IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-404-008390

UNDER	the Defamation Act 1992
BETWEEN	PETER VERSCHAFFELT Plaintiff
AND	SUNDAY STAR-TIMES NEWSPAPER First Defendant
AND	HOUSING NEW ZEALAND CORPORATION LIMITED Second Defendant

(on the papers)

Counsel: E Orlov for plaintiff
RKP Stewart for first defendant
MA Gilbert for second defendant

Judgment: 29 October 2009 at 4:45 pm

JUDGMENT OF ASSOCIATE JUDGE FAIRE
[on costs]

Solicitors: Dennis Jay Gates, PO Box 222, Whangaparaoa for plaintiff
IzardWeston, PO Box 5348, Wellington for first defendant
Gilbert Walker, PO Box 1595, Auckland for second defendant

[1] On 14 May 2009 I struck out the plaintiff's claim. No appearance was entered on the plaintiff's behalf at that time. The order I made was made in reliance on r 15.2 of the High Court Rules.

[2] Rule 15.2 provides:

> **15.2 Dismissal for want of prosecution**
>
> Any opposite party may apply to have all or part of a proceeding or counterclaim dismissed or stayed, and the court may make such order as it thinks just, if—
>
> (a) the plaintiff fails to prosecute all or part of the plaintiff's proceeding to trial and judgment; or
>
> (b) the defendant fails to prosecute all or part of the defendant's counterclaim to trial and judgment.

[3] In this proceeding the plaintiff pleads six causes of action seeking relief in the form of damages.

[4] At the first case management conference held on 17 February 2009 I fixed the costs category for the proceeding at Category 3. Security for costs was raised as a potential interlocutory application. Counsel for the plaintiff indicated that an application for legal aid had been made. I adjourned the proceeding to 2:15 pm on 26 March 2009 to check the position in relation to legal aid.

[5] Counsel filed a memorandum shortly before the chambers listing of the proceeding. As a result, I issued a minute of 25 March 2009 adjourning the proceeding for further mention at 2:15 pm on 14 May 2009.

[6] On 14 May 2009 no appearance was entered on the plaintiff's behalf. Appearances were entered by other counsel. I then struck the proceeding out based on r 15.2 as earlier indicated. A copy of my minute was sent to Mr Orlov, counsel for the plaintiff, and to his instructing solicitors. I reserved the question of costs and gave directions for the filing of memoranda.

[7] The plaintiff then filed an application to recall the judgment striking out. It was opposed. I was concerned about its content. Directions were given concerning

the filing of an amended application. No amended application was filed. On 14 August 2009 I dismissed the application and reserved costs. I gave directions in relation to the filing of costs in respect of that matter.

[8] Counsel for the first defendant has filed a memorandum seeking costs at a figure less than the standard costs based on Category 3 and Band B in the sum of $6,805.20 which counsel confirms to me are, in fact, the costs charged to the first defendant. Counsel for the second defendant has filed and served a memorandum seeking costs at the figure charged to the second defendant in the sum of $4,404.35, plus disbursements of $90.

[9] No memorandum in answer has been filed on the plaintiff's behalf. The Case Officer who has charge of this file has emailed counsel for the plaintiff. The only response received from counsel for the plaintiff was that he was going to seek leave to withdraw as counsel. No such application, however, has been filed.

Principles applicable in awarding costs

[10] Rule 14.1 gives the Court a discretion to order costs in relation to a step taken in a proceeding. That discretion is generally to be exercised in accordance with the specific Rules contained in rr 14.2-14.10: *Glaister v Amalgamated Dairies Ltd* [2004] 2 NZLR 606 [19]. In *Mansfield Drycleaners Ltd v Quinny's Drycleaning (Dentice Drycleaning Upper Hutt) Ltd* (2002) 16 PRNZ 662 at 668 the Court of Appeal said of the costs regime contained in what is now rr 14.2-14.10 that:

> there is a strong implication that a Court is to apply the regime in the absence of some reason to the contrary

The test to be applied is entirely an objective and not a subjective one. The only reference which it is necessary to make towards actual costs is to be found in r 14.2(f), namely that an award of costs should not exceed the costs incurred by the party claiming the costs: *Glaister v Amalgamated Dairies Ltd* at 610 [14].

[11] Rule 14.2 lists the principles applying to a determination of costs. Subrule (a) affirms the principle that the losing party should pay the costs to the successful party.

Subrule (b) requires that the costs reflect the complexity and significance of the proceedings and refers specifically, therefore, to the categorisation of a proceeding which is provided for in r 14.3. Subrule (c) requires a consideration of each step for which costs are sought and an application of the daily rate having regard to the appropriate band which is to be applied after a consideration of r 14.5(2) and the Third Schedule to the High Court Rules.

[12] Where a proceeding is withdrawn or struck out the position which arises on the filing of a notice of discontinuance will often apply by analogy. That is set out in r 15.23 of the High Court Rules and applies with the result that the plaintiff must pay the costs to the defendant of an incidental to the proceeding up to and including the order that is made unless, of course, the Court orders otherwise. The Court usually does not speculate on the merits of the case. That is because it has not heard the case. The reasonableness of the stance of both parties has to be considered: *Kroma Colour Prints v Tridonicatco New Zealand Ltd* (2008) 18 PRNZ 973 at 975.

[13] The process that I must now embark upon is to consider the actual steps taken in terms of r 14.5 and the Third Schedule. Counsel have identified, in their respective memoranda, that that involves considering:

Item 2 The commencement of the defence

Item 3 Appearances at a case management conference on 17 February 2009

Appearances at a mention hearing on 14 May 2009.

[14] Were it not for r 14.2(f) which sets out one of the general principles applying in the determination of costs, namely that an award of costs should not exceed the costs incurred by the party claiming costs, the allowance for the steps that I have identified which would be justified for the first defendant total $7,347, based on the Category 3 designation. In the case of the second defendant, the costs on the same basis amount to $5,925.

[15] I see no reason for departing from the costs category or for changing the steps that were taken and the allowance for them on a Band B basis. That being the case

the question is how to deal with the fact that what has been charged to the clients is less than the entitlement under the costs regime which now applies under the High Court Rules. I conclude that the wording of r 14.2(f) permits me, in these circumstances, to award the actual costs of both first and second defendants, because same do not exceed the allowance which is otherwise justified pursuant to Category 3 Band B of the Second and Third Schedules to the High Court Rules.

[16] Accordingly I order:

a) The plaintiff shall pay the first defendant's costs in the sum of $6,805.20 together with disbursements as fixed by the Registrar;

b) The plaintiff shall pay the second defendant's costs in the sum of $4,404.25 together with disbursements as fixed by the Registrar.

JA Faire
Associate Judge