that it has been possible to reduce the costs that would otherwise have been incurred in the defence of the proceedings and that the actual costs claimed are reasonable;

[d] Recovery under the costs rules which have applied since 1 January 2000 is based, in the normal case, on the straight-forward calculation of the amount due for each of the various steps taken in the proceeding in question by applying the daily recovery rate provided for in the Second Schedule to the reasonable time provided for in the Third Schedule: see r 47(c) and (e);

[e] There is no good reason for departing from the costs categorisation and banding fixed in the conference on 22 November 2000

[f] If, contrary to the submission in sub-paragraph [d], the costs regime in force since 1 January 2000 is intended to provide a successful party with two-thirds only of its actual costs (which is denied), then there is good reason, having regard in particular to the affidavit of Mr BR Barnett, for an order that the plaintiffs pay the defendants' actual costs

The plaintiffs' case on costs

[9] The key point of the plaintiffs' case on costs is that, on the proper interpretation of the costs rules in force since 1 January 2000, the successful party or parties should not recover more than two-thirds of its or their actual reasonable solicitor and client costs.

My findings

[10] I do not accept Mr Brown's submission that the intention of the costs rules in force since 1 January 2000 is that a successful party or parties should not recover more than two-thirds of its or their actual reasonable solicitor and client costs. It is, in my view, clear from r 47(c)-(e) of the Rules that the intention is to provide, in the normal case, for recovery on the basis of the formula contained in the Rules without regard to the actual solicitor and client costs incurred, except where those costs are less than the amount that would be recovered by the application of the formula.

[11] If I am wrong in coming to this conclusion, then the contents of Mr Barnett's affidavit of 24 October 2001 amply justify an award of actual and reasonable solicitor and client costs. (I note, in this connection, that the affidavit sworn by Mrs SP Todd, the third-named plaintiff, does not challenge the contents of Mr Barnett's affidavit nor allege that the statements by Mr P Kennedy deposed to in that affidavit were made without authority from the plaintiffs. This is despite the fact that Mrs Todd's affidavit was sworn approximately three weeks after Mr Barnett's.)

The costs of the costs' application

[12] The defendants seek costs on the costs' application in addition to the costs which are the subject of the application.

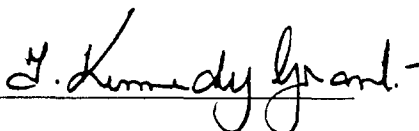
[13] Given that it has been necessary for them to make the application for costs and they have been successful in it, I hold that they are entitled to costs on the application also, on a 3B basis or for the actual solicitor and client costs of making the application and prosecuting it, should the latter be less.

Orders

[14] I therefore make the following orders:

- [a] The plaintiffs are ordered jointly and severally to pay the costs of the defendants in the three proceedings (excluding the costs of this application) in the sum of \$46,715.96.
- [b] The plaintiffs are ordered jointly and severally to pay the defendants' costs of this application in the sum of \$2,090 or such lesser sum as represents the actual solicitor and client costs incurred by the defendants in bringing and prosecuting the application, determined as provided in order [c].
- [c] In order to give finality in respect of order [b], Mr AS Vane, the solicitor for the defendants, is to file and serve within seven days of the date of this judgment a certificate stating whether the solicitor and client costs incurred by the defendants in bringing and prosecuting the costs application exceed the sum of \$2,090 and, if they do not, stating the amount of those costs.
- [d] Acknowledgement of receipt by Le Pine and Co, being the firm of which Mr Vane, the defendants' solicitor of record, is a principal, of payment of the costs ordered to be paid in orders [a] and [b] will be a sufficient discharge of the liability of the plaintiffs jointly and severally.

[15] This judgment is signed at 12.52 pm. on 17 January 2002.



MASTER T KENNEDY-GRANT

[16]