IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2012-404-001701
[2016] NZHC 3133

BETWEEN	IAN WISHART Plaintiff
AND	CHRISTOPHER ROBERT MURRAY First Defendant
	KERRI MAREE MURRAY Second Defendant
	DIMENSION DATA NEW ZEALAND LIMITED Third Defendant

Hearing:	4 August 2016
Appearances:	Plaintiff in person D M Salmon and E D Nilsson for First and Second Defendants H B Rennie QC for Third Defendants
Judgment:	19 December 2016

JUDGMENT OF COURTNEY J
[Costs]

This judgment was delivered by Justice Courtney
on 19 December 2016 at 2.50 pm
pursuant to R 11.5 of the High Court Rules

Registrar / Deputy Registrar

Date…….

Introduction

[1] In this judgment I deal with applications for costs by:

(a) the first and second defendants, Mr and Mrs Murray, in relation to a strike-out application that I determined in March 2013;[1]

(b) the third defendant, Dimension Data New Zealand Ltd (DDNZ) under r 7.77(8) for costs in relation to the four amended pleadings filed by Mr Wishart;

(c) applications by all the defendants for increased or indemnity costs for steps taken between March and June 2016.

Chronology

[2] There has been a good deal of delay in this proceeding and a number of amended pleadings. These aspects are relevant to all the costs applications advanced and it is convenient to record a brief chronology at this point:

29 March 2012	Statement of claim filed
15 May 2012	Mr and Mrs Murray apply to strike out the statement of claim for security for costs
15 May 2012	DDNZ applies for summary judgment
17 October 2012	DDNZ withdraws application for summary judgment
19 May 2013	Mr and Mrs Murray's strike-out and security for costs application dismissed
10 July 2013	First amended statement of claim filed
31 July 2013	Proceedings stayed pending appeal against dismissal of strike-out and security for costs applications
19 September 2014	Court of Appeal allows appeal in part. Mr Wishart given leave to amend pleadings.
17 October 2014	Second amended statement of claim filed
28 November 2014	Defendants seek further particulars and costs on 2013 strike-out applications
19 December 2014	Further particulars provided

[1] *Wishart v Murray* [2013] NZHC 540.

6 March 2015	Third amended statement of claim filed
27 March 2015	DDNZ applies to strike out third amended statement of claim
16 April 2015	DDNZ applies for stay of proceedings
4 May 2015	Fourth amended statement of claim filed
12 June 2015	DDNZ files amended application for partial strike out or stay
22 December 2015	Proceeding stayed pending compliant pleading
31 March 2016	Mr Wishart files application to set aside stay with proposed draft fifth amended statement of claim
7 June 2016	Mr Wishart granted extension for filing draft ASOC5
17 June 2016	Mr Wishart (through counsel) granted further extension
22 June 2016	Further draft ASOC6 (prepared with the assistance of counsel, Mr Patterson)
22 June 2016	Next version of draft ASOC5 (prepared with the assistance of Mr Patterson)
24 June 2016	Draft ASOC5 (prepared with the assistance of Mr Patterson) handed up
4 August 2016	Hearing of application to set aside stay

First and second defendants' applications for costs in relation to the 2013 strike-out decision

[3] The strike-out application was brought on the grounds that (1) the statements sued on were not capable of bearing the pleaded meanings (2) the statement of claim was prolix and oppressive and included material that was scandalous and/or irrelevant, and (3) Mr Murray could not, at law, be the publisher of statements that he did not author. In the event of the statement of claim not being struck out, the first and second defendants sought security for costs.

[4] Although I struck out a number of pleaded statements on the basis that they were not capable of bearing the meanings asserted, the majority survived this ground. However, I struck out a number of pleaded statements as oppressive and prolix. Whether Mr Murray was the publisher of non-party posts proved a difficult legal issue for which there was no New Zealand authority. The conclusion I reached regarding the test for whether a Facebook host could be a publisher (the "ought to know" test) was rejected by the Court of Appeal in favour of the "actual knowledge" test.[2] This

2 *Murray v Wishart* [2014] NZCA 641, [2014] 3 NZLR 722.

aspect of the case, on which Mr and Mrs Murray failed before me but succeeded in the Court of Appeal, required substantial attention in terms of legal submission.

[5] I omitted to fix costs on the strike-out application and the Court of Appeal directed that I determine costs in light of its judgment. Overall, although both parties had a measure of success before me, when I take into account the Court of Appeal's decision, and the number of pleaded statements struck out on the other grounds, I consider that Mr and Mrs Murray are entitled to costs on the strike-out application on a 2B basis.

[6] I accept the calculation contained in the schedule to counsel's memorandum dated 28 November 2014 of costs of $9,177, together with disbursements of $864.35, making a total of $10,041.35. There is an order for costs accordingly.

Third defendant's application for costs in relation to the amended statements of claim

[7] In November 2014 (at the same time as Mr and Mrs Murray applied for costs following the Court of Appeal's decision) DDNZ sought costs under item 9 of Schedule 3 of the High Court Rules which allows costs for:

> Pleading in response to amended pleading (payable regardless of outcome except when formal or consented to).

[8] At that point the relevant pleadings comprised the original statement of claim to which DDNZ had pleaded and the first and second amended statements of claim, to which it had not pleaded. DDNZ sought costs on a band C basis on the ground that, even though it had not filed a statement of defence to either of the amended pleadings, each amended pleading required a time consuming review and remained the subject of interlocutory applications and the appeal at which DDNZ appeared as an interested party. It was therefore actively engaged in each of the new pleadings.

[9] For various reasons DDNZ's application of 14 November was not dealt with at the time. At the August 2016 hearing DDNZ renewed that application and sought, alternatively, to have costs fixed in respect of each of the subsequent amended

pleadings under r 7.77(8). Mr Rennie QC, for DDNZ, proposed that if the matter were dealt with in this way it would subsume the 2014 application.

[10] In my view, neither item 9 of Schedule 3, nor r 7.77(8) allow costs to be fixed now in relation to the amended pleadings.

[11] Rule 7.77(8) provides that:

> If an amended pleading has been filed under this rule, the party filing the amended pleading must bear all the costs of and occasioned by the original pleading and any application for amendment, unless the court orders otherwise.

[12] Rule 7.77 deals with amendments to pleadings before trial and is directed towards enabling the parties and the Court to avoid the delay, costs and inconvenience of fresh proceedings where an amendment of the existing proceeding would enable the issues between the parties to be justly resolved.[3] Rule 7.77(8) is therefore concerned with the wasted costs of responding to an original pleading, not to any amended pleading. Rule 7.77(8) and item 9 of Schedule 3 are therefore complementary; r 7.77(8) is concerned with the costs caused by the original pleading, whereas item 9 is concerned with the cost of responding to an amended pleading.

[13] In *Lorenzen v Cullen,* Associate Judge Faire (as he then was) held that r 7.77(8) was to be considered in conjunction with the predecessor to item 9, which was in the same terms. He considered that an award of costs could not be made where no pleading had been filed in response to an amended pleading; even though there had been consideration of the new basis for the claim; r 7.77(8) did not provide any justification for departing from the strict wording of Schedule 3.

[14] In its memorandum filed in support of the application for costs in November 2014 Mr Cox, the solicitor for DDNZ, acknowledged that *Lorenzen v Cullen* could be viewed as authority against the awarding of costs where no pleading had been filed in response to an amended statement of claim but argued that the facts of that case were sufficiently different to affect the outcome of DDNZ's application.

---

3 *Strong v Hurunui Hotel (2004) Ltd* [2013] NZHC 1924 at [21].

[15] I respectfully agree with the reasoning in *Lorenzen v Cullen*. The steps for which time allocations are permitted are clear and item 9 only allows a time allocation where there has been a pleading in response to an amended pleading. It seems possible that, at the conclusion of the proceeding an application could be made for increased costs in respect of any eventual pleading or under item 2, commencement of defence. Neither of those steps are, however, for determination at this point in the proceeding.

[16] Nor do I consider that r 7.77(8) responds to the present situation. Rule 7.77(8) does not give any indication as to when costs payable under it should be determined. In *Jones v Norterra Rural Resources Ltd* Woolford J compared r 7.77(8) with r 14.8(1) which requires (unless there are special reasons to the contrary) costs on opposed interlocutory applications to be fixed when the application is determined.[4] He observed that:[5]

> Rule 14.8 reflects the fact that the merits of particular applications and those of the substantive proceedings are different matters.[6] An original pleading is, however, not different altogether from an amended pleading. It may be quite difficult to isolate the wasted costs involved in responding to an original pleading unless and until the amended pleading goes to trial.
>
> The vendor therefore had no right to have its costs application determined on 8 August 2014. It also has no right to have it determined prior to the substantive proceeding. The application is to be determined at some stage in the future when the Court considers that it is best to hear it.

[17] The reasoning in that decision applies equally in the present case. In this case most of the allegations, including liability for non-party posts have been carried forward from the original pleading. It is therefore not appropriate to determine what wasted costs were occasioned by the original pleading at this stage; that is an assessment to be made at the conclusion of the case.

[18] The third defendant's application for costs in respect of the amended pleadings therefore fails.

---

4 *Jones v Norterra Rural Resources Ltd* [2014] NZHC 2855.
5 At [32].
6 Citing *Chapman v Badon Ltd* [2010] NZCA 612 at [12].

Costs for steps since March 2016

[19] The terms on which I stayed the proceedings required Mr Wishart to produce a draft ASOC5 that complied with the High Court Rules and the Defamation Act by 31 March 2016 unless circumstances arose requiring an extension of time. Mr Wishart filed an application to lift the stay together with a draft ASOC5 by the required date but the draft pleading was, plainly, not compliant. The defendants filed notices of opposition. A hearing date was scheduled for 7 June 2016.

[20] In an affidavit filed on 31 May 2016 Mr Wishart detailed a catalogue of personal problems dating back to January 2016. Had Mr Wishart come to the Court in March 2016 and explained his situation then the terms of the stay would certainly have been varied to allow him more time. Instead, he made the foolish decision to soldier on, without legal advice, and produced another non-compliant pleading which the defendants' counsel had to consider in order to file their notices of opposition.

[21] At the hearing on 6 June 2016 I expressed the frustration that both I and the defendants' counsel felt with Mr Wishart's failure to produce a compliant pleading, which was mainly the result of not obtaining legal advice. I adjourned the application until 24 June 2016 with the strongest possible recommendation that Mr Wishart engage counsel and the requirement that he file and serve a draft ASOC5 by 17 June 2016. I also made an order for 2B costs against Mr Wishart in relation to that hearing.

[22] On 17 June 2016 Mr Patterson filed a memorandum advising that he had been engaged by Mr Wishart to advise on the pleading. Although he had first been approached in May 2016 his other commitments had precluded assisting Mr Wishart until June. Given his late entry into the proceeding Mr Patterson sought an extension of the time for filing the draft ASOC5 until 21 June 2016 and an adjournment of the 24 June 2014 hearing date. Despite the defendants' opposition I granted an extension until 22 June but, at the defendants' request, retained the hearing date of 24 June 2016.

[23] At the hearing on 24 June 2016 Mr Wishart handed up a final version of draft ASOC5 which had been prepared with Mr Patterson's assistance. Given the lateness of this development it was not possible to deal with Mr Wishart's application to lift

the stay. I made timetable directions and a further date was eventually allocated of 4 August 2016.

[24] In these circumstances the defendants seek indemnity or increased costs for the steps they were required to take during the period March – June 2016. In response, Mr Wishart argued that the circumstances that existed in the first half of this year do not fall within the scope of either indemnity or increased costs given that there had been no flagrant or exceptionally bad behaviour and nothing unreasonable about his conduct.

[25] I have reached the following conclusions regarding costs over this period. First, the defendants should be entitled to costs on the notices of opposition filed on 14 and 15 April 2016 in response to Mr Wishart's application to lift the stay dated 31 March 2016. The draft ASOC5 was not compliant and required consideration by the defendants in order to formulate a response to the application to lift the stay.

[26] Secondly, although I am not prepared to re-visit the order for costs in relation to the 7 June 2016 hearing of Mr Wishart's application, which was not appealed, that costs award did not include an allowance for the preparation of written submissions for the purposes of that hearing; the third defendant, which filed written submissions, is entitled to costs for that.

[27] Thirdly, I decline to make any costs award in relation to the 24 June 2016 hearing date. This is because Mr Patterson filed a memorandum on 17 June 2016 signalling that he had been engaged to assist in the preparation of a compliant pleading but that his other work would not allow him to complete that task within the then current timetable and he sought an extension of the time for the filing of the draft amended pleading and an adjournment of the 24 June 2016 hearing to avoid prejudice to the other parties. The defendants did not agree to either. The reason I decline to make a costs order in favour of the defendants in relation to the 24 June 2016 hearing is that I had signalled clearly in my 7 June 2016 minute my concern to do justice to both parties. Agreeing to the extension and adjournment of the 24 June 2016 date would have avoided further costs for the defendants and enabled the plaintiff, who had finally obtained legal advice, to progress his pleading.

[28] Fourthly, I decline to make any award of costs in relation to the amended notices of opposition or the appearance on 4 August 2016. In my separate decision on the stay application I held that the draft ASOC5 pleading is substantially compliant and that the stay does not operate as an unless order. It would not be appropriate to award costs in these circumstances.

[29] In terms of the steps in respect of which I am awarding costs (the notices of opposition and submissions in relation to the original application to lift the stay) I agree that there should be an uplift of 50 per cent under r 14.6(3)(b) increased costs may be awarded if the party opposing costs has contributed unnecessarily to the time or expense of the proceeding by failing to comply with the rules. It is evident from my description of the circumstances that, in failing to apply for an extension of the time Mr Wishart required for filing the amended pleading, he put the defendants to unnecessary expense and that fact should be recognised. His conduct, however, does not satisfy the threshold for indemnity costs.

[30] If counsel and Mr Wishart cannot agree on the correct calculation of the costs that I have awarded they may file memoranda by 23 and 30 January 2017 respectively.

_____

P Courtney J