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

**CIV 2007-485-2212**
**[2015] NZHC 327**

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| BETWEEN | ROBERT ALEXANDER MOODIE<br>Plaintiff |
| AND | ELIZABETH GRACE STRACHAN<br>Defendant |

In Chambers: On papers

Judgment: 2 March 2015

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**JUDGMENT OF THE HON JUSTICE KÓS**
**(Costs on stay of proceeding)**

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[1] Dr Moodie practised as a solicitor in the town of Feilding. Ms Strachan was for a time a solicitor employed by him. That employment relationship ended unhappily and in litigation in the Employment Court. Remarks regarding Dr Moodie's professional conduct as a solicitor were published in the 17 March 2007 issue of *The Listener*. The article, under the title "Moodie Blues", was informed by the comments of two particular sources: Mr Tony Ellis, a barrister practising in Wellington, and Ms Strachan.

[2] That same year, 2007, Dr Moodie commenced defamation proceedings against APN Specialist Publications NZ Limited (publishers of *The Listener*), Mr Ellis, and Ms Strachan.

[3] In 2009, a settlement was reached between Dr Moodie, Mr Ellis and APN. This left the proceeding live against Ms Strachan only. Ostensibly on the basis of two causes of action. However, the settlement with Mr Ellis and APN barred Dr

Moodie from pursuing the second cause of action against Ms Strachan, pursuant to the joint tortfeasor rule.[1] This left only the first cause of action alive.

[4] Progress of this proceeding has been profoundly unsatisfactory. It has been attended now by nine interlocutory judgments (by six different Judges).[2] A number of the judgments of this Court have expressed concern at the compilation of cost without the achievement of meaningful progress. Delays have not been wholly of the plaintiff's making, however.[3] Young J described the delays in the following terms:[4]

> [65] The delay in this case has been unacceptable, now almost seven years. Part of the responsibility falls to both the litigants in agreeing a "stay" while both appealed interlocutory orders (some three years). However, the delay is not such that currently it is an abuse of process to allow the case to continue. Dr Moodie will, however, understand that this litigation cannot go on forever. As plaintiff, it is his responsibility to get the case now to a speedy hearing. Further, unreasonable delay could justify further consideration as to whether this litigation is an abuse of process.

[5] Trial was due to begin on 1 December 2014. On 9 September 2014, the defendant filed an interlocutory application for a stay of proceeding; alternatively, for further security for costs.

[6] In a memorandum filed on 19 September 2014, Dr Moodie consented to stay. He explained his consent as being motivated by his ill health causing serious mobility, memory, concentration and speech issues. He also points to his age (76 years) as reason to terminate the proceeding. In that memorandum, he sought leave to be excused from the hearing on 29 September 2014 on the basis of those grounds.

[7] Unstated, but also problematically, Dr Moodie faced imminent bankruptcy. That was due to his failure to meet judgment given in Ms Strachan's favour in the

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1 *Moodie v Strachan* HC Wellington CIV-2007-485-2212, 21 May 2010.

2 *Moodie v Ellis* HC Wellington CIV-2007-485-2212, 13 November 2008; *Moodie v Ellis* HC Wellington CIV-2007-485-2212, 18 March 2009; *Moodie v Ellis* HC Wellington CIV-2007-485-2212, 19 March 2009; *Moodie v Ellis* HC Wellington CIV-2007-485-2212, 28 October 2009; *Moodie v Strachan* HC Wellington CIV-2007-485-2212, 21 May 2010; *Moodie v Strachan* HC Wellington CIV-2007-485-2212, 26 August 2010; *Moodie v Strachan* [2013] NZHC 1394, 12 June 2013; *Moodie v Strachan* [2013] NZHC 2951, 8 November 2013; *Moodie v Strachan* [2014] NZHC 1090, 21 May 2014.

3 See for example, *Moodie v Strachan* [2014] NZHC 1090 at [3] and [12].

4 *Moodie v Strachan* [2013] NZHC 1394.

Employment Court. The application for renewed security for costs was, in the circumstances, bound to be granted. In those same circumstances, he would be unable to satisfy such an order.

[8] On 29 September 2014 Collins J granted the stay application. The stay is permanent and unconditional. This proceeding is effectively at an end.

[9] Dr Moodie was declared bankrupt on 11 December 2014.[5]

[10] It now falls to me to determine costs.

**Submissions**

[11] Counsel for Ms Strachan submits that an order for costs ought to be made in favour of Ms Strachan in the amount of $42,988, being based on the original costs categorisation, category 2, and band B.

[12] Dr Moodie disagrees. He submits that the Court ought to exercise its discretion in awarding costs in this proceeding, and to let them lie where they fall. He submits that Ms Strachan's conduct was the genesis of this proceeding, and that this fact debars her from an award of costs. He also says that, although she was deemed a joint tortfeasor, her refusal to back away from her comments contravenes the settlement agreement.

[13] In reply counsel for Ms Strachan says that the settlement in the initial proceeding was driven by economic considerations, whereas Ms Strachan genuinely believes in the truth of what she said to Ms Black, the *Listener* journalist. Counsel submits that Dr Moodie's perception of the case is slanted by his personal involvement. No legal basis was advanced why costs ought to lie where they fall. Counsel submits that costs should be awarded in Ms Strachan's favour, in full. Dr Moodie had not disputed any of the specific costs elements claimed by Ms Strachan.

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5 *Strachan v Moodie* [2014] NZHC 3167.

**Discussion**

[14] Rule 15.23 deals with costs on discontinuance. It includes a presumption that a plaintiff who discontinues a proceeding must pay costs to the defendant up to and including the date of discontinuance. There is no explicit rule in relation to the consequence of a permanent stay, as opposed to discontinuance. However, the rule has been applied by analogy in situations where a plaintiff has elected not to continue proceeding (i.e. has abandoned it without formal discontinuance).[6] It has also been applied in other cases where a plaintiff or applicant has effectively failed to proceed.[7] The approach taken in r 15.23 is plainly applicable in this situation, where the plaintiff has consented to permanent stay of his own proceeding.

[15] Displacement of the usual rule (that a discontinuing plaintiff pay costs) will normally depend on a summary merits assessment where the Court is able to say, in the absence of full trial, that:

(a) Some action on the part of the defendant obviates the necessity for proceeding, thus vindicating the plaintiff's action. An obvious example is where the defendant effectively satisfies the claim by payment, or some other action – although without filing formal confession to judgment.[8] Examples include *Carmel College Auckland Ltd v North Shore City Council*,[9] *Whiting v Earthquake Commission*[10] and *Ryde v The Earthquake Commission.*[11]

(b) Some event beyond the direct control of the parties obviates the continued necessity for proceedings, again vindicating the issue of the proceeding.[12]

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6 *Scaffold Shore Load Ltd v Gill & Gundry Concrete Construction* Ltd HC Auckland CIV-2006-404-1207, 30 June 2006.

7 See for example *Harrison v Harrison* HC Wellington CIV-2005-485-2673, 2 February 2007 and *Clark v Police* HC Wellington CIV-2005-485-245, 9 March 2006.

8 See r 15.16 (admission of cause of action).

9 *Carmel College Auckland Ltd v North Shore City Council* HC Auckland CIV-2007-404-5894, 20 January 2009.

10 *Whiting v Earthquake Commission* [2014] NZHC 1736.

11 *Ryde & Anor v The Earthquake Commission* [2014] NZHC 2763.

12 See for example *Body Corporate 81381 v Trebe NZ Ltd (in liquidation)* HC Wellington CIV-2003-485-332, 10 September 2003.

(c) Some other special reason exists why it is just and equitable that the plaintiff not pay costs to the defendant.[13]

[16] In each of these three situations the Court has a discretion, by reason of rr 14.1 and 15.23, to mitigate costs payable, to order that no costs are payable, or even to direct that the defendant contribute to the plaintiff's costs. In the first two instances, the plaintiff has been vindicated by events. The prospect of ordering costs in favour of the plaintiff is probably highest in the first instance and lowest in the third.

[17] Court of Appeal authority makes clear that the Court will not consider the merits of the parties' respective cases unless so obvious on summary inspection that they should influence the cost outcomes.[14] Questions that are relevant for the Court to ask in this context include the following:[15] Was it reasonable to bring this proceeding? Was it reasonable for the defendant to defend it? Why was the proceeding discontinued? Are the merits so obvious that they should influence the costs outcome? Does the outcome represent vindication of the plaintiff's commencement of proceeding? Has the plaintiff displaced the r 15.23 presumption?

[18] In this case, it was reasonable for Dr Moodie to bring the proceeding. As Young J noted[16] that the defamatory comments were serious, and went to the heart of Dr Moodie's professional reputation. Young J acknowledged that Dr Moodie was entitled to the opportunity to bring proceedings to vindicate his reputation.[17] Equally, it was reasonable for Ms Strachan to defend the proceeding. This Court cannot say on a summary basis, without further evidence, that the defences advanced to the claim were bound to fail. The reasons for the case being discontinued are set out at [7] and [8] of this judgment. In short, Dr Moodie lost the physical, mental and economic capacity to maintain the proceedings further. The quite extraordinary delays that have attended this case, which Dr Moodie must take primary responsibility for as plaintiff, have doubtless contributed to that outcome. The merits

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13 See for example *Vulcan Steel Ltd v McDermott* [2013] NZHC 3232.
14 *Kroma Colour Prints Ltd v Tridonicatco NZ Ltd* [2008] NZCA 150, (2008) 18 PRNZ 973.
15 *Ryde v Earthquake Commission* [2014] NZHC 26763.
16 *Moodie v Strachan* [2013] NZHC 1394 at [63].
17 At [68].

of this case are not so obvious that they should influence the costs outcome. Discontinuance in no sense represents vindication of the plaintiff's commencement of the proceeding. It has simply ground to a halt under a combination of its own weight and inertia, and the plaintiff's want of energy and capacity. Neither of the three considerations set out at [15] apply here. There has been no displacement of the r 15.23 presumption, and the plaintiff must pay the defendant's cost in the usual way.

**Quantum**

[19] No challenge is made by Dr Moodie to Ms Strachan's schedule. No basis for doing so is apparent to me in any event. The sum claimed, $42,988, is a net costs sum. No disbursements are claimed, and none therefore are allowed.

**Result**

[20] The defendant will have costs from the plaintiff of $42,988, as sought.

**Stephen Kós J**

Solicitors:
Izard Weston, Wellington for Defendant