IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY CIV-2003-485-174

	BETWEEN	DAVID LESLIE MCILROY
		First Plaintiff
	AND	ALAN BRENT HENDRICKSON
		Second Plaintiff
	AND	LINDSAY DONALD EGERTON
		Third Plaintiff
	AND	THE NEW ZEALAND ACT PARTY
		First Defendant
	AND	KENNETH SHIRLEY
		Second Defendant

Hearing: 16 December 2005

Counsel: C Withnall, QC, for plaintiffs
D J S Parker for second defendant

Judgment: 16 December 2005

ORAL JUDGMENT OF MACKENZIE J

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[1] The defendant applies for costs against the first plaintiff, Mr McIlroy. The proceeding is an action for defamation, originally by three plaintiffs against two defendants. By the time the matter came for trial, in March 2005, there were two remaining plaintiffs, Mr McIlroy and Mr Egerton. Mr Shirley was the sole defendant. The proceeding was set down for hearing for two days. That time estimate was woefully inadequate and the matter had to be adjourned for a further fixture. That was set down to commence on 26th November. On 23rd November,

Mr McIlroy filed a discontinuance. That had apparently been signalled in an earlier letter dated 11th November. Subsequently, a settlement was reached between Mr Egerton and Mr Shirley, and the trial did not proceed.

[2] Counsel for both parties have filed lengthy written submissions, and I have heard oral submissions this morning. The starting point, for a consideration of costs, is, subject to a point to which I shall come later, Rule 476C of the High Court Rules. That provides that, unless the defendant otherwise agrees or the Court otherwise orders, a plaintiff who discontinues a proceeding against a defendant must pay costs to the defendant of and incidental to the proceeding up to and including the discontinuance. The issues here which fall to be determined are:

1. Does Rules 476C apply, and is there an ability to award costs under that rule, or do costs fall to be determined at the discretion of the Court subject to the ordinary principles in Rule 46?

2. The second issue is the appropriate category for the proceedings.

3. The third is the appropriate band for individual steps in the proceeding;

4. Whether Mr Shirley is entitled to increased costs or indemnity costs; and

5. How should the costs of the proceeding be apportioned between Mr McIlroy and Mr Egerton so as to determine the proportion payable by Mr McIlroy?

[3] So the first issue is the ability to award costs in favour of Mr Shirley. Counsel for the plaintiff submits that there was a single proceeding brought by two plaintiffs against one defendant. He submits that Rule 476A, which deals with the effect of a discontinuance, applies only where the proceeding as a whole is brought to an end by the discontinuance. He submits that this proceeding did not do so, because the proceeding remained alive, so far as Mr Egerton was concerned, following Mr McIlroy's discontinuance, and that it came to an end as a result of the settlement between Mr Egerton and Mr Shirley. Mr Parker for the defendant submits

that the proceedings were brought severally rather than jointly and that a separate award of costs can be made against Mr McIlroy.

[4] Rule 476A provides:

> **476A Effect of discontinuance**
>
> (1) A proceeding ends against a defendant or defendants, as the case may be, on—
>
> > (a) the filing and service of a notice of discontinuance under rule 475(1)(a); or
> >
> > (b) the giving of oral advice of the discontinuance at the hearing under rule 475(1)(b); or
> >
> > (c) the making of an order under rule 476.
>
> (2) The discontinuance of a proceeding does not affect the determination of costs.
>
> (3) This rule is subject to rule 476B.

[5] So the proceeding ends against the defendant on the filing of a discontinuance. Mr Withnall's submission would have the effect that it would not be possible for one plaintiff, where there is more than one plaintiff who do not sue in respect of an interest which is joint rather than several, to discontinue. That, it seems to me, would be the effect of the submission he makes. I do not consider that that effect should be given to the rule. Rule 475 provides that a plaintiff may at any time before the giving of judgment discontinue a proceeding by filing a notice of discontinuance and serving a copy on every other party to the proceeding. There is no suggestion in that rule that one of several plaintiffs may not exercise that right.

[6] So I consider that the discontinuance is effective, that the discontinuance under Rule 476A(2) does not affect the determination of costs, and that Rule 476C applies. Rule 476C provides:

> **476C Costs**
>
> Unless the defendant otherwise agrees or the Court otherwise orders, a plaintiff who discontinues a proceeding against a defendant must pay costs to the defendant of and incidental to the proceeding up to and including the discontinuance.

[7] So that rule applies "Unless the defendant otherwise agrees". I do not consider that the defendant has agreed not to seek costs against Mr McIlroy. Mr McIlroy was not a party to the settlement. I am informed that the settlement expressly reserved Mr Shirley's rights to claim for costs against Mr McIlroy. There can, in my view, be no basis for a suggestion that Mr Shirley has agreed otherwise than that Rule 476C should apply. The settlement between Mr Egerton and Mr Shirley did not bring the entire proceeding to an end so as to preclude any subsequent order for costs. Rule 476A sets out the effect of the discontinuance, so far as it concerns the plaintiffs' proceeding. That discontinuance did not affect the determination of costs. The question of costs remains open for determination.

[8] The second question is the appropriate category for the proceedings. I deal separately with the category and the band, because, although the two are often considered in conjunction, they are clearly quite separate and distinct. Rules 48 and 48B make that clear. The category applies to the proceedings as a whole, the band applies to steps within that proceeding. Mr Parker for Mr Shirley submits that the proceeding should be categorised as category 3. Mr Withnall submits that it should be categorised as category 2. Category 2 applies to proceedings of average complexity requiring counsel of skill and experience considered average in the High Court, while category 3 involves proceedings that, because of their complexity or significance, require counsel to have special skill and experience in the High Court. In making the assessment, I bear in mind that these are defamation proceedings, and that defamation is a specialised field of practice. The fact that it is a specialised field of practice does not of itself affect the categorisation. The question whether the proceeding is one requiring counsel of average skill and experience or special skill and experience is to be made having regard to the basic requirement that counsel must be expected to be familiar with the relevant specialty involved in the litigation. Defamation proceedings fall, within that specialty, into a range which may require counsel of average or of special skill and experience. A specialist defamation counsel is not necessarily a counsel with special skill and experience for categorisation purposes.

[9] One point to be borne in mind is that for much of the period of this litigation, indeed until shortly before the trial commenced in March, Mr Shirley was

unrepresented. He is not, of course, entitled to costs in respect of steps taken within that period, though I propose to adopt a broad approach to the fixing of costs having regard to that factor. I mention it now for its relevance to the categorisation of the proceeding.

[10] The Court did not determine in advance the applicable category under Rule 48(2). I therefore have the benefit of hindsight in fixing the category. In doing so, I bear in mind that the trial did not proceed beyond the first two days. Accordingly, much of the work which is to be compensated for by an award of costs is work in preparation for the trial. That work is unlikely to have been undertaken substantially by senior counsel, though senior counsel will no doubt have had a significant role. It is also to be borne in mind that the categorisation of the proceeding is dependent upon the proceeding itself, rather than upon the identity of counsel actually instructed.

[11] Bearing all of those matters in mind, I am satisfied that the appropriate category for this proceeding is category 2.

[12] I must therefore now consider the appropriate band for each step in the proceeding. Under Rule 48B, the band is to be separately determined for each step. However, neither counsel here adopted that approach. Counsel for Mr McIlroy submitted that the appropriate band for all steps was band B, and counsel for Mr Shirley submitted the appropriate band for all steps was band C.

[13] In fixing the band, it is relevant to observe that in this case, for by far the larger component of the costs, the banding will not in fact make a difference. That is because by far the larger component is that of preparation for trial. Under the scale in Schedule 3, that is determined by reference to the hearing time, and does not differ between bands B and C. For the other steps in the proceeding, I consider that there is nothing in the circumstances which justifies a conclusion that other than a normal amount of time for any particular step in the proceeding was required. Accordingly, I regard band B as appropriate for this proceeding.

[14] The next question is whether, in addition to the amount which would be payable calculated on that basis, increased costs or indemnity costs may be justified.

[15] The relevant principles as to costs on a discontinuance are well established. They were set out by Tompkins J in *North Shore City Council v Local Government Commission* (1995) 9 PRNZ 182 as follows:

> 1. In terms of Rule 476 there is a presumption that a discontinuing plaintiff will be liable for costs;
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> 2. Where, as is the usual case, the Court is unable to determine what the outcome of the trial that never took place would have been, it will not strive to speculate as to the answer in determining the costs; and
>
> 3. The presumption is nonetheless rebuttable in the exceptional cases where the merits are clear but subject always to the overriding provision of Rule 46 that "all matters relating to the costs of or incidental to any proceeding or any step therein shall be in the discretion of the Court".

That has been applied in *Oggi Advertising Ltd v McKenzie* (1998) 12 PRNZ 535, and more recently in *Doone v Fairfax New Zealand Ltd* (High Court, Wellington, CIV-2000-485-854, 6 July 2005).

[16] The second principle is particularly important here. Mr Parker seeks to persuade me that Mr McIlroy's claim was so weak, and doomed to failure, that that justifies an award of increased costs or indemnity costs. The usual case is that the Court is unable to determine what the outcome of the trial that never took place would have been. The Court will not strive to speculate as to the answer when determining costs. Mr Parker has invited me to consider the briefs of evidence which would have been called if the matter had proceeded to trial. I have not done so. I am not prepared to make any assessment at all of the merits of the case on the basis of what witnesses might have said in evidence. It would be quite wrong to do so. I am unable to make any assessment of credibility, and the evidence in the briefs has not been tested by cross-examination. Nor am I prepared, as counsel invites me to do, to draw adverse inferences as to Mr McIlroy's credibility, from the evidence

which I heard from him. Much of his cross-examination consisted, entirely properly, of counsel putting to him evidence which other witnesses might give. But the evidence has not been given, and I cannot assume that it would have been found more credible than Mr McIlroy's evidence. This is an application for costs. It is not a vehicle to achieve, by another route, the trial which was precluded, as was Mr McIlroy's right, by the filing of a discontinuance.

[17] A further factor which has persuaded me that it is not appropriate to consider the briefs of evidence is that the strength or weakness of the case which has been discontinued is generally not relevant to the issue of costs in any event. The circumstances in which the Court may order a party to pay increased costs or indemnity costs are prescribed by Rule 48C. Those do not expressly include considerations of whether the case involved was a strong or weak one. That applies to cases which have proceeded to trial, where the Judge has been able to reach a view as to the strength or weakness of the case. It must apply even more strongly where there has been a discontinuance. The cases where the merits are clear are, as was noted in *North Shore City Council*, likely to be exceptional. In my view, it is likely that they will generally be cases where the outcome is clearly apparent from some deficiency in the case as pleaded, or matters of that sort.

[18] A further factor which has persuaded me that it is not appropriate to consider the briefs of evidence and to make an assessment of the merits of the case is that the strength or weakness of the case which has been discontinued is generally not relevant to the issue of costs in any event. For costs purposes, a discontinuing plaintiff is effectively treated as an unsuccessful litigant. How unsuccessful a litigant is is not generally a relevant factor. The circumstances in which the Court may order a party to pay increased costs or indemnity costs are prescribed by Rule 48C. It is those considerations which I must take into account. Those do not expressly include considerations of whether the case involved was a strong or weak one. That applies to cases which have proceeded to trial, where the Judge has been able to reach a view as to the strength or weakness of the case, and it must apply even more strongly where there has been a discontinuance.

[19] Turning to the grounds on which increased costs may be awarded, the first is the nature of the proceeding. There is nothing in the nature of the proceeding here which would justify an increase. Only one of the matters set out in paragraph (b) of Rule 48C(3) is raised here, namely "failing, without reasonable justification, to accept an offer of settlement". Mr Parker submits that a settlement offer was made and not accepted in March, shortly before the start of the trial. The terms of that settlement offer have been put before me. It is apparent that two offers were made. One was made on the basis that it must be accepted by both parties. The second offer was an offer to Mr Egerton, and could be accepted by him alone. No offer was made to Mr McIlroy which was capable of acceptance by him alone. Neither of those two offers was accepted. Because no offer was made to Mr McIlroy alone, the offer is not a matter which can be taken into account in fixing costs. Paragraph (c) of Rule 48C(3) does not apply here. As to paragraph (d), the only reason which is relied upon is the matter to which I have already referred, namely the strength of the case. For the reasons I have given, I do not regard that as a reason which can be taken into account as justifying increased costs in this case.

[20] So far as indemnity costs are concerned, the circumstances in which those may be ordered are contained in paragraph 48C(4). One of the grounds relied upon here is paragraph (a), that the party has acted vexatiously, frivolously, improperly or unnecessarily in commencing, continuing or defending the proceeding. That submission is inextricably bound up with the submission that the case was so weak that it should never have been brought. For the reasons I have given, I do not regard that as a justification for an award of indemnity costs. The only other potentially relevant consideration is that in paragraph (f), some other reason. Again, for the reasons I have given, I do not regard the claimed weakness of the case as a reason for awarding indemnity costs.

[21] The final question is the basis upon which the costs should be apportioned. Mr Parker submits that there was more involved in defending Mr McIlroy's claim than Mr Egerton's and that a 60:40 apportionment would be appropriate. Mr Withnall submits that, because the imputation relied on by Mr Egerton in his claim was that it was defamatory to suggest that he associated with Mr McIlroy, a known poacher of deer, in essence the sting of the alleged defamation against

Mr McIlroy had also to be proved in the case against Mr Egerton. He submits, on that basis, that costs should not fall on Mr McIlroy when those costs would also have been incurred in defending the claim by Mr Egerton had it proceeded. He submits that an apportionment of some 10% or 20% to Mr McIlroy would reflect the additional costs attributable to his claim. I do not accept the logic of that submission. It might equally apply the other way: that all of the evidence, or substantially all of it, would have been necessary to defend the claim by Mr McIlroy had it proceeded, and that Mr Egerton's involvement would have added only in a minor way. I consider that that serves to illustrate that an apportionment based upon an attempt to assess the relative costs of defending the two claims would be fraught with difficulty. I do not consider it appropriate to do other than allocate costs on the basis that there were two plaintiffs, and the costs of the entire proceeding should be equally allocated between them. As Mr Egerton has settled, no award is to be made for his share.

[22] Accordingly, I award costs to the defendants at 50% of an amount assessed on a category 2 band B basis.

[23] Counsel for the defendant assesses costs on a category 2 band B basis at 45.2 days, based on two days of actual hearing and preparation for an additional 15 days hearing which did not proceed. Mr Withnall submits that the time estimate was excessive, and that only 10 days would have been required. I propose to allow preparation costs based on the actual hearing time, plus the latest estimate which was given and concurred in by both parties, namely 15 days. That would lead to a figure of 45.2 days as calculated. As I noted earlier, Mr Shirley was unrepresented at some stage of the proceedings. It is not entirely clear whether that time relates to any of the steps that have been taken in fixing that 45.2 days. In any event, the assessment is necessarily a somewhat broad one, and I do not consider that any adjustment is appropriate on that account. 45.2 days at the category 2 rate of $1,450 per day amounts to $65,540. I award 50% of that, namely $32,770. I add an extra day's allowance for preparation for, and participation in, this costs hearing. That adds $1,450, giving a total of $33,220.

[24] Disbursements are also claimed. The list of disbursements claimed may be incomplete in that Mr Parker in his submissions put forward details of the amounts claimed for the indemnity costs claimed which includes some matters which may be recoverable as disbursements. In the circumstances, I consider the better course is to award disbursements to be fixed by the Registrar. That award will, like the award for costs, be on a 50% basis. I indicate, however, that of those matters specifically listed in Mr Parker's written submissions at page 14 the filing fees would be allowed, and a reasonable amount to the Crown Law Office in respect of the costs of non-party discovery is allowed. Mr Withnall wishes to question the quantum, and I leave the quantum of the allowance to be fixed by the Registrar.

[25] I indicate that the other matters claimed are not recoverable as disbursements. The Westland Investigations costs are, as the accounts from that firm indicate, essentially costs involved in briefing witnesses, and those costs are covered in the award of costs which I have made. Two items by way of witness costs are claimed. Those are in excess of the amounts that would have been payable under the Witnesses and Interpreters Fees Regulations, and the witnesses have not been called; so I do not consider that they should be allowed. The item for helicopter hire is not a usual disbursement which would be recoverable as an item which would ordinarily be charged for separately from professional services, and I decline to approve it as a disbursement in terms of Rule 48H(2).

"A D MacKenzie J"

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