IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2004-404-3903

BETWEEN	SIMUNOVICH FISHERIES LTD & ORS Plaintiffs
AND	TELEVISION NZ LTD & ORS Defendants

Hearing: On the papers

Appearances: M G Keall for plaintiffs
T J Walker for first defendant

Judgment: 15 February 2008

JUDGMENT NO.8 of ALLAN J
COSTS ON JUDGMENTS NO.5, 6 and 7 AS BETWEEN PLAINTIFF AND FIRST DEFENDANT

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[1] In this protracted and complicated defamation proceeding, I have to date delivered seven judgments. For the most part issues relating to costs have been settled by the parties themselves without recourse to the Court, but it was necessary for me to make a costs ruling in respect of judgment No.3, as between the plaintiff and the first to fourth defendants. This present judgment concerns costs in respect of judgments 5, 6 and 7, as between the plaintiff on the one hand and the first defendant on the other. They have been unable to resolve questions both as to liability for, and the quantum of, the costs which should be fixed in terms of those judgments.

[2] In judgment No.5 I ruled against the plaintiffs on their application against the first defendant for discovery of draft scripts for the Assignment Programme which is the subject of the plaintiffs' claim against that defendant.

[3] Judgment No.6 dealt with applications by the defendants against the plaintiffs for further and better discovery of financial and other records. Again the plaintiffs were substantially unsuccessful in their opposition to that application, although minor concessions were made by the defendants.

[4] Judgment No.7 dealt with a number of pleading issues raised by a strike out application filed by the plaintiffs. The plaintiffs and the defendants each enjoyed a measure of success as a result of my conclusions in that judgment. The extent to which the respective parties were successful is an issue for consideration in respect of the present applications for costs.

[5] It is agreed that the primary differences between the parties as to costs arise from:

a) conflicting approaches to categorisation and the allocation of time bands in respect of judgments 5 and 6;

b) a difference of view as to the degree of success enjoyed by the respective parties in judgment No.7;

c) a dispute as to whether the first defendant is entitled to reimbursement of expert witnesses' fees in respect of judgment No.6.

Principles

[6] The principles governing the proper approach of the Court to the award of costs are now well settled. Because counsel for the plaintiff expressly accepts the summary appearing in the memorandum filed by Ms Walker for the first defendant, it is convenient to reproduce that summary here:

a) All matters relating to costs are at the discretion of the Court: r 46(1).

b) The general discretion in r 46(1) is qualified by the specific costs rules in r 47-48G: *Glaister v Amalgamated Dairies Ltd* [2004] 2 NZLR 606.

c) Under r 47 the principles to be applied in the determination of costs include:

   i) the party who fails with respect to a proceeding should pay costs to the party who succeeds (r 47(a));

   ii) an award of costs should reflect the complexity and significance of the proceeding (r 47(b)).

[7] Fundamental aspects of the costs regime which forms part of the Rules are the need to allocate a costs category to a proceeding, and to determine a reasonable time for each step in that proceeding. Categorisation is governed by r 48 which provides:

> **48 Categorisation of proceeding**
>
> (1) For the purposes of rule 47(b), proceedings must be classified as falling within 1 of the following categories:

Category 1 proceedings	Proceedings of a straight-forward nature able to be conducted by counsel considered junior in the High Court:
Category 2 proceedings	Proceedings of average complexity requiring counsel of skill and experience considered average in the High Court:
Category 3 proceedings	Proceedings that because of their complexity or significance require counsel to have special skill and experience in the High Court.

(2) The Court may at any time determine in advance an applicable category in relation to a proceeding. If it does, the category applies to all subsequent determinations of costs in the proceeding unless there are special reasons to the contrary.

[8] Issues relating to the determination of a reasonable time are governed by r 48B which provides:

48B Determination of reasonable time

(1) For the purposes of rule 47(c), a reasonable time for a step in a proceeding is—

(a) The time specified for that step in the Schedule 3; or

(b) If the Schedule 3 does not apply, a time determined by analogy with that schedule; or

(c) If no analogy can usefully be made, the time assessed as likely to be required for the particular step.

(2) In determining what is a reasonable time for a step in a proceeding under subclause (1),—

(a) If a comparatively small amount of time for the particular step is considered reasonable, the determination must be made by reference to band A; or

(b) If a normal amount of time for the particular step is considered reasonable, the determination must be made by reference to band B; or

(c) If a comparatively large amount of time is considered reasonable, the determination must be made by reference to band C.

[9] Categorisation is required in respect of a proceeding as a whole. That is plain from the opening words of r 48(1). Once categorised, a proceeding retains that category in respect of all subsequent determinations of costs in the proceeding unless there are special reasons to the contrary: r 48(2). The plain legislative intention is that each proceeding is to be placed at the outset, or in its early stages, into a category under r 48(1), which will reflect the degree of complexity of the proceeding, and hence the skill and experience required of counsel. But that approach does not apply to time banding under r 48B. The appropriate time band for a particular step may be fixed by the judicial officer dealing with that step. Banding may be different for different steps in the proceeding: see *McLachlan v Mercury Geotherm Ltd (in receivership)* CA 117/05 4 December 2006, at [62]-[64].

[10] The Court of Appeal discussed costs issues in some detail in *Paper Reclaim Ltd v Aotearoa International Ltd* CA70/04 28 November 2007. At [29] it observed that:

> Where such categorisation is done at an early stage, the category applies to all subsequent determinations of costs in the proceeding unless there are special reasons to the contrary: r 48(2). The idea behind early categorisation is that it assists the parties in calculating, as a proceeding goes forward, their potential exposure to costs. In that way, it assists general principle (g) as set out in r 47, namely that "so far as possible the determination of costs should be *predictable* and expeditious."

But in respect of time banding, as discussed at [35]:

> [We] do not accept a blanket approach is desirable, or even possible, under the rules. This is especially the case where a party is arguing for a blanket band C. If a party wants other than band B, that party must demonstrate why 'a normal amount of time for the particular step; would be insufficient: see 4 48B(2).

[11] I mention these somewhat fundamental principles simply because there seems to be a suggestion in memoranda filed by the plaintiff that it is open to the Court to reallocate a different complexity category to a proceeding, by reference to the requirements of a particular step. That is not so. Recategorisation will be rare: r 48(2).

[12] To date this proceeding has not been formally categorised, although all counsel have, at least informally, accepted that it should fall into category 3. I agree.

If any proceeding falls into that category this is it. To date it has proved to be complex, protracted and demanding. Without doubt it is one of the more significant defamation cases seen in this country, quite apart from the difficult legal and factual issues which arise. The quantum of the plaintiffs' claim (of the order of $30 million) also serves to distinguish it as a category 3 proceeding for costs purposes.

Judgment No.5

[13] The issues discussed in this judgment were relatively narrow, but raised matters of some significance for which there was little prior authority. It would not be unfair to characterise the arguments of the parties as somewhat limited in depth. I found it necessary to conduct a certain amount of personal research.

[14] Mr Keall accepts that the first defendant is entitled to costs in respect of its successful defence of the application, but he says that category 2B applies. That submission flies in the face of fundamental aspects of the costs regime, discussed above. Category 3 must apply, but I accept that for time banding purposes band B is appropriate and not band C as is argued for by Ms Walker. Issues in this case were not so time consuming (at least as prepared for and argued by the parties) as to justify band C. I leave it to counsel to carry out the necessary calculations. In the event of dispute the matter may be referred to me by memorandum.

Judgment No.6

[15] In this judgment I dealt with a wide ranging dispute between the plaintiff on the one hand and the defendants on the other, as to the adequacy of the defendants' discovery. The argument related to two primary issues. First, the plaintiffs argued that rather than being required to make complete discovery of all documents (hard copy and electronic), the defendants ought to be required, at least in the first instance, to content themselves with a random audit approach, which is more particularly described in the judgment concerned. I held against the plaintiffs on that point.

[16] The second issue (or rather, more correctly, series of issues) concerned a long list (of some 30 categories) of documents for which the defendants sought further discovery over the plaintiffs' objection.

[17] Mr Keall takes several points. First he says that category 2 is appropriate. For the reasons already discussed I reject that submission. Category 3 applies. Next, he says that it is not appropriate (as Ms Walker for the first defendant contends) that time band C be allocated because there was no disagreement as to legal principle, and the primary burden of the argument in respect of the 30 separate categories fell (by arrangement between defence counsel) on counsel for the second defendant.

[18] In my view band C is appropriate. The history of this litigation, and the wide-ranging character of the discovery dispute justifies that outcome, even though as a matter of convenience defence counsel agreed that at the hearing, counsel for the first defendant would concentrate on matters of legal principle and counsel for the second defendant would attend to matters arising from the separate categories.

[19] I am satisfied that a comparatively large amount of time must necessarily have been involved in taking the relevant steps in respect of the matters resolved in judgment No.6, and that accordingly category 3C is appropriate.

[20] Finally Mr Keall submits that the plaintiffs enjoyed a measure of success in judgment No.6, and consideration ought therefore be given to some overall reduction in the quantum of costs awarded. I do not accept that. While it is true that category 10 was adjourned and that there had already been a degree of discovery in respect of five of the 30 categories, those considerations are insufficient to justify a reduction in the quantum of the costs to which the first defendant is otherwise entitled.

[21] Again I leave it to counsel to calculate the amount of the appropriate award. Counsel may refer to me by memorandum any dispute as to the relevant calculation.

Judgment No.7

[22] Here the parties do agree that category 3C is appropriate, but the parties differ as to the degree of success enjoyed by each in terms of the judgment. In *Packing In Ltd (in liquidation) v Chilcott* (2003) 16 PRNZ 869, the Court of Appeal noted that where in broad terms each party has had similar success, it is unhelpful to focus too closely on which party failed or succeeded: [5]:

> Costs in a case such as this should rather be based on the premise that approximately equal success and failure attended the efforts of both sides. To that starting point should be added issues such as how much time was spent on each transaction or group of transactions in issue, and any other matters which can reasonably be said to bear on the Court's ultimate discretion on the subject of costs. In the end, as in all costs matters, the Court must endeavour to do justice to both sides, bearing in mind all material features of the case.

[23] The plaintiffs accept that the first defendant was successful in respect of:

a) The plaintiffs' application to strike out the first defendant's statement of defence of truth, pleaded in reliance on s 8(3)(b) of the Defamation Act 1992.

b) The plaintiffs' attempt to strike out from the first defendant's statement of defence reference to the speeches of the Hon W Peters in Parliament;

c) The plaintiffs' application to strike out the defence of statutory qualified privilege which appears at paragraphs 42-43 of the first defendant's statement of defence.

[24] But differences arise in respect of the scope of the Court's direction to the first defendant to re-order the very extensive particulars appearing in its statement of defence.

[25] Ms Walker accepts that the plaintiffs enjoyed some success in obtaining directions from the Court which require the first defendant substantially to recast its

particulars, and has accordingly allowed a discount of 20% on the Schedule costs to which the first defendant would otherwise be entitled.

[26] I do not propose to engage in a detailed analysis of the issues upon which I upheld the plaintiffs' complaints. It is sufficient merely to observe that in a number of material respects I have required the first defendant to replead. The 20% discount allowed by Ms Walker is inadequate. I direct that there be a discount of 50%. In my view that properly reflects the strength of the competing arguments, while recognising that the first defendant enjoyed, overall, greater success than the plaintiffs in judgment No.7.

Mr Hagan's account

[27] The first defendant seeks to recover as a disbursement the sum of $4,950 being the amount of Mr Hagen's account, dated 30 November 2006. On behalf of the first defendant it is said that Mr Hagen's account represents the first defendant's one-half share of Mr Hagen's fees for providing expert support in respect of issues relevant to judgment No.7 (and swearing a consequential affidavit), as the forensic accountant retained by the first and second defendant in this litigation. The remaining one-half share has been borne by the second defendant.

[28] The plaintiff objects to the inclusion of this invoice among the first defendant's claimed disbursement for two reasons:

a) There is no settled practice pursuant to which a party may claim expert witnesses' costs in respect of interlocutory arguments;

b) In any event Mr Hagan's invoice lacks sufficient detail to enable the plaintiffs to identify the portion of his time specifically devoted to the application which was the subject of judgment No.7, rather than on-going work related to the wider aspects of the litigation.

[29] The first defendant refers to the judgment of Courtney J in *ABB Ltd v New Zealand Insulators* HC AK CIV 2004-404-4829 18 December 2006, in support of

the proposition that it is appropriate to award as a disbursement the costs of an expert witness in respect of an interlocutory application. That principle does not immediately emerge from Her Honour's judgment. Witness expenses are generally dealt with post-trial. Moreover, there is substance in Mr Keall's complaint that there is insufficient detail in Mr Hagen's invoice to enable the plaintiffs to be satisfied that the whole of the invoice does relate to the matters resolved by judgment No.7. The narration in the invoice simply reads "To professional services relating to further review of discovery matters, to reporting thereon, and to preparation of affidavit as required". Where, as here, the plaintiffs challenge the scope of the work done they are entitled to a break-down of the amount claimed.

[30] Accordingly, I disallow Mr Hagen's account as a disbursement for the purposes of the present application, but the first defendant remains entitled to seek to include the invoice among its disbursements if successful at trial. Nothing I have said in this judgment about the invoice is to be taken as binding the parties in any way in respect of the first defendant's ultimate entitlement to recover the amount of the invoice (in whole or in part) from the plaintiffs.

Result

[31] Costs are to be calculated by the parties on the following basis. Counsel may file memoranda in the event of any further dispute.

a) Costs in respect of judgment No.5 are to be assessed on a 3B basis.

b) Costs in respect of judgment No.6 are to be assessed on a 3C basis.

c) Costs in respect of judgment No.7 are to be assessed on a 3C basis with a 50% discount to reflect the partial success of the plaintiffs.

d) Mr Hagen's account is disallowed as a disbursement at this stage but without prejudice to the first defendant's entitlement to witnesses' expenses and other disbursements if successful at trial.

C J Allan J