

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

**CIV-2013-404-002046
[2013] NZHC 1397**

UNDER the Defamation Act 1992

IN THE MATTER OF an interlocutory application under Rules
7.23 and 7.53 of the High Court Rules

BETWEEN JOHN CHUNG CHING CHEN
Plaintiff

AND JOHN NORMAN CARTER
First Defendant

ROGER BERNARD APPERLEY
Second Defendant

DAVID LLOYD BURGESS
Third Defendant

PETER FRANCIS
Fourth Defendant

JOHN LEONARD MORRIS
Fifth Defendant

SALLY LEONARD SYNNOTT
Sixth Defendant

CROCKERS BODY CORPORATE
MANAGEMENT LIMITED
Seventh Defendant

ROCHELLE WILLIAMS
Eighth Defendant

Judgment: 12 June 2013

JUDGMENT (ON THE PAPERS) AS TO COSTS OF COLLINS J

[1] On 3 May 2013 I delivered my reasons for setting aside an earlier injunction that had been issued by Keane J.

[2] In paragraph [55] of my judgment I said that the defendants were entitled to costs. In expressing this conclusion I also recorded that I was inclined to award costs on a scale 2B basis and that if the parties were unable to reach agreement on costs they should file memoranda explaining their positions.

[3] The defendants' memorandum on costs was filed on 17 May 2013. The plaintiff's memorandum in reply was filed on 24 May 2013. The parties' memoranda were referred to me on 7 June 2013.

[4] The defendants seek either:

- (1) an award of costs calculated on a scale 2B basis with a 100 per cent uplift; or
- (2) indemnity costs.

[5] The plaintiff opposes any increase in costs above a scale 2B calculation.

[6] After careful reflection I have decided that the defendants are entitled to costs on a scale 2B basis without any uplift.

[7] My reasons for reaching this conclusion can be distilled to the following five grounds:

- (1) In relation to the claim for indemnity costs, I am satisfied that the plaintiff did not commence his proceeding:¹
 - (a) for an unacceptable reason; or
 - (b) in wilful disregard of known facts or clearly established law; or

¹ *Bradbury v Westpac Banking Corporation* [2009] 3 NZLR 400 (CA) at [29].

- (c) knowing that his proceeding was based upon unjustified allegations.
- (2) I am also satisfied the plaintiff did not conduct himself in any way that justifies an increase in costs in the way described in r 14.6(3) of the High Court Rules.
- (3) It will be apparent that I believe the plaintiff was wrong to have sought an injunction but I attribute his error to a lack of appreciation of the merits of the defendants' grounds for opposing his application. The plaintiff's misguided approach to the application for an injunction was substantially due to his "heat of the moment" reaction to what he thought were defamatory comments made about him by the defendants.
- (4) While I am concerned that an important matter was not disclosed to Keane J, I accept the assurances of counsel for the plaintiff that the omission was an inadvertent clerical error.
- (5) I also accept the suggestion from Mr Miles QC that the case was unlikely to proceed to trial was not a concession that engaged s 45 of the Defamation Act 1992.

[8] In these circumstances, I order that the defendants are entitled to costs on a scale 2B basis in accordance with the calculations attached to the memoranda from counsel for the defendants.

D B Collins J

Solicitors:
Minter Ellison Rudd Watts, Auckland for Plaintiff
DAC Beachcroft New Zealand Limited – Wellington Branch, Wellington for Defendants