

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2005-404-001808

BETWEEN	KORDA MENTHA FORMERLY FERRIER HODGSON First Plaintiff
AND	MICHAEL PETER STIASSNY Second Plaintiff
AND	VINCENT ROSS SIEMER First Defendant
AND	PARAGON SERVICES LIMITED Second Defendant
AND	OGGI ADVERTISING LIMITED Third Defendant
AND	YAHOO! INC Fourth Defendant

Hearing: On the Papers

Judgment: 18 August 2009

JUDGMENT (No.2) OF COOPER J ON COSTS

This judgment was delivered by Justice Cooper on
18 August 2009 at 9.00 a.m., pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors:
McElroys, PO Box 835, Auckland
Copy to:
J G Miles QC, PO Box 4338, Auckland

[1] In my judgment of 23 December 2008 I found for the plaintiffs. I gave judgment to the first plaintiff in respect of its defamation claim and in respect of its claim based on breach of the settlement agreement.

[2] I also gave judgment in favour of the second plaintiff in respect of his defamation claim, awarding general, aggravated and exemplary damages. I granted the plaintiffs a permanent an injunction against the first defendant and, in the circumstances, held that the plaintiffs were entitled to costs.

[3] Counsel for the plaintiffs filed a memorandum in which they sought costs in the sum of \$56,223.

[4] In a minute that I issued on 10 February 2009 I noted that, although Mr Siemer had been debarred from defending the claim he was entitled to be heard on the quantum of the plaintiffs' claim for costs. I directed that he could make submissions by memorandum and he duly did so.

[5] As will be apparent from the background that I set out in my judgment of 23 December 2008, the history of this matter has been characterised by the repeated failures by Mr Siemer to comply with orders made against him in the interlocutory stages of the proceeding. One of the consequences of Mr Siemer's conduct was that by an order made by Potter J on 9 July 2007 Mr Siemer was debarred from defending the present claim.

[6] The plaintiffs' claim for costs is summarised in the following extract from their submissions:

Costs under High Court Amendment Rules (No.2)
2003 in force 1 January 2004 to 31 May 2006

Commencement of proceeding (Item 1 on 3C basis: \$2,150 x 10)	\$21,500
Memorandum for case management conference on 24 April 2006 (Item 4.10 on 3B basis: \$2,150 x 0.4)	\$860
Appearance at case management conference on	\$645

24 April 2006
(Item 4.11 on 3B basis: \$2,150 x 0.3)

Costs under High Court Amendment Rules 2006 in
force 1 June 2006 to 31 January 2009

List of documents for discovery 13 October 2006 (Item 4.5 on 3C basis: \$2,370 x 6)	\$14,220
Production of documents for discovery (Item 4.6 on 3B basis: \$2,370 x 1)	\$2,370
Inspection of documents (Item 4.7 on 3B basis: \$2,370 x 1.5)	\$3,555
Memoranda for case management conferences on 7 June 2006 and 30 November 2006 (Item 4.10 on 3B basis: \$2,370 x 0.4 x 2)	\$1,896
Appearance for case management conference on 7 June 2006 and 30 November 2006 (Item 4.11 on 3B basis: \$2,370 x 0.3 x 2)	\$1,422
Preparation for hearing on 8 October 2008 (Item 8 on 3B basis: \$2,370 x 2)	\$4,740
Appearance for hearing on 8 October 2008 by principal counsel (Item 9.1 on 3B basis: \$2,370 x 1)	\$2,370
Appearance for hearing on 8 October 2008 by second counsel (Item 9.1 [sic] on 3B basis: \$2,370 x 0.5)	\$1,185
<u>Disbursements</u>	
Filing fee on statement of claim	\$1,100
Filing fees on four amended statements of claim	\$360
Total	\$56,223

[7] As can be seen, recovery for all items is based on either category 3B or category 3C. The proceeding was allocated to category 3 for costs purposes by Ellen France J on 5 May 2005. The plaintiffs submit that the complexity and significance of the proceeding required counsel of special skill and experience. Further, counsel note that the commencement of proceeding has been claimed under Band C because of the need to prepare four amended statements of claim, the variety of the ways in which Mr Siemer defamed them and the necessity which arose to file successive amended statements of claim as Mr Siemer continued to defame the plaintiffs after the proceedings had been commenced.

[8] The plaintiffs also claim for discovery under time Band C referring to a large number of documents which had to be produced both in 2005 and in 2006. All other items have been claimed under Band B.

[9] In his memorandum, Mr Siemer has chosen to express himself in terms very critical of the Court, the manner in which the judgment was written and the process that was followed in dealing with the matter in his absence. He leaves out of account the reasons which resulted in the order made by Potter J debaring him from defending the claim.

[10] Only in paragraph 12 of his memorandum does Mr Siemer focus on the question of costs. There, he notes that the hearing was completed by the “morning recess” and records the amount of the costs claimed by the plaintiffs. He then states:

It is respectfully submitted that we all know what justice requires in this respect.

[11] As a whole, Mr Siemer’s submission is most unhelpful on the question of costs. Mr Siemer offers no reason why costs should not follow the event in the normal way, nor does he suggest that the original decision placing the matter in category 3 for costs purposes should be reviewed. Save in respects to which I will shortly refer, the plaintiffs do not seek costs other than in accordance with Schedule 3, and Mr Siemer offers no basis upon which the Court could properly consider reducing the costs otherwise payable under what is now r 14.7. Indeed, none of the circumstances set out in that rule could possibly apply.

[12] Mr Siemer states that the matter was “finished by the morning recess”. In fact, I adjourned at 1.15 p.m., (after starting at the normal time), having heard the plaintiffs’ evidence and submissions. Under Schedule 3 of the Rules, the costs of appearing at the hearing are to be measured in half days. However, in the plaintiffs’ memorandum the costs for the appearance of counsel at the hearing are sought as for a full day. Under items 9.1 and 9.2 (the plaintiffs’ memorandum makes an incorrect reference to item 9.1 instead of 9.2 in respect of the costs of second counsel) the figures payable under these items must be reduced by a half in each case, so as to be \$1,185 and \$592.50 respectively. As a consequence, the time claimed for

preparation must also be halved, to \$2,370. These deductions reduce the plaintiffs' claim by \$4,147.50, to a (rounded) total of \$52,075.

[13] It is very plain from Mr Siemer's memorandum that he disagrees with the outcome of the judgment, and the reasoning in it. However, the costs decision must be made on the basis of the conclusions expressed in the judgment. Effectively, the only issue which arises now is whether the plaintiffs can properly claim costs on a Band C basis in respect of the two items in respect of which they seek to do so. I have already summarised the basis upon which that banding has been claimed, in respect of commencement costs and discovery. Mr Siemer has chosen not to engage with the reasons that the plaintiffs maintain an entitlement to Band C for those items.

[14] In my view, adjusted as above to reflect the requirements of Schedule 3 the claims are reasonable on the basis they have been put.

[15] In the circumstances I order that the plaintiffs are entitled to their costs and disbursements in the sum of \$52,075.