IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

CIV-2014-412-000167
[2015] NZHC 1920

BETWEEN	PIETER MATTHEW VAN DE KLUNDERT Plaintiff
AND	PAULA GAEL CLAPPERTON Defendant

Submissions filed: 21 May 2105 (Defendant); 16 June 2015 (Plaintiff)

Appearances: L A Anderson for the Plaintiff
G Mason for the Defendant

Judgment: 13 August 2015

JUDGMENT OF ASSOCIATE JUDGE OSBORNE
as to costs

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[1] The defendant, Ms Clapperton, seeks an order of costs and disbursements upon the plaintiff's (Mr van de Klundert) discontinuance of this defamation proceeding. Rule 15.23 High Court Rules applies so that the plaintiff must pay costs of and incidental to the proceeding unless the Court otherwise orders.

[2] Mr van de Klundert commenced this proceeding by seeking summary judgment on a claim for a declaration that he had been defamed, under s 24 Defamation Act 1992. In a judgment delivered on 10 March 2015, I dismissed this application.[1] On 20 April 2015, Mr van de Klundert discontinued this proceeding.

[3] The only remaining issues between the parties relate to costs. This Court must establish, first whether the r 15.23 presumption should stand, and secondly, the appropriate category of proceedings for costs purposes.

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1 *Van de Klundert v Clapperton* [2015] NZHC 425.

Ms Clapperton's application

[4] Mr Mason, for Ms Clapperton, submits that there should be an award of costs on a 2C basis, (Category 2 pursuant to r 14.3 High Court Rules, and band B pursuant to r 14.5 High Court Rules), or alternatively the subject of increased costs. Mr Mason submits that there is a "without prejudice save as to costs" offer which this Court should consider when exercising its discretion regarding costs. Alternatively, Mr Mason accepts the Court would award costs on a 2B basis.

[5] The costs sought on a 2C basis amount to $27,760.50, with disbursements of $1,623.73. If costs are awarded on a 2B basis they will amount to $11,243.50 (plus disbursements).

Mr van de Klundert's position

[6] Mr van de Klundert opposes costs. Mr Anderson, for Mr van de Klundert, submits that this is a case where costs should not follow the discontinuance for three reasons:

(a) Ms Clapperton's conduct reflected a combative response to Mr van de Klundert's grievance, a stance which prevented settlement and occasioned an extraordinarily high level of costs incurred by Ms Clapperton.

(b) Although Ms Clapperton refused to make the retraction requested by Mr van de Klundert, she made a partial correction after the proceedings had been issued. Had this correction been made before the proceedings were issued, pursuant to Mr van de Klundert's request, it is unlikely the proceedings would have issued at all.

(c) The Court should take a holistic view of these proceedings, taking into account the fact that Mr van de Klundert merely sought a declaration of defamation (not damages). This justifies the Court's

not applying r 15.23 presumption and finding that costs should lie where they fall.

Applicable principles (and a convenient formula)

[7] Rule 15.23 creates a presumption that a discontinuing plaintiff must pay the defendant's costs. For the purposes of costs, then, a choice to discontinue is akin to being unsuccessful in a proceeding.[2] The presumption may be displaced, but only with good reason. There must exist "just and equitable circumstances not to apply it".[3]

[8] There will be situations where the discontinuing party has succeeded. Rule 14.2(a) provides as a general principle that the party who fails should pay costs to the party who succeeds. That is subject to the overarching rule that all matters as they relate to costs are at the discretion of the Court.[4]

[9] If the r 15.23 presumption is overcome, the Court has a discretion as to the appropriate costs order.

[10] I adopt the summary of principles as stated by the authors of *McGechan on Procedure*, which are derived from the leading authorities:[5]

> (a) Although the r 15.23 presumption is designed to give a certain and predictable outcome upon discontinuance, it may be displaced if the Court finds there are circumstances which make it just and equitable that it should not apply.
>
> (b) Although the Court is not limited in the factors it may take into account when considering whether the presumption is displaced, generally:
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> (i) The Court will not consider the merits of the respective cases, unless they are so obvious that they should influence the costs outcome.

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2 *Asia Pacific Hotel Investments Ltd v Grant* [2015] NZHC 1460 at [21].

3 *Kroma Colour Prints v Tridonicatco New Zealand Ltd [2008] NZCA 150*, (2008) 18 PRNZ 973 at [12].

4 High Court Rules, r 14.1.

5 *McGechan on Procedure* (online looseleaf ed, Brookers) at [HR15.23.01], citing *Kroma Colour Prints Ltd v Tridonicatco NZ Ltd*, above n 3, and *FM Custodians Ltd v Pati* [2012] NZHC 1902 at [10]-[12].

(ii) The Court will consider the reasonableness of the stance of both parties: whether it was reasonable for the plaintiff to bring and continue the proceeding, and for the defendant to oppose the proceeding up to the point of discontinuance.

(iii) Conduct prior to the commencement of the proceeding may be relevant (for example, if any conduct by a defendant precipitated the litigation), as may be the reason for discontinuing (for example, a change of circumstances rendering the proceeding unnecessary).

(c) The Court's general discretion in r 14.1 as to costs can also override the general principles relating to discontinuance.

[11] In *Ryde v Earthquake Commission,* Kós J helpfully expounded the legal principles applicable to costs applications where a proceeding is discontinued.[6] From these principles and leading case law, his Honour also formulated a list of relevant questions to be assessed regarding entitlement to costs in such circumstances. Although the questions posed go largely to whether costs should be awarded, rather than the quantum of such an award, they provide valuable assistance. Reframed for general application, the questions are:[7]

(a) Was it reasonable to bring this proceeding?

(b) Was it reasonable for the defendant to defend this proceeding?

(c) Why were the proceedings discontinued?

(d) Were the merits so obvious that they should influence the costs outcome?

(e) Does the outcome represent vindication of the plaintiff's commencement of proceedings?

(f) Has the plaintiff displaced the r 15.23 presumption?

[12] I adopt that approach to the consideration of costs in this case.

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6 *Ryde v Earthquake Commission* [2014] NZHC 2763 at [23]–[30].

7 At [30].

Analysis

Was it reasonable to bring the proceedings?

[13] In this case, there was an element of unreasonableness in Mr van de Klundert's bringing the proceedings. As I noted in my summary judgment decision, Ms Clapperton's evidence is highly suggestive of Mr van de Klundert's oppressive use of the defamation proceedings.[8] The Court of Appeal held such oppression to be impermissible in *Salmon v McKinnon.*[9] The challenged email elicited the recipient school's assertive support for Mr van de Klundert, indicating that Mr van de Klundert's reputation had probably not been damaged. Accordingly, Mr van de Klundert did not need to bring proceedings to vindicate his reputation.[10]

[14] Further, Mr van de Klundert did not deny Ms Clapperton's pleaded view that he was seeking a defamation declaration for marketing purposes. I take this motive into account in exercising my discretion as to relief.[11]

Was it reasonable for Ms Clapperton to defend this proceeding?

[15] It was reasonable for Ms Clapperton to defend the proceeding. This Court could not have said on a summary basis that defamation was made out, that qualified privilege did not apply, and that the declaratory relief sought was appropriate. Indeed, in my judgment I found that Ms Clapperton had "not merely an arguable case but a strong case" that the defamatory email was written on an occasion of qualified privilege.[12]

[16] Although Mr Andersen portrayed Ms Clapperton's attitude throughout the proceedings as combative, I find that Ms Clapperton's stance as to costs might well flow from the oppressive aspect of the proceedings against her.[13]

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8 *Van de Klundert v Clapperton*, above n 1, at [34].
9 *Salmon v McKinnon* [2007] NZCA 516 at [50].
10 Compare *Moodie v Strachan* [2015] NZHC 327 at [18], where the comments went to the heart of the plaintiff's professional reputation, and the opportunity for vindication was thus essential.
11 *Salmon v McKinnon* [2007] NZCA 516 at [49].
12 *Van de Klundert v Clapperton*, above n 1, at [46].
13 The Court of Appeal reached this conclusion in *Salmon v McKinnon* [2007] NZCA 516 at [52].

Why were the proceedings discontinued?

[17] Mr van de Klundert's discontinuance occurred after my decision dismissing his summary judgment application. Mr Mason submits that the "unavoidable inference" is that either Mr van de Klundert issued proceedings he was not particularly committed to or that he changed his mind over the merits of the case.

[18] In such cases, the Court permits a plaintiff to show that its discontinuance should not be interpreted as failure.[14] I do not consider that Mr van de Klundert has established this. Mr Andersen's submissions do not proffer any alternative explanation for Mr van de Klundert's discontinuance, but focus on the unpredictability of the final outcome of the proceedings.

Were the merits so obvious that they should influence the costs outcome?

[19] Both parties referred to *Kroma Colour Prints Ltd v Tridonicatco NZ Ltd*, where the Court of Appeal noted the need for caution when reversing the r 15.23 presumption and speculating on the respective strengths and weaknesses of the parties' cases.[15] The reasonableness of the stance adopted by the parties must be considered. 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.

[20] Ms Clapperton had raised the issue of qualified privilege with Mr van de Klundert prior to the issue of proceedings. In the context of a summary judgment application, I found that Ms Clapperton had "not merely an arguable case but a strong case" to rely upon qualified privilege.[16] The availability of this defence meant that the summary judgment application would fail. If Mr van de Klundert was to have rebut to this defence, he would have needed to establish that Ms Clapperton was (beyond argument) predominantly motivated by ill-will towards him or otherwise took improper advantage of the occasion of publication.[17] This, in turn,

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14 *Powell v Hally Labels Ltd* [2014] NZCA 572 at [21].
15 *Kroma Colour Prints v Tridonicatco New Zealand Ltd, above n 3.*
16 *Van de Klundert v Clapperton*, above n 1, at [46].
17 Defamation Act 1992, s 19.

depended on Mr van de Klundert's compliance with the procedural requirements of s 41 Defamation Act. At no stage did Mr van de Klundert provide this Court with the requisite particulars of ill-will.

[21] In this case, the merits are sufficiently clear as to influence the costs outcome. Mr van de Klundert's position lacked merit; it was unreasonable to bring the proceedings and particularly to pursue summary judgment.

Does the outcome represent vindication of Mr van de Klundert's commencement of proceedings?

[22] Discontinuance in no sense represents vindication of the issue of proceedings.

Has Mr van de Klundert displaced the r 15.23 presumption?

[23] The Court of Appeal has held that "the presumption of costs on a discontinuance is not necessarily displaced merely because the plaintiff acted reasonably in bringing and discontinuing the proceeding, though these are relevant factors".[18]

[24] I note also the comments of the Court of Appeal in *Powell v Hally Labels Ltd*, where Miller J noted that:[19]

> … a plaintiff may not displace the presumption merely by showing that it had some merit on its side. Indeed, the Court need not consider the merits and ordinarily refuses to do so unless they are immediately apparent.

[25] As I have noted, the immediately apparent merits of this case rest with Ms Clapperton. If Mr van de Klundert's discontinuance was a reasonable course of action, it is insufficient to displace the r 15.23 presumption. The plaintiff should pay the defendant's costs in the usual way.

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[18] *Kroma Colour Prints v Tridonicatco New Zealand Ltd, above n 3, a*t [22], citing *Vector Gas Ltd v Todd Petroleum Mining Company Ltd* HC Wellington CIV-2004-485-1753, 7 December 2010 at [18].

[19] *Powell v Hally Labels Ltd*, above n 14, at [23] (citations omitted).

The appropriate costs band

[26] Mr Mason submits that defamation proceedings are arcane and complex, and that against such difficult legal terrain these proceedings required comparatively large amounts of time for the various steps in terms of r 14.5(2).[20] Accordingly, the proceedings should be categorised as 2C.

[27] There is no dispute that category 2 is appropriate for this proceeding, meaning that it is a proceeding of average complexity requiring counsel of skill and experience considered average in the High Court. The time band needs to be determined with that agreed position on the complexity of the proceeding in mind.

[28] For two reasons, I am not persuaded that this is a case "where a comparatively large amount of time" was reasonably required.

[29] First, as Mr Andersen submits, the degree of work which might normally flow from defamation proceedings does not arise in relation to a case which fails at summary judgment in the way this case did. The lack of merit of the plaintiff's case, leading to dismissal of the application, counts against a finding that a large amount of time was involved or called for.

[30] Second, it is not inevitable that defamation proceedings fall within band C. Mr Mason did not identify a case in which costs were set on band C. Mr Andersen identified one: *Osmose New Zealand v Wakeling*.[21] As is evident from r 14.5(2), the setting of a band is determined by the amount of time considered reasonable for each step in the particular proceedings.

[31] I am satisfied that the circumstances of this discontinued proceeding call for a 2B approach, and I so order.

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[20] *Jones v Lee* HC Wellington CIV-2007-485-001510, 3 September 2010 at [14].
[21] *Osmose New Zealand v Wakeling* [2007] 1 NZLR 841 (HC) at [108].

Increased costs

[32] In the event that this Court bases its award on a 2B approach, Mr Mason submits that increased costs are appropriate given Mr van de Klundert's pursuit of an argument that lacked merit.[22] He further submits that the dubious integrity of Mr van de Klundert's case justifies an order for increased costs pursuant to r 14.6(3)(d). Mr Mason describes Mr van de Klundert's claim as opportunistic and misconceived, warranting a stern response from this Court in the form of costs. Mr Mason also emphasises the conciliatory efforts made by Ms Clapperton both prior and subsequent to the issue of proceedings.

[33] I do not consider that Mr Mason's approach to the integrity of Mr van de Klundert's case or Ms Clapperton's conciliatory actions are sufficient to justify an order for increased costs. The former submission goes to the question of the merit of the argument, and the latter does not outweigh the principle that the determination of costs should be predictable and expeditious. Something more than the fact of failure in a summary judgment application is required for ordering increased costs under r 14.6(3)(b)(ii).

Quantum

[34] Mr Andersen challenges two items in Ms Clapperton's schedule of costs and disbursements with the consequence that he says this award should be:

(a) costs of $10,447.50; and

(b) disbursements of $1,423.73.

[35] These proposed adjustments remove the item for Ms Clapperton's claim for leave to file additional documents, as that involved an indulgence sought from the Court which should not form part of any costs payable by Mr van de Klundert. I

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[22] High Court Rules, r 14.6(3)(b)(ii).

agree that the item should be disallowed. It follows that the applicable disbursement (filing fee) should also be disallowed.

The purported Calderbank offer

[36] Mr Mason made a submission based on an offer of Mrs Clapperton to agree to discontinuance. I do not view that offer as altering the appropriateness of the award of costs and disbursements I have discussed.

Order

[37] I order that the plaintiff pay to the defendant the costs of the proceeding which I fix at $10,447.50 together with disbursements of $1,423.73.

Associate Judge Osborne

Solicitors:
Wadham Partners Lawyers, Palmerston North
Alistair D Paterson Lawyers, Dunedin

Copy to:
Glenn Mason, Barrister, Palmerston North
Len Anderson, Barrister, Dunedin