

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

**CIV 2009-404-006077**

BETWEEN

LOIZOS MICHAELS  
Plaintiff

AND

APN NEW ZEALAND LIMITED  
Defendant

Hearing: on papers

Counsel: D C S Reid for plaintiff  
A E Ferguson for defendant

Judgment: 18 May 2010 at 4:00pm

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**COSTS JUDGMENT OF ASSOCIATE JUDGE ABBOTT**

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*This judgment was delivered by me on 18 May 2010 at 4:00pm,  
pursuant to Rule 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar*

Solicitors:  
D C S Reid Solicitor, 1/1 Ruskin Street, Parnell, Auckland 1052 for plaintiff  
Wilson Harle, PO Box 4539, Auckland 1140 for defendant

[1] This claim for damages for alleged defamation was struck out on 29 March 2010 for failure to file an amended claim with proper particulars of the alleged defamation. The defendant now seeks indemnity costs of \$7,044.57, together with the costs of making this application. The defendant also seeks an order for payment of disbursements it has incurred.

[2] The defendant says that it should be awarded indemnity costs because the plaintiff brought the claim for an ulterior purpose, and unreasonably increased the defendant's costs by its conduct. The defendant contends that the plaintiff issued the proceeding to prevent the defendant from continuing to publish material about an investigation of the plaintiff and his business activities by the Serious Fraud Office, and without any intention to pursue the claim. It contends that the plaintiff then caused it unnecessarily to incur costs in its defence, by its failure to provide proper pleadings and prosecute its claim in a timely manner.

[3] The plaintiff was directed to respond to the defendant's application by 27 April 2010. He has not done so.

## **Principles**

[4] The court's power to award indemnity costs is found in r 14.6(4) of the High Court Rules and in the court's inherent jurisdiction.

[5] The defendant relies on the following provisions of r 14.6(4) in particular:

### **14.6 Increased costs and indemnity costs**

- (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; 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.

[6] The general principles on which the court approaches an application for indemnity costs were reviewed in *Bradbury v Westpac Banking Corporation*.<sup>1</sup> In summary they are that the court can award indemnity costs where the justice of the case requires. The court is not limited in the matters it can take into account, but matters include commencing or continuing a proceeding for an ulterior motive, and unduly prolonging a claim by making or persisting with groundless allegations.

[7] The defendant also relies on s 45 of the Defamation Act 1992 which reads:

**45 Proceedings deemed to be vexatious if no intention to proceed to trial**

The commencement of proceedings to recover damages for defamation shall be deemed to be a vexatious proceeding if, when those proceedings are commenced, the plaintiff has no intention of proceeding to trial.

**Ulterior motive**

[8] The plaintiff issued this proceeding on 18 September 2009, claiming that he had been defamed in articles appearing in the defendant's publication *The New Zealand Herald* on 29 August 2009, and 5 and 12 September 2009. The articles were about the plaintiff's business activities and an investigation of the plaintiff by the Serious Fraud Office.

[9] The plaintiff, through his solicitor, acknowledged that the proceeding had been prepared hurriedly, in anticipation of a further publication. This acknowledgment came in a letter responding to a detailed letter from the defendant's solicitors the previous day, pointing out a number of deficiencies in the plaintiff's pleading which made it untenable, and inviting the plaintiff to discontinue.

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<sup>1</sup> *Bradbury v Westpac Banking Corporation* <sup>1</sup>HC Auckland CIV-2006-404-1328, 23 May 2008.

Although the plaintiff's solicitor marked his letter as being without prejudice, it does not qualify as a without prejudice communication.

[10] It is a reasonable inference from this acknowledgment that the proceeding was issued for the purpose of preventing any further publication. Further support for this inference can be found in the plaintiff's failure to prosecute his claim assiduously since that time, in face of the efforts made by the defendant to obtain a clear understanding of the allegations.

[11] There is clear legislative intent to be found in the Defamation Act 1992 that defamation proceedings are not to be used unreasonably. This intent can be found in s 43(2) of the Act which provides:

**43 Claims for damages**

....

(2) In any proceedings for defamation, where—

- (a) Judgment is given in favour of the plaintiff; and
- (b) The amount of damages awarded to the plaintiff is less than the amount claimed; and
- (c) In the opinion of the Judge, the damages claimed are grossly excessive,—

the Court shall award the defendant by whom the damages are payable the solicitor and client costs of the defendant in the proceedings.

[12] I am satisfied on the evidence before the court that this proceeding comes within the provisions of s 45 as a vexatious proceeding brought purely to stifle further publication and without intention of proceeding to trial. This also brings it within the terms of r 14.6(4)(a).

**Improper conduct**

[13] The defendant contends that the plaintiff caused it to incur additional and unnecessary legal costs by the manner of conduct of the claim. I am satisfied that the following conduct is established:

- a) The statement of claim contained a number of deficiencies. As a result, the defendant was put to the expense of writing to the plaintiff setting out the deficiencies, including the fact that the claim was untenable as the articles complained of were incapable of bearing the defamatory meanings pleaded. In that letter, the plaintiff was also invited to discontinue the claim with no issue as to costs.
- b) In response to that letter, the plaintiff requested further time to consider amending the statement of claim or filing a discontinuance. As a result of that request, the defendant was put to the expense of drafting a consent memorandum extending the time for filing a statement of defence or strike out application.
- c) Despite several requests to do so, the plaintiff failed to approve the draft consent memorandum in a timely manner. It was only after the defendant had incurred additional costs in writing to the plaintiff, advising the plaintiff that if he did not agree to the consent memorandum the defendant would commence drafting a statement of defence or application to strike out the statement of claim, that the plaintiff signed the memorandum and the timetable orders were made.
- d) The amended statement of claim was not properly particularised. As a result, the defendant was put to the expense of requesting further and better particulars. The defendant also wrote to the plaintiff requesting evidence of the plaintiff's ability to pay an award of costs.
- e) In his memorandum for the case management conference on 26 January 2010, the plaintiff disputed that the particulars requested were needed. Accordingly, the defendant had to file a further memorandum to identify the further particulars sought to enable the court to fully consider the issue.
- f) In his memorandum for the case management conference on 26 January 2010, the plaintiff also requested a further three months to

file an amended statement of claim to enable him to apply for legal aid.

- g) On the morning of the case management conference, the solicitor for the plaintiff advised the solicitors for the defendant that he no longer had instructions from the plaintiff and the plaintiff intended to instruct new counsel. The plaintiff did not appear. The conference went ahead but the request for further particulars could not be resolved until new counsel had been instructed. The conference was adjourned to 25 February 2010 to enable the plaintiff to instruct new counsel.
- h) The plaintiff failed to instruct new counsel by 25 February 2010 and did not advise the defendant or the court as to whether he would appear at the conference. As a result, the defendant was put to the expense of corresponding with the court and former and proposed counsel as to whether the conference would proceed. The conference did proceed, and unless orders were made, requiring the plaintiff to file an amended statement of claim addressing the further particulars sought by 19 March 2010.
- i) The plaintiff failed to file an amended statement of claim or discontinue the proceeding by 19 March 2010. This required the defendant to file a memorandum seeking an order that the proceeding be stuck out.

[14] Ordinarily I would regard a failure to conduct litigation in a timely manner as a matter for increased costs. However, in this case it supports the view that the plaintiff brought the proceeding for an ulterior motive. I consider that the facts as set out above bring this claim within the provisions of r 14.6(4)(b) and (f).

### **Quantum**

[15] The defendant has produced invoices in support of its claim (reduced to remove attendances in relation to a related but separate matter). I am satisfied from

the narrative that the work charge was necessarily incurred. The costs sought are approximately 25% over standard scale costs. I accept that they are reasonable.

### **Decision**

[16] I accept that this is an appropriate case for an award of indemnity costs. I order the plaintiffs to pay the defendant the sum of \$7,044.57, together with disbursements of \$90 (filing fee for a statement of defence). The defendant has not given details of the actual costs of preparation of its memorandum in support of its application for costs. I award the defendant costs of \$640 for preparation of its memorandum (in accordance with item 4.10 of schedule 3 to the High Court Rules calculated on a scale 2B basis).

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**Associate Judge Abbott**