IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2015-404-1845
[2016] NZHC 1876

UNDER	the Defamation Act 1992
BETWEEN	JORDAN HENRY WILLIAMS Plaintiff
AND	COLIN GRAEME CRAIG First Defendant
AND	NATHANIEL JOHN HESLOP, KEVIN STITT, ANGELA MARIA STORR Second Defendants

On the papers

Appearances:	PA McKnight and A Romanos for plaintiff First-named second defendant in person
Judgment:	12 August 2016

JUDGMENT OF TOOGOOD J
[Plaintiff's application for costs against first-named second defendant]

This judgment was delivered by me on 12 August 2016 at 3:30 pm
Pursuant to Rule 11.5 High Court Rules

Registrar/Deputy Registrar

[1] The plaintiff, Jordan Williams is suing Nathaniel Heslop and others in defamation. On 4 December 2016, Mr Heslop filed an interlocutory application for summary judgment and for the determination of a separate question. On 27 April 2016, however, a few days before the interlocutory applications were to be heard, Mr Heslop discontinued them.

[2] Mr Williams now applies for increased costs against Mr Heslop in respect of the discontinued interlocutory applications. Mr Heslop argues that costs should be reserved until the substantive proceeding is determined but he says that, if costs are awarded, they should be on a category 2B basis without an uplift.

Background

[3] The relevant chronology of facts is as follows:

(a) On 29 July 2015, an allegedly defamatory brochure was said to have been published on the website of the Conservative Party of New Zealand. Mr Heslop was the party's secretary at that time.

(b) On 18 August 2015, Mr Heslop was served with Mr Williams's statement of claim for the substantive defamation proceeding.

(c) On 18 September 2015, Mr Heslop filed his statement of defence.

(d) On 13 November 2015, Mr Williams amended his statement of claim.

(e) On 4 December 2015, Mr Heslop filed an interlocutory summary judgment application and an application for the determination of a separate question. The application for a determination of a separate question related to whether he was a "publisher" of the allegedly defamatory material.

(f) On 21 December 2015, Mr Williams' counsel made a telephone call to Mr Heslop, offering to discontinue proceedings against Mr Heslop Mr Heslop agreed not to seek costs.

(g) On 22 December 2015, Mr Heslop rejected Mr Williams's offer on the basis that costs would be necessary.

(h) On 21 March 2016, this Court set down the hearing of Mr Heslop's applications for the week of 2 May 2016.

(i) On 31 March 2016, Mr Williams filed a second amended statement of claim, which further particularised the allegations of Mr Heslop's involvement in publishing the allegedly defamatory material.

(j) On 27 April 2016, Mr Heslop withdrew and discontinued his application for summary judgment and for determination of a separate question.

[4] The substantive hearing is set down for trial beginning on 5 September 2016.

Costs claims

[5] Mr Williams seeks a total of $19,342.00 in costs and disbursements for Mr Heslop's discontinued application. This is claimed on a category 2B basis, with a 100 per cent uplift.

[6] In opposing Mr Williams's application for costs, Mr Heslop says that because the application was for summary judgment, costs should be reserved until the end of the substantive proceeding. In the alternative, he says he would accept he should pay $4733.00 in costs, based on a modified 2B scale.

Should costs be reserved?

[7] Rule 15.23 of the High Court Rules specifies that a plaintiff who discontinues a proceeding is to pay costs to the defendant:

> **15.23 Costs**
>
> Unless the defendant otherwise agrees or the court otherwise orders, a plaintiff who discontinues a proceeding against a defendant must pay costs

to the defendant of and incidental to the proceeding up to and including the discontinuance.

[8] This rule, however, is subject to the Court's general discretion as to costs,[1] and it may be displaced if there are just and equitable reasons not to apply it.[2] Although the rule is not directed to discontinued interlocutory proceedings, both parties proceed on the basis that it applies in this case by analogy.

[9] Mr Heslop submits that costs on the discontinued proceedings should not be awarded until the outcome of the substantive proceeding is known. He notes that r 14.8, which specifies that costs on opposed interlocutory applications must be fixed when the application determined, does not apply to applications for summary judgment. This exception exists because it is often difficult to determine who should pay costs in a summary judgment application until the outcome of the litigation is determined.[3]

[10] Counsel for Mr Williams points out, however, that Courts regularly fix costs following a defendant's application for summary judgment. This is because such applications are often analogous to strike-out proceedings,[4] and usually do not have the benefit of clarifying or bringing disputes to a head.[5] I note, however, that this is not a universal practice: there are cases where Courts have reserved costs on such applications pending the determination of the substantive issues.[6]

[11] In this case, Mr Heslop's applications were never determined; they were discontinued. He claims that they were discontinued in light of Mr Williams's second amended statement of claim, which further particularised the defamatory allegations against Mr Heslop. I have not had the benefit of receiving submissions on the those applications, and I am not prepared to make an assessment on their

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1 *North Shore City Council v Local Government Commission* (1995) 9 PRNZ 182 (HC)

2 *Kroma Colour Prints Ltd v Tridonicatco NZ Ltd* [2008] NZCA 150, (2008) 18 PRNZ 973; Rule 14.1.

3 *Chapman v Badon Ltd* [2010] NZCA 613, (2014) 20 PRNZ 83 at [12]; *Schmidt v Registrar-General of Land* [2015] NZHC 2438, (2015) 22 PRNZ 794.

4 *Suharnan v Brookfields* [2013] NZHC 586, (2013) PRNZ 790.

5 *Sim's Court Practice* (LexisNexis NZ, online ed) at [HCR14.8.5].

6 For example, see *Schmidt v Registrar-General of Land*, above n 3, which cited *EBS v CAS* [2014] NZHC 2929 and *Rhodes v Shaw* [2015] NZHC 1530, (2015) 16 NZCPR 326.

merit, apart from saying that they do not appear to be obviously ill-founded.[7] It is a reasonable inference from the train of events that the second amended statement of claim, filed by Mr Williams on 31 March 2016, addressed what Mr Heslop might otherwise have argued were flaws in the earlier pleading.

[12] I accept there is some force in Mr McKnight's submission for Mr Williams that the discontinuance could have been filed much earlier than 3 working days before the hearing. Nevertheless, I have concluded it is not appropriate to fix costs for Mr Heslop's discontinued applications at this stage of the proceeding.

[13] The discontinued summary judgment application was not an entirely self-contained matter of law; it directly related to the plaintiff's pleadings against him as they existed at that time. Moreover, Mr Williams has argued various grounds in support of the claim for increased costs, including allegations about Mr Heslop's failure to accept offers of settlement and that his applications were unreasonable. Such matters should be considered in the context of the overall outcome of the substantive proceeding.

Result

[14] The question of costs on Mr Heslop's application for summary judgment and his application for the determination of a separate question is reserved for determination as part of the final determination of costs at the conclusion of the proceeding.

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Toogood J

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7 *N-Tech Ltd v Abooth Ltd* [2012] NZHC 1167.