IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2006-404-5175

	BETWEEN	CASH FOR SCRAP LIMITED Plaintiff
	AND	CANWEST TV WORKS LTD First Defendant
	AND	AUCKLAND REGIONAL COUNCIL Second Defendant

Hearing: 9 July 2008

Counsel: R E Harrison QC for Cash for Scrap Ltd, Ms C Down and Mr A D Banbrook
J G Miles QC and A Ferguson for Canwest TV Works Ltd
No appearance by or on behalf of Auckland Regional Council

Judgment: 17 November 2008

JUDGMENT OF HEATH J

This judgment was delivered by me on 17 November 2008 at 3.00pm pursuant to Rule 540(4) of the High Court Rules

Registrar/Deputy Registrar

Solicitors:
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J G Miles QC, PO Box 4338, Auckland
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The issue

[1] Cash for Scrap Ltd brought defamation proceedings against Canwest TV Works Ltd (TV3). Those proceedings were discontinued a few months before trial. TV3 seeks indemnity costs against not only Cash for Scrap Ltd but also a director, Ms Carol Down, and the barrister instructed to act for Cash for Scrap Ltd, Mr Banbrook.

Introduction

[2] Cash for Scrap Ltd dealt in scrap metal, from premises situated in Bairds Road, Otara. The company has an unhappy history of failure to comply with resource consents granted in its favour. Amongst other things, problems have arisen from the leakage of oil and other contaminants into the ground, adjacent to a waterway, as a result of its business operations.

[3] On 26 April 2006, TV3 broadcast a news item from the business premises of Cash for Scrap Ltd. It did so in the company of a pollution control officer from the Auckland Regional Council (the Regional Council). The broadcast was not complimentary of Cash for Scrap Ltd's business activities. The company was identified by name. Visual images of the business premises were shown. The pollution control officer was also interviewed.

[4] On 21 July 2006, Cash for Scrap Ltd issued proceedings against the Regional Council and named employees. Damages of over $15 million were claimed, based on misfeasance in public office and intentional infliction of economic loss by unlawful means.

[5] In August 2006, Cash for Scrap Ltd issued defamation proceedings against TV3. Compensatory and aggravated damages were sought, together with special damages of $1,460,000, alleged to be the equivalent of six months loss of gross profit.

[6] The proceeding against the Regional Council was struck out as a result of judgments given by Cooper J on 9 October and 20 December 2007.

[7] The defamation proceeding was set down for hearing in May 2008. An adjournment was sought because senior counsel, whom Cash for Scrap Ltd intended to instruct for the trial, was unavailable. On 15 January 2008, Mr Banbrook, an Auckland barrister who had been instructed to act for Cash for Scrap Ltd, advised the solicitors for TV3, by telephone, on 15 January 2008 that the claim would be discontinued. A notice of discontinuance was subsequently filed. Costs remained at large.

The costs applications

[8] After referring to the sorry history of Cash for Scrap Ltd's failure to comply with valid regulatory requirements of the Regional Council and orders of the Environment Court, Mr Miles QC, for TV3, referred to the principle that a person who pursues an unlawful trade, or who participates in illegal acts, cannot maintain an action for defamation in respect of reputation gathered through illegal activity. Mr Miles submitted that the proceeding against TV3 was hopeless from inception. See, generally, *Gatley on Libel and Slander* (10th ed, Sweet & Maxwell London, 2004) at para 2.15 and *Wilkinson v Sporting Life Publications Ltd* (1933) 49 CLR 365 (HCA) at 379.

[9] Indemnity costs are sought against Cash for Scrap Ltd, Ms Down and Mr Banbrook. There are three distinct jurisdictional sources for the claims.

[10] The claim for costs against Cash for Scrap Ltd must be determined under the High Court Rules. Rule 476C creates a presumption that a plaintiff who discontinues shall pay costs to the defendant up to the date of discontinuance. That presumption can be rebutted: eg *Kroma Colour Prints Limited v Tridonicatco NZ Limited* (2008) 18 PRNZ 973 (CA). Whether indemnity costs should be ordered will turn on the application of r 48C(4) of the Rules.

[11] The jurisdiction to order non-party costs springs from this Court's inherent jurisdiction. The circumstances in which costs might be awarded against a non-party were discussed in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd (No. 2)* [2005] 1 NZLR 145 (PC). The questions are whether the claim for costs against Ms Down falls within the scope of those principles and, if so, are indemnity costs justified.

[12] The jurisdiction to award costs against counsel who prosecutes a civil claim on behalf of a client arises from the High Court's inherent disciplinary jurisdiction over legal practitioners. The jurisdiction is founded on the proposition that counsel owes obligations to the Court which transcend those owed to a client. The circumstances in which an order of this type might be made were discussed in *Harley v McDonald* [2002] 1 NZLR 1 (PC).

[13] Mr Harrison QC, for the three parties against whom costs are sought, submits that there was a tenable basis for the claims to be brought and that there was nothing in their prosecution which would justify awarding increased or indemnity costs against Cash for Scrap Ltd. Further, Mr Harrison submitted that, on any view, the claims for costs against both Ms Down and Mr Banbrook could not be substantiated, based on the applicable principles laid down in the two Privy Council decisions to which I have referred.

Background to the defamation proceeding

[14] In 2001, Cash for Scrap Ltd was carrying on business from 11 Bairds Road, Otara. The Regional Council received a complaint about alleged pollution. Following investigations by the Regional Council and its inability to resolve issues either by agreement or through the use of abatement notices, the Regional Council sought interim and final enforcement orders from the Environment Court. Those orders were sought to prevent continuing contamination.

[15] Interim orders were made by consent on 4 November 2002. On the basis of findings that it made on 12 December 2002, the Environment Court made final enforcement orders on 19 December 2002.

[16] During 2003, Cash for Scrap Ltd, Ms Down and Mr Conway (Ms Down's partner) were charged with various offences under the Resource Management Act 1991. Those charges referred to events that occurred between 1 May 2001 and 18 June 2003. Cash for Scrap Ltd and Mr Conway pleaded guilty to a number of counts in the indictment shortly before trial. Pleas were entered to three charges of discharging contaminants onto land in circumstances that may have resulted in the contaminant entering a waterway. Cash for Scrap Ltd was fined $25,000. Mr Conway was sentenced to three months imprisonment. Both appealed against sentence. The Court of Appeal dismissed those appeals on 28 October 2004: see *R v Conway* [2005] NZRMA 274 (CA).

[17] The Regional Council sought an order for committal against Ms Down for non-compliance with enforcement orders. That application was granted by Judge Hubble on 8 June 2005. Subsequently, it was overturned on appeal to this Court on the grounds that Judge Hubble, sitting in the District Court, lacked jurisdiction to make the order: *Conway v Auckland Regional Council* [2007] NZRMA 252 at [61] and [62]. Lang J held that the applications should have been filed in the Environment Court and heard by an Environment Court Judge.

[18] By this time, Cash for Scrap Ltd was conducting its business from premises at both 11 and 13 Bairds Road, Otara.

[19] On 26 April 2006, the Regional Council took steps to implement enforcement orders made in respect of the property at 11 Bairds Road that had been granted by the Environment Court on 6 December 2005. When the enforcement officer went to Cash for Scrap Ltd's premises he was accompanied by a TV3 news crew. TV3 filmed some of the events that transpired, despite efforts made on behalf of Mr Moorhead, Cash for Scrap Ltd's Chief Financial Officer, to ward them off the property.

[20] A transcript of the TV3 broadcast was produced in evidence. After some unpleasantries were exchanged, in relation to TV3's authority to enter the land. The transcript discloses the following discussion between the presenter (Ms Middlebrook) and the Council enforcement officer:

> The Council says the yard has been polluting water ways for 5 years as operator William Conway has already been jailed because of it. **[Libby Middlebrook]**
>
> This is just the kind of muddy oily mess that the Council says is unacceptable. There are all kinds of contaminants here, hydraulic fluid oil, fuel and battery acids and all of it flowing directly into the Tamaki Estuary. **[Libby Middlebrook]**
>
> The first thing the Council did this morning was cripple the yard's most important piece of machinery – the bridge it uses to weigh scrap metal. That's when the company called in its lawyer. **[Libby Middlebrook]**
>
> More oil would come off the road in the traffic along there less than what 30 metres away but would go in the back creek there from this side. **[Cliff Lyon speaking]**
>
> The Council was about to remove the weighbridge but it stopped when theyard said it was seeking a stay of execution from the Courts. **[Libby Middlebrook]**

[21] On 27 April 2006, Cash for Scrap Ltd sought successfully a stay of the enforcement orders made on 6 December 2005. Shortly thereafter, in August 2006, the defamation proceedings were issued.

[22] Mr Harrison, in submissions, highlighted two particular passages:

a) Ms Middlebrook's statement that "the yard has been polluting waterways for five years" and

b) That "there are all kinds of contaminants here, hydraulic fluid, oil, fuel and battery acids and all of it flowing directly into the Tamaki Estuary".

Was the defamation action tenable?

[23] The claims for indemnity costs are based on the premise that the defamation proceedings ought never to have been issued. Mr Miles put forward four factors for consideration:

a) Because Cash for Scrap Ltd's reputation had been derived through unlawful acts, there was no reputation to vindicate in defamation proceedings: *Wilkinson v Sporting Life Publications Ltd*.

b) In any event, Cash for Scrap Ltd's claim for $1,460,000 damages was grossly excessive and not supported by discovered documents.

c) Conduct of Cash for Scrap Ltd's case involved unjustifiable delays, failure to make full disclosure in discovery and breaches of timetabling orders.

d) Cash for Scrap Ltd issued the proceeding for an ulterior purpose and never intended to proceed to trial.

[24] The principle on which Mr Miles relies is set out in *Wilkinson v Sporting Life Publications Ltd*. Dixon J said, at 375-376:

> If it is a material part of a plaintiff's cause of action that he exercises a trade or calling, conducts a business or has engaged in a transaction and it is unlawful for him to do so, his action must fail. But, in my opinion, it is not the law that a plaintiff who engages in an unlawful pursuit or transaction is disabled from recovering in respect of defamatory statements, not otherwise justifiable, merely because they impute misconduct in the course of or arising out of that pursuit or transaction.

…

> [A plaintiff cannot] recover when the defamatory character of the publication complained of consists only in reflections upon his skill, fitness or competence in a business or a vocation which he carried on unlawfully… In such a case… the only reputation which he seeks to protect from disparagement is dependant upon or arises from an illegal course of conduct.

See also, Rich J at 372; Starke J at 374; Evatt J at 389-380; and McTiernan J at 380-381.

[25] Mr Harrison contended that there was no inevitability about the defamation proceeding foundering on the illegality point raised by Mr Miles. First, he submitted that this was an arcane point; one difficult to find, even in authoritative texts. By way of illustration, he referred me to Laws NZ, *Defamation* at para 237 where Rt Hon Sir Ian McKay, an acknowledged authority on defamation law in New Zealand, deals with the point in a footnote, under the heading "mitigation".

[26] No other authority seems to have embraced *Wilkinson* as a clear statement of principle, sufficient to found an application to strike out a Statement of Claim. Indeed, despite the eminence (particularly in the defamation field) of counsel instructed by TV3, the point was not raised until 25 October 2007, in TV3's Second Amended Statement of Defence. I find it difficult, in those circumstances, to accept that the principle was so clearly established that it can provide a basis for indemnity costs, on the grounds that the proceeding was commenced in wilful disregard of established principles of law.

[27] While there may be good reason to suspect that Cash for Scrap Ltd issued the proceeding as a "gagging writ", it would be difficult to draw safe inferences that the slow and somewhat sloppy conduct of the case was undertaken deliberately or that the proceeding was issued for an ulterior purpose. What is clear, however, is that the damages claimed were excessive.

Analysis of costs claims

(a) The claim for costs against Cash for Scrap Ltd

[28] Rule 476C of the High Court Rules 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.

[29] Mr Harrison did not dispute application of r 476C. He accepted that Cash for Scrap Ltd was obliged to pay costs on discontinuance. He did not accept, however, that costs should be paid on an indemnity basis.

[30] The costs incurred by TV3 were significant. On the information provided to me, they total $97,860.68, up to February 2008.

[31] Increased or indemnity costs may be awarded in the circumstances identified in r 48C of the High Court Rules. Rule 48C(3) and (4) provides:

> **Increased costs and indemnity costs**
>
> …
>
> (3) The Court may order a party to pay *increased costs* if—
>
> (a) The nature of the proceeding or the step in the proceeding is such that the time required by the party claiming costs would substantially exceed the time allocated under band C; or
>
> (b) The party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in the proceeding by—
>
> (i) Failing to comply with these rules or a direction of the Court; or
>
> (ii) Taking or pursuing an unnecessary step or an argument that lacks merit; or
>
> (iii) Failing, without reasonable justification, to admit facts, evidence, documents, or accept a legal argument; or

(iv) Failing, without reasonable justification, to comply with an order for discovery, a notice for further particulars, notice for interrogatories, or other similar requirement under these rules; or

(v) Failing, without reasonable justification, to accept an offer of settlement whether in the form of an offer under rule 48G … or some other offer to settle or dispose of the proceeding; or

(c) The proceeding is of general importance to persons other than just the parties and it was reasonably necessary for the party claiming costs to bring the proceeding or participate in the proceeding in the interests of those affected; or

(d) Some other reason exists which justifies the Court making an order for increased costs despite the principle that the determination of costs should be predictable and expeditious.

(4) The Court may order a party to pay *indemnity costs* if—

(a) The party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding; or

(b) The party has ignored or disobeyed an order or direction of the Court or breached an undertaking given to the Court or another party to the proceeding; or

(c) Costs are payable from a fund, the party claiming costs is a necessary party to the proceeding affecting the fund, and the party claiming costs has acted reasonably in the proceeding; or

(d) The person in whose favour the order of costs is made was not a party to the proceeding and has acted reasonably in relation to the proceeding; or

(e) The party claiming costs is entitled to indemnity costs under a contract or deed; or

(f) Some other reason exists which justifies the Court making an order for indemnity costs despite the principle that the determination of costs should be predictable and expeditious

[32] The proceeding was issued some four months after the television broadcast. The timing is equivocal; it could be consistent with the issue of a "gagging writ" or a genuine attempt to vindicate reputation. Mr Harrison submitted that the alleged defamatory words pleaded in the Statement of Claim (to which reference is made in para [22] above) were not necessarily confirmed by the findings of the various Courts that had ruled on aspects of Cash for Scrap Ltd's activities. I agree that this issue is not clear-cut.

[33] Indemnity costs are usually reserved for the most extreme of cases. Rule 48C(4) makes that clear: see, in particular, the references to frivolous or vexatious actions or disobedience of a Court order.

[34] The slowness of the proceeding and the failure to comply with Court orders in a timely fashion do, in my view, justify increased costs, but not indemnity costs. See, in particular, r 48C(3)(b)(i) and (iv). I rely also on the excessive damages claimed.

[35] Proceedings such as this, particularly having regard to the amount involved, generally require a Category 3 order for costs, with most if not all steps based on band B. I propose to add an uplift of 50% on such costs. Cash for Scrap Ltd shall pay costs to TV3 on a 3B basis (plus an uplift of 50%), together with disbursements. Both costs and disbursements shall be fixed by the Registrar.

(b) The claim for costs against Ms Down

[36] Mr Miles submits that Ms Down was the sole shareholder and director of Cash for Scrap Ltd at the relevant time. He submits that I can infer that she authorised a hopeless proceeding to be issued with no intention of prosecuting it to trial.

[37] I am prepared to infer that Ms Down was the sole director and shareholder of Cash for Scrap Ltd at the time it issued the proceedings. By the time Mr Banbrook gave notice to the solicitors for TV3 that the proceeding was to be discontinued, Cash for Scrap Ltd's name had been changed to 123 Metals Ltd. Nevertheless, Ms Down's name remained on the public records held by the Registrar of Companies.

[38] In drawing that inference, I apply the *maxim* that all evidence must be weighed according to the proof which it was within the power of one side to have produced and in the power of the other to have contradicted: see *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32 (HL) at 46, para 13, applying

Blatch v Archer (1774) 1 Cowp 63 at 65 and *Snell v Farrell* (1990) 2 SCR 311 (SCC) at 328. There was no evidence from Ms Down to assist me on this point.

[39] Mr Miles accepts that TV3 must go further than pointing to Ms Down's dual role as director and shareholder. In any case in which a shareholder is also a director and is concerned in making decisions about the way in which a company will act, there will be room to infer that a successful outcome will pass on benefits to the shareholder. It would defeat the purpose of the rule that treats a company as a distinct legal entity from its shareholders (*Salomon v Salomon & Co* [1897] AC 22 (HL)) to suggest that something more was not required before a non-party order could be made.

[40] Mr Miles relies upon the Privy Council decision in *Dymocks Franchise Systems NSW (Pty) Ltd v Todd (No 2)* to support that general proposition. At para [25], Lord Brown of Eaton-under-Heywood said, for the Board:

> (1) Although costs orders against non–parties are to be regarded as "exceptional", exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such "exceptional" case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact–specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against.
>
> (2) Generally speaking the discretion will not be exercised against "pure funders", described in para [40] of *Hamilton v Al Fayed* [[2002] 3 All ER 641 (CA)] as "those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course". In their case the Court's usual approach is to give priority to the public interest in the funded party getting access to justice over that of the successful unfunded party recovering his costs and so not having to bear the expense of vindicating his rights.

[41] Mr Harrison submitted that there was no evidence to establish that Ms Down played any role in the provision of instructions for Mr Banbrook to initiate or to progress the defamation proceeding. He emphasised the point to which I have already referred, namely that something more than status as a director or a shareholder is required sheet home liability for costs to a director or shareholder.

[42] Mr Harrison submitted further that it was inappropriate to draw any inference that Ms Down was involved in the provision of instructions, notwithstanding the absence of any evidence from her in opposition to the application. He referred to the reorganisation of the affairs of Cash for Scrap Ltd in late March 2007 and the rather muddled picture that emerged, both as to the way in which continued trading operations occurred and the true ownership and control of the company. I was informed that Cash for Scrap Ltd is now in liquidation.

[43] Nor, Mr Harrison submitted, ought I to draw any inference of any improper motive to issue and continue the proceedings from the letter forwarded by Mr Banbrook on 21 January 2008 advising that a notice of discontinuance of the claim would be filed, due to the lack of shareholder interest in funding the proceeding further. Mr Banbrook wrote to the solicitors for TV3 in the following terms:

> Further to my telephone advice I now enclose by way of service a copy of a memorandum of discontinuance of proceedings the original of which has been filed in the High Court at Auckland.
>
> I confirm my telephone advice to affect that the shareholders of Cash for Scrap Limited have advised me immediately prior to the Christmas vacation that they are not prepared to continue to finance this litigation.
>
> You should be aware that the company Cash for Scrap Limited ceased to trade in the year ended 31 March 2007. As a result the company has no resources from which to meet any costs order which your client may wish to pursue.

[44] It was open for Ms Down to provide evidence on her role in prosecuting the claim. I am prepared to infer that she gave instructions to Mr Banbrook to prosecute the proceeding. While there is no basis for me to infer that she acted with an ulterior motive, I do draw the inference from Mr Banbrook's letter (para [43] above) that, unbeknown to TV3, Cash for Scrap had depleted its financial resources some time earlier and the "shareholders" (a term which would, at least, include Ms Down) were funding the litigation. The earlier information provided through Mr Banbrook to TV3's solicitors which did not suggest that the company was financially stretched tends to explain why an appropriate order for security for costs was not obtained: see para [49](c) below.

[45] Although costs orders against non-parties are regarded as "exceptional", as Lord Brown observed in *Dymocks Franchise Systems (NSW) Pty Ltd*, that means "no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense": at [25](1). The issue is whether it is just to make an order.

[46] At the time the proceeding was issued the business of Cash for Scrap Ltd was in a state of disarray. That is clear from the way in which records were retained and from the continuing battles with the Regional Council which must have placed great burdens on the company, both financially and in diversion of management time. Ms Down ought to have known the true financial position. The need for shareholder funding was not disclosed to TV3.

[47] Cash for Scrap Ltd is now in liquidation. The proceeding was prosecuted at a time when its directors ought to have known that financial difficulties were worsening.

[48] In those circumstances I consider that costs should be awarded against Ms Down, but without the uplift ordered in respect of Cash for Scrap Ltd. I order that Ms Down pay costs to TV3 on a 3B basis, together with reasonable disbursements, both to be fixed by the Registrar.

(c) The claim for costs against Mr Banbrook

[49] Mr Miles founds TV3's claim for costs against Mr Banbrook on four distinct points:

a) Mr Banbrook, while acting as counsel for Cash for Scrap Ltd, during the currency of proceedings in the Environment Court that preceded the defamation proceeding, had information in his possession or control from which he knew, or ought to have known, that the company had been operating illegally for many years. In particular, Mr Miles referred to the fact that Mr Banbrook was acting as counsel for Cash for Scrap Ltd at a hearing in the Environment Court before

Judge McElrea in August 2006, around the same time as the defamation proceeding was issued. Ultimately, Judge McElrea made adverse findings of fact, as a result of evidence given in that hearing, against Cash for Scrap Ltd and confirmed that it continued to operate illegally.

b) Mr Banbrook acted for Cash for Scrap Ltd in both the proceeding issued against TV3 and that issued against the Regional Council. Mr Miles submits that Mr Banbrook engaged in a consistent pattern of conduct designed to keep the regulator and media at bay while his client continued its illegal activity.

c) Mr Banbrook made a representation to the solicitors for TV3 in a letter dated 8 November 2006 which enclosed financial statements purporting to record an actual profit for the six months from 1 April to 30 September 2006 and to forecast an increased profit for the six months to 31 March 2007. Although Mr Banbrook knew that a company reconstruction took place in March 2007, he omitted to inform TV3's solicitor of that. On that basis, the solicitors for TV3 incorrectly continued to rely on the information provided earlier, even though there had been a material change to Cash for Scrap's ability to meet an order for security for costs.

d) Mr Banbrook conduct himself in the litigation as if he were the solicitor for his client, not counsel instructed to act as such. In taking over that role, Mr Banbrook assumed obligations in respect of discovery and inspection of documents which he failed to perform to the requisite standard. Those failures caused additional cost to TV3. Mr Miles submitted it was not open to Mr Banbrook to abdicate his responsibility for discovery and inspection issues in the context of a significant claim in which over $1.4 million had been sought.

[50] Mr Harrison contended that there was no basis on which the Court's quasi-disciplinary jurisdiction ought to be invoked to award costs (let alone indemnity costs) against Mr Banbrook.

[51] Mr Harrison also pointed to four factors to answer the points raised by Mr Miles. They were:

a) The fact that Mr Banbrook was involved as counsel in earlier proceedings in the Environment Court ought not to weigh against him. Mr Harrison drew attention to the specific terms of the alleged defamation and submitted that there had been no findings of serial pollution of waterways by the listed contaminants in earlier proceedings in the Environment Court. He also submitted that it would be "very dangerous" to institute a head of liability for costs in these circumstances which is dependent upon the degree of knowledge that a practitioner has when settling the pleadings. Mr Harrison submitted that the approach for which Mr Miles contended might result in a legal practitioner who was ignorant of factual background being less likely to have an order made against him or her than one who was fully informed. He submitted that it was wrong in principle for the counsel who is best prepared to be the more exposed to liability.

b) Mr Harrison referred to Cooper J's two judgments in the proceedings brought against the Regional Council. He submitted that Mr Miles was in error in contending that the order striking out those proceedings demonstrated that it had no merit. Mr Harrison referred to Cooper J's adjournment of the application following his first judgment to give an opportunity for Cash for Scrap Ltd to re-plead. Re-pleading did not occur because insolvency intervened before the second hearing was to take place.

c) On the issue of alleged misrepresentation over the financial position of the company, *vis a vis* security for costs, Mr Harrison submitted

there was no continuing obligation on Mr Banbrook to inform the solicitors for TV3 of any change in financial position of Cash for Scrap Ltd. Further, he pointed out the precise terms of the letter sent by Mr Banbrook to accompany the financial information provided to the solicitors for TV3. At the end of that letter, Mr Banbrook had invited the solicitors to contact him further if they had any queries on issues of solvency. That, Mr Harrison submitted, put the onus on the solicitors for TV3 to revisit this issue.

d) Mr Harrison submitted that Mr Banbrook could not be criticised in relation to the discovery process. He drew my attention to an affidavit sworn by Mr Moorhead explaining the reason for the lateness in filing a verified list of documents. He drew attention to a change in premises, when the company moved to Tide Road, and to a fire which caused damage to many company records.

[52] Mr Harrison also pointed to what he termed an inability of Mr Banbrook to answer a number of allegations on the grounds that, to do so, may contravene legal professional privilege. In answer to a question from me, Mr Harrison confirmed that no waiver had been sought from the liquidator of the company, as client.

[53] The absence of evidence on certain issues is problematic. I advised counsel at the hearing that if Mr Banbrook's inability to respond on these issues became a critical point I would provide an opportunity for Mr Banbrook to seek a waiver of privilege and to file a further affidavit before any decision was given on the present application. I have decided that further evidence is not required.

[54] The circumstances in which a Court may make an order for compensatory costs against a solicitor or a barrister engaged in proceedings was examined and explained in *Harley v McDonald*. Delivering the advice of the Privy Council, Lord Hope of Craighead identified the relevant principles, in the context of a claim against a barrister sole:

> [49] A costs order against one of its officers is a sanction imposed by the Court. The inherent jurisdiction enables the Court to design its sanction for

> breach of duty in a way that will enable it to provide compensation for the disadvantaged litigant. But a costs order is also punitive. Although it may be expressed in terms which are compensatory, its purpose is to punish the offending practitioner for a failure to fulfil his duty to the Court. In *Myers v Elman* [1940] AC 282 Lord Wright of Richmond described the Court's inherent jurisdiction as to costs in this way at p 319:
>
> > "The underlying principle is that the Court has a right and a duty to supervise the conduct of its solicitors, and visit with penalties any conduct of a solicitor which is of such a nature as to tend to defeat justice in the very cause in which he is engaged professionally . . .. The jurisdiction is not merely punitive but compensatory. The order is for payment of costs thrown away or lost because of the conduct complained of. It is frequently, as in this case, exercised in order to compensate the opposite party in the action."
>
> The jurisdiction is compensatory in that the Court directs its attention to costs that would not have been incurred but for the failure in duty. It is punitive in that the order is directed against the practitioner personally, not the party to the litigation who would otherwise have had to pay the costs.
>
> [50] As a general rule allegations of breach of duty relating to the conduct of the case by a barrister or solicitor with a view to the making of a costs order should be confined strictly to questions which are apt for summary disposal by the Court. Failures to appear, conduct which leads to an otherwise avoidable step in the proceedings or the prolongation of a hearing by gross repetition or extreme slowness in the presentation of evidence or argument are typical examples. The factual basis for the exercise of the jurisdiction in such circumstances is likely to be found in facts which are within judicial knowledge because the relevant events took place in Court or are facts that can easily be verified. Wasting the time of the Court or an abuse of its processes which results in excessive or unnecessary cost to litigants can thus be dealt with summarily on agreed facts or after a brief inquiry if the facts are not all agreed. Scope for the making of a costs order that will compensate as well as penalise is then likely to be found in making an order against the practitioner that will indemnify the opposing litigant against costs incurred as a result of the breach of duty that would otherwise not be recoverable.

[55] Mr Banbrook was not cross-examined. Therefore, I must take his evidence at face value in determining whether costs should be awarded. As Lord Hope made clear in *Harley v McDonald*, an order against an officer of the Court is both compensatory and punitive (at [49]) and the context in which such issues must be determined are confined strictly to those which are for summary disposal by the Court (para [50]).

[56] No counsel should be penalised for acting in an unpopular cause. Mr Banbrook has provided detailed evidence explaining his role in prosecuting the claim, particularly in answering allegations relating to failures to comply with

requests and orders for discovery. Mr Banbrook deposes that he relied on an assessment made by Mr Moorhead to determine the damages claimable.

[57] The evidence of Mr Banbrook, while revealing a laxity in both prosecution of the case and in attending to discovery that can be criticised, is not of a type that would justify any order for costs. In the absence of cross-examination there is no evidence to suggest that Mr Banbrook conducted the case with ill-will towards TV3 or with a deliberate intention (personally) of preventing TV3 from broadcasting things he knew were true. As to the point arising from *Wilkinson*, I do not consider Mr Banbrook can be criticised for not facing up to it, at least until it was raised expressly in TV3's Second Amended Statement of Defence.

[58] I find that TV3 has not made out a case for costs against Mr Banbrook.

Result

[59] For the reasons given:

a) Costs are awarded in favour of TV3 against Cash for Scrap Ltd on a 3B basis (together with a 50% uplift) plus disbursements. Both costs and disbursements are to be fixed by the Registrar.

b) Costs are awarded in favour of TV3 against Ms Down on a 3B basis together, with reasonable disbursements. Costs and disbursements are to be fixed by the Registrar.

c) The application for costs against Mr Banbrook is dismissed.

[60] Having regard to the circumstances in which the substantive claim was brought and prosecuted and to the mix of success and failure on the part of Cash for Scrap Ltd, Ms Down and Mr Banbrook (all of whom were represented by the same counsel at this hearing), I decline to make any order as to costs on the present application.

[61] I thank counsel for their assistance.

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P R Heath J

Delivered at 3.00pm on 17 November 2008