IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-092-1026
[2017] NZHC 307

BETWEEN	MELISSA JEAN OPAI Plaintiff
AND	LAURIE CULPAN First Defendant
	ATTORNEY-GENERAL (sued on behalf of the COMMISSIONER OF POLICE) Second Defendant

Hearing: On the papers

Appearances: N W Woods for the Plaintiff
H B Rennie QC for the First Defendant
A F Todd for the Second Defendant

Judgment: 2 March 2017

JUDGMENT No.4 OF ASSOCIATE JUDGE R M BELL
COSTS

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*This judgment was delivered by me on **2 March 2017** at **3:00pm***
pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Solicitors:
Rice Craig (N W Woods), Papakura, for Plaintiff
Thomas Dewar Sziranyi Letts (D G Dewar), Wellington, for First Defendant
Crown Law Office (A F Todd), Wellington, for Second Defendant
New Zealand Police (N S Ridder), Wellington, for Second Defendant

Counsel:
Hugh B Rennie QC, Wellington, for First Defendant
Matthew F McClelland QC, Wellington, for Second Defendant

[1] On 13 December 2016 I issued three interlocutory judgments in this proceeding.[1] This decision is on costs on the first two. The third decision was on a media access application. The media applicant is not a party to this proceeding and there is no basis for making orders against an unsuccessful media applicant.

The applications to review

[2] Ms Opai and the Attorney-General have applied to review my first judgment. Notwithstanding the review, costs should be decided now. Any errors in this costs decision may be corrected at the same time as the review of my first judgment. There will be efficiencies in not deferring costs until after any decisions on the review applications. That is also consistent with r 14.8 under which costs on opposed interlocutory applications are to be fixed when the application is decided, unless there are special reasons. As I shall explain later, there are special reasons for not deciding costs on judgment (No. 2), but that does not prevent the principle applying generally.

Impact of Senior Courts Act 2016

[3] The Senior Courts Act 2016, which has a new régime for challenging associate judges' decisions on interlocutory applications, came into force on 1 March 2017.[2] That will not prevent the current applications for review being determined, nor this decision on costs. Under s 27 of the Senior Courts Act, the only way to challenge a decision of an associate judge is to appeal to the Court of Appeal. Section 56(3) provides that a decision on an interlocutory application requires leave. Those provisions apply only to proceedings started after 1 March 2017. Under the transitional provisions in Schedule 5 of the Senior Courts Act, the current régime of review under Part 2 subpart 1 of the former High Court Rules continues to apply. Clause 11 of Schedule 5 says:

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1 *Opai v Culpan* [2016] NZHC 3004; *Opai v Culpan (No 2)* [2016] NZHC 3005; *Opai v Culpan (No 3)* [2016] NZHC 3006.

2 Senior Courts Act 2016, s 2(1).

> **11 Proceedings subject to former High Court Rules**
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> (1) In this clause, former High Court Rules 2016 means the High Court Rules 2016 as in force immediately before 1 March 2017.
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> (2) A proceeding that is pending on 1 March 2017 must be continued, completed, and enforced under the High Court Rules 2016 as in force immediately after that date, except as provided in subclause (3).
>
> (3) A proceeding that is pending on 1 March 2017 must be dealt with as if—
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> …
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> (b) the provisions of the former High Court Rules 2016 referring to section 26P of the Judicature Act 1908 were in force.

The reference in cl 11(3)(b) to s 26P of the Judicature Act 1908 saves the review provisions under Part 2 sub-part 1 of the High Court Rules. Accordingly that leaves it open for this costs judgment to be reviewed, even though it comes out after the commencement of the Senior Courts Act.

The interlocutory applications

[4] In my first judgment I gave decisions on:

(a) Mr Culpan's application to strike out the claim generally and against him in particular, to stay the proceeding while Ms Opai's employment grievances were heard in the employment institutions, and for preliminary determination of the meanings of alleged defamatory statements;

(b) the Attorney-General's application to strike out Ms Opai's claim in its entirety, to strike out certain alleged meanings, and to strike out her notices under ss 39 and 41 of the Defamation Act 1992; and

(c) Ms Opai's application for the Attorney-General to provide a more explicit pleading and to strike out parts of his statement of defence.

[5] In the second judgment, I gave rulings on Ms Opai's discovery application against the Attorney-General.[3]

[6] Some other matters were resolved without requiring my decision. Mr Culpan applied for security for costs against Ms Opai. That became redundant once he was removed as a defendant. Ms Opai filed an application attacking Mr Culpan's pleading, but that was resolved before the hearing. Ms Opai and the Crown resolved most of their discovery issues ahead of the hearing on 31 October 2016 and I made consent discovery orders by minute.

[7] In my first decision I found against Mr Culpan on his stay application, his attack on the form of the statement of claim, his attack on the "campaign to vilify" pleading.[4] He had partial success on his attack on the pleaded meanings.[5] He was completely successful in having the claim against him dismissed under the *Jameel* principle.[6]

[8] The Attorney-General was successful in having the claim for exemplary damages struck out,[7] but failed in attacking the form of the statement of claim and in striking out the notices given under ss 39 and 41 of the Defamation Act.[8] He was partly successful in reducing the scope of the claim under the *Jameel* principle and in supporting Mr Culpan's attack on some of the pleaded meanings.

[9] Ms Opai failed in her attack on the Attorney-General's pleadings.[9]

[10] In the second decision, my rulings were on relatively narrow matters which the parties had not been able to agree and which were generally between the positions advocated by each side.

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3 *Opai v Culpan (No 2)*, above n 1.
4 *Opai v Culpan*, above n 1, at [60] – [61].
5 At [53].
6 At [74] – [92]; *Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75, [2005] QB 946.
7 At [62] – [65].
8 At [101] – [109] and [110] – [113].
9 At [114] – [125].

The parties' contentions in brief

[11] After I received the parties' written submissions on costs, I asked for and received further submissions on the application of r 14.15 of the High Court Rules. Mr Culpan seeks costs against Ms Opai, having succeeded on his application. He claims costs under category 2 band B, and calculates these at $25,199.00. He seeks an uplift of 50 per cent on part of those costs because of Ms Opai's failure to withdraw her claim against him, when I gave her that opportunity in my minute of 19 April 2016 (at [14]). He also seeks disbursements of $940.00. He submits that r 14.15 does not apply and he should have costs independently of any costs awarded to the Attorney-General.

[12] The Attorney-General submits that as between him and Ms Opai, there was mixed success under judgments 1 and 2, but contends that he was more successful. He seeks 70 per cent of costs on a 2B scale. He calculates scale costs at $19,847.00 and claims disbursements of $1,586.52. 70 per cent of that is $14,933.46. He seeks an award in addition to any granted to Mr Culpan.

[13] Ms Opai did not submit any memorandum on costs sought by Mr Culpan. On the first judgment she seeks costs against the Attorney-General under category 2 band B, of $7,015.50 and disbursements of $110.00. She claims greater success than the Attorney-General and says that the *Jameel* argument involved a novel area of law. She says that r 14.15 should be applied. On the discovery judgment, Ms Opai says that she was vindicated in having pursued the discovery which resulted in both agreed further discovery by the Crown and rulings in her favour. On a 2B basis she seeks costs of $8,808.50 and disbursements of $500.00.

Rule 14.15 of the High Court Rules

[14] Rule 14.15 says:

> **14.15 Defendants defending separately**
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> The court must not allow more than 1 set of costs, unless it appears to the court that there is good reason to do so, if—
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> (a) several defendants defended a proceeding separately; and

(b) it appears to the court that all or some of them could have joined in their defence.

[15] *McGechan on Procedure* says that the following principles emerge from the cases:[10]

(a) The Court will look in a realistic way at whether the parties have common or overlapping interests and, if so, to what extent. A consideration is the extent to which separate cases were run against, and separate relief sought from, each defendant, and whether the impact on the defendants of granting that relief would have been identical or different.

(b) Whether a conflict of interest was likely in terms of the way the plaintiffs ran their case, and/or whether the defendants' relationship was such that they were justified in remaining at arm's length from each other.

(c) If defendants' reputations are at stake (for example, where they are alleged to have acted fraudulently or to have colluded in trading unfairly), the Court will be more ready to accept, as reasonable, separate representations.

(d) Whether the parties took legal advice as to the appropriateness of separate/joint representations and, if so, what it was and whether it was followed.

(e) The extent to which one party did or could have relied upon the evidence or submissions of another.

[16] Ms Opai sues for allegedly defamatory statements made by Mr Culpan in the course of his employment. The Attorney-General is sued for the Crown's vicarious liability under s 6(1)(a) of the Crown Proceedings Act 1950. In this defamation proceeding Ms Opai does not and cannot allege that the Crown is liable independently of Mr Culpan. He and the Crown had a common interest in opposing Ms Opai's claim. The Crown's vicarious liability was not in dispute. The Crown stood or fell with Mr Culpan. If he was liable, the Crown was too. It could also raise the same defences as he could.

[17] This identity of interest can be seen in the statements of defence, which repeated the same admissions, denials and affirmative defences. At the pleadings hearing, Mr Culpan had more extensive submissions and relied also on a stay

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[10] Andrew Beck and others *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at [HR14.15.02].

application which the Crown did not support. But in other respects, their positions were the same and they adopted each other's submissions. There had clearly been co-operation between Mr Culpan and the Crown in preparing applications, evidence and submissions. There is nothing to suggest any possibility of conflict of interest that required Mr Culpan and the Crown to have separate representation or that they were at arm's length. As for reputations, only Mr Culpan's was at stake. That did not require separate representation.

[18] To a certain extent my ruling that Mr Culpan could be removed from the proceeding showed that his presence before the court was not necessary and that it was likely to lead to inefficiency. Admittedly Mr Culpan was not responsible for that. Ms Opai had him added as a defendant in the District Court. His interests were adequately protected by the Crown. The fact that he need not have been joined does not, however, mean that once joined he had to have separate representation.

[19] I also take into account that it is common practice in media defamation cases to have common representation where a journalist and the broadcaster/publisher are both defendants.

[20] For these reasons, r 14.15 applies. Costs will be assessed as though Mr Culpan and the Crown had common representation.

Costs on the pleadings judgment (1)

[21] Mr Culpan and the Attorney-General are to be considered as one. Generally, they were successful. Mr Culpan was removed. Some of the statements in issue were struck out. There were directions for amending pleadings in respect of meanings. They were not, however, completely successful given the failure to have the Crown removed from the proceeding, the failure of the attacks on the notices under ss 39 and 41 of the Defamation Act, on the form of the pleading and on some of the pleaded meanings.

[22] While Ms Opai might point to that less than complete success, there are aggravating matters within r 14.7 in her conduct of the case. In my judgment it was

unnecessary for Ms Opai to join Mr Culpan as a defendant. She was offered the opportunity to abandon the claim against him. The defendants indicated that they would allow her to withdraw the claim against him without any order as to costs. Her reasons for keeping him in the proceeding were unconvincing. That has added to the costs. That can be set off against anything that Ms Opai might raise to say that the defendants had less than complete success. When those matters are set against each other, the defendants should have costs for succeeding, without any adjustments either way under rr 14.6 and 14.7 of the High Court Rules.

[23] I do not regard the arguments as to the *Jameel* principle as raising any special considerations that affect costs. The principle had already been recognised in New Zealand case law.[11]

[24] It was also submitted for Ms Opai that the defendants ought not to have run arguments on which they failed with the result that they contributed unnecessarily to costs. Insofar as there is anything in that, I have allowed for it in recognising the defendants' partial success.

[25] I fix the costs of the application at $25,199.00 as claimed by Mr Culpan. All the steps claimed are appropriate. I also allow the disbursements of $940.00.

Costs on Ms Opai's discovery application against the Crown

[26] While the general rule is that costs on interlocutory applications should be fixed when the application is decided, I reserve costs on Ms Opai's application for costs against the Attorney-General heard on 31 October 2016.[12] As to the matters decided after argument, I do not regard either side as being the winner or loser. The Crown was required to concede some additional discovery. The decision was very much a case of fine-tuning matters where there was already broad agreement on how discovery should be carried out.

[27] Ms Opai may consider that she has been vindicated in having obtained consent to additional discovery orders on the eve of the hearing. At present I cannot

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11 See *Opai v Culpan*, above n 1, at [77] – [78].
12 *Opai v Culpan (No 2)*, above n 1.

assess that. I am suspicious that she has been disproportionate in her discovery requests and that the Crown acceded, simply to placate her, but I may be wrong. This may become clearer after a final judgment has been given. The safer course is to defer any decision for the time being.

Ms Opai's pleadings application against Mr Culpan

[28] The parties resolved that application by consent and no orders were required. In my judgment that consent resolution should be reflected in no order for costs.

Result

[29] I award the defendants costs of $25,199.00 and disbursements of $940.00, a total of $26,139.00. Subject to any agreement between them otherwise, Mr Culpan and the Attorney-General are to share those costs equally.

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Associate Judge R M Bell