IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2010-404-003038
[2012] NZHC 1211

BETWEEN	JOSEPH FRANCIS KARAM Plaintiff
AND	KENT PARKER First Defendant
AND	VIC PURKISS Second Defendant

Judgment: 31 May 2012

RESERVED JUDGMENT OF ASSOCIATE JUDGE SARGISSON
(Costs application)

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*This judgment was delivered by me on **31May 2012** at **3 pm** pursuant to Rule 11.5 of the High Court Rules*

Registrar/Deputy Registrar

Date .....

Solicitors:
Duncan Cotterill, Level 1, PO Box 5326, Auckland

[1] There are outstanding questions as to costs on the plaintiff's largely successful application for an order to strike out the statements of defence and on the defendants' unsuccessful application to strike out the statement of claim.

[2] This judgment deals with those questions.

Background

[3] In my judgment dated 29 July 2011 I gave a preliminary indication that scale 2B costs might be the appropriate basis for an award of costs in favour of the plaintiff.

[4] There is no dispute that the plaintiff is entitled to be treated as the successful party on both applications (which were heard at the same sitting) in accordance with r 14.2(a)[1]and that costs should follow the event in the usual way under the statutory costs regime. Nor is there any dispute that, ordinarily, costs could be expected to be awarded on a 2B basis. However, the plaintiff seeks that the court exercise its discretion to order increased costs pursuant to r 14.6(1).

[5] Relevantly, r 14.6(1) states:

> (1) Despite rules 14.2 to 14.5 the court may make an order –
>
> (a) increasing costs **otherwise** payable under those rules (increased costs)
>
> (emphasis added)

[6] The plaintiff relies on the specific grounds set out in r 14.6(3)(b)(i) and (ii). Sub-clause 3(b)(i) and sub-clause 3(b)(ii) provide:

> (3) The court may order a party to pay increased costs if—
>
> …

[1] Rule 14.2(a) states the general principle that the party who fails with respect to a proceeding on an interlocutory application should pay costs to the party who succeeds.

(b) the party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in it by—

(i) failing to comply with these rules or with a direction of the court; or

(ii) taking or pursuing an unnecessary step or an argument that lacks merit;

...

[7] Counsel for the plaintiff submits that the defendants breached:

a) Sub-clause (3)(b)(i) in that their lengthy statement of defence (some 52 pages) was convoluted and time and time again blatantly breached the basic rules of pleading; and

b) Sub-clause 3(b)(ii) in that their opposition to the plaintiff's application and their own counter application entirely lacked merit.

[8] Counsel points out that the plaintiff on a number of occasions invited the defendants to rectify the deficiencies in their statement of defence. He contends that the complexity of the plaintiff's strike out application and extra preparation and hearing time was caused by the lengthy, convoluted pleading in the statement of defence.

[9] Counsel further submits that these factors demonstrate that there was a failure to act reasonably. Such failure, counsel contends, contributed to the time and expense of the proceeding and the one day of court hearing time that was "wasted" and would not have been necessary had the defendants' pleadings complied with the relevant High Court Rules and provisions in the Defamation Act 1992. The plaintiff submits an "across the board" increase of 50% is warranted in respect of:

a) The preparation of the application to strike out;

b) The preparation of the opposition to the defendants' application to strike out; and

c) Preparation for hearing and hearing from lead counsel.

[10] Alternatively, the plaintiff seeks a Band C allocation in respect of just one step, namely the preparation and filing of the plaintiff's application, increasing the time allocation from 0.6 days to 2 days.

[11] The defendants resist an order for increased costs. Essentially they say the plaintiff's claim could have been drafted in a way that made it easier for them to respond to and that it was not until they received the plaintiff's submissions and sat through the hearing that they realised how complicated it is to respond to a defamation proceeding. They are now proceeding with the help of competent counsel, having expended all of their "initial resources" on representation that did not assist greatly.

Legal Principles

[12] The steps the court is to take when considering whether to order increased costs are set out in the Court of Appeal's decision in *Holdfast NZ Ltd v Selleys Pty Ltd*.[2] In summary:

a) The first step is to categorise the proceeding in terms of r 14.3 and specifically whether it is a category 1, 2 or 3 proceeding.

b) The second step is to work out a reasonable time for each step in the proceeding, applying the appropriate time band under r 14.5. Band C is considered appropriate where a "comparatively large amount of time is considered reasonable" for the particular step. It is possible to exceed the time allowed by Band C for a particular step where the claimant can show that a step in the proceeding was such that the time required would substantially exceed the time allowed under that band: r 14(3)(a).

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2 *Holdfast NZ Ltd v Selley Pty Ltd* (2005) 17 PRNZ 879 (CA) at [43]-[48].

c) The third step is to consider whether there are additional grounds for increasing costs as set out in r 14.6(3)(b) all of which depend on a finding that the opposing party has "contributed unreasonably to the time or expense of the proceeding or step" in the proceeding.

d) The final step requires the court to step back and look at the costs award that a claimant would be entitled to at this point. The Court of Appeal said that any increase above 50% on scale costs produced in the above steps was unlikely. The reason is that the daily recovery rate is two-thirds of the daily rate considered reasonable (in theory at least) under the statutory costs regime.

[13] Counsel for the plaintiff submits that a costs award of $14,714.00 is justified on a "third step" basis or alternatively $13,348 on a "second step" basis. This compares, counsel submits, with 2B costs of $10,716 assuming the appearance by second counsel is certified.

Discussion

[14] Though the two applications were dealt with at the same sitting each requires consideration for the purpose of determining costs. I turn first to the defendant's application, and whether it was so devoid of merit as to warrant a finding of unreasonableness under r 14.6(3)(b).

[15] I accept, as the defendants contend, that increased costs are not warranted. I am satisfied that costs should be assessed on a 2B basis as would be the case ordinarily.

[16] My reasons can be stated briefly:

a) The defendants' application proceeded on two main grounds;

b) The first ground turned essentially on whether it is the persons placing posts on a private site who are alone in their role as the publishers or whether the administrator of the site is also a publisher;

c) The second albeit misconceived ground relied on an English case that turned on whether or not there was a substantial tort that occurred in the United Kingdom as opposed to another jurisdiction;

d) Neither ground was raised irresponsibly or unreasonably. Both warranted careful consideration – the first especially.

[17] I turn next to the plaintiff's application.

[18] Plainly the plaintiff has been put to extra time and cost in this proceeding because of:

a) The defendants' lengthy pleading which I have found to breach time and again the requirements of pleading; and

b) The defendant's failure to sort out their pleading, in the face of a number of opportunities to do so, leaving the plaintiff with no option but to resort to a formal application.

[19] I accept in these circumstances that the defendants have contributed unreasonably to the time or expense of the proceeding and that there should be some recognition of that.[3] I also accept the plaintiff's contention that court hearing time was "wasted" dealing with an application for which court time would not have been required had there been a more conscientious approach to compliance with the rules of pleading and the requirements of the Defamation Act. I am satisfied that subclause 3(b) conduct is made out and that the normal response of providing an uplift on scale costs is appropriate. There is a qualification however. The hearing time spent on the application was not a full day. Part of the one day hearing was spent on the defendants' application. There should be proper allowance for that.

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[3] It is only to the extent that the failure to act reasonably has contributed to the time or expense of the proceeding that any percentage uplift from scale could be justified: *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2010] NZCA 400, (2010) 24 NZTC 24,500 at [165].

Result

[20] The result is that I am satisfied the following 2B scale costs are appropriate, with three uplifts as set out below:

a) Plaintiff's application*:*

i)	4.12	Preparing and filing interlocutory application and supporting affidavits plus 50% uplift	$1,692.00
ii)	4.14	Preparation for hearing interlocutory – quarter days x 3 plus 50% uplift	$2,115.00
iii)	4.15	Appearance at hearing – quarter day x 3 plus 50% uplift	$2,115.00
		Total	$5,922.00

b) Defendants' application

i)	4.13	Preparing and filing opposition to interlocutory application	$1,128.00
ii)	4.14	Preparation for hearing – quarter days x 1	$470.00
iii)	4.15	Appearance at hearing – quarter days x 1	$470.00
		Total	$2,068.00

[21] I have decided not to certify second counsel's appearance at the hearing. Instead, I adopt the usual practice in interlocutory matters of allowing for principal counsel. I acknowledge that the plaintiff should not have to navigate through the difficulties that are so often manifest when lay persons are self represented and that the rules expect the same measure of compliance whether or not a lay defendant is

represented. I do not condone the defendants' conduct of their defence or suggest that the plaintiff's decision to have second counsel was not reasonable. However, such circumstances do not warrant automatic certification of second counsel and I am not satisfied that there is sufficient reason to treat this application as one that is so out of the ordinary as to warrant certification for second counsel.

[22] I also do not allow for preparation of the bundle. As the application did proceed to a hearing, and as preparation for a hearing includes preparation of bundles of documents and authorities, the award I have made for item 4.14 of the plaintiff's application already covers this part of the claim.

Result

[23] There will be an order for costs against the defendants in favour of the plaintiff on a 2B basis in the sum of $7,990.00. I also allow the disbursements claimed, as follows:

a) Airfares $392.00; and

b) Taxies $212.17.

[24] In addition, the plaintiff is entitled to the filing fee on his application and documents in opposition, as fixed by the Registrar.

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Associate Judge Sargisson