IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-1790
[2018] NZHC 2389

UNDER	Section 124 of the District Courts Act 2016
BETWEEN	COLIN GRAEME CRAIG Appellant
AND	JACQUELINE STIEKEMA Respondent

Hearing: On the papers

Counsel: J Marcetic and LC Bercovitch for appellant
L Clark and HJP Wilson for respondent

Judgment: 11 September 2018

JUDGMENT OF FITZGERALD J
[As to costs of appeal/in District Court]

This judgment was delivered by me on 11 September 2018 at 4 pm,
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Solicitors: Chapman Tripp, Auckland
Kensington Swan, Wellington

Introduction

[1] Mr Craig successfully appealed an interlocutory decision of the District Court striking out his defamation claims against Ms Stiekema. In allowing the appeal, I quashed the District Court decision, including the costs orders, and invited the parties to attempt to resolve costs issues between themselves.

[2] In the event the parties could not reach agreement on costs, they were content for me to deal with both the costs of the appeal and costs in the District Court on the strike out application. I indicated a preliminary view that there did not appear to be any basis to depart from an ordinary scale costs award.[1]

[3] Mr Craig and Ms Stiekema have been unable to agree and seek a costs determination.

Contentions on costs

[4] Mr Craig seeks scale costs on a 2B basis. With disbursements, a total of $18,177.80 is sought.[2] He argues that as the entirely successful party he is entitled to costs. Mr Craig also raised evidence of settlement offers made to Ms Stiekema which, he says, demonstrate that he has been put to unnecessary expense in pursuing the appeal. It is submitted there are no reasons to the contrary to depart from the presumption Mr Craig should be awarded costs.

[5] Ms Stiekema opposes the application for costs on two grounds. First, she says the figure calculated in memoranda filed for Mr Craig is in error and a correct figure is $17,452.80. Second, she invites the Court to exercise its discretion under r 14.8(1) of the High Court Rules 2016 to reserve costs for determination at the conclusion of the substantive proceedings.

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1 *Craig v Stiekema* [2018] NZHC 838, [2018] NZAR 1003 at [80].

2 In his original memorandum on costs, Mr Craig sought $18,889.90. A subsequent memorandum in reply clarified that $712.00 had been included in error, leaving a figure of $18,177.80.

Further submissions sought

[6] Both parties' initial submissions on costs proceeded on the basis that r 14.8 applies. That rule provides that costs of interlocutory applications must be determined at the time the interlocutory application itself is determined (and not simply reserved into the substantive proceeding), "unless there are special reasons to the contrary". In their initial submissions, the parties put forward their arguments why there are such special reasons (as advanced on behalf of Ms Stiekema), and why there are no such special reasons (as advanced on behalf of Mr Craig).

[7] The decision I gave was, however, in respect of *an appeal* from the determination of an interlocutory application. Appeals are governed by pt 20 of the Rules. Rule 20.19 allows the court on appeal to "make any order the court thinks just, including any order as to costs."[3] I therefore invited further submissions clarifying the parties' positions on costs under r 20.19 (at least in relation to those aspects of costs claimed which relate to the appeal, rather than costs in the District Court).

[8] I also sought submissions on two additional matters. First, r 14.8 rule does not apply to summary judgment applications.[4] The usual approach to an unsuccessful summary judgment application is that costs will be deferred until the substantive proceedings are resolved.[5] But in *Schmitt v Registrar-General of Land*, Brewer J noted that there "is some support for the proposition that an application for summary judgement [sic] by a defendant should be treated differently."[6] Given the analogy between a *defendant's* application for summary judgment and a strike-out application, I invited further submissions on the applicability, if any, of Brewer J's judgment (or the authorities surveyed therein) to this case.

[9] Second, I sought further submissions on whether s 43(2) of the Defamation Act 1992 was of any relevance to the question of costs. Section 43(3) provides, in effect, that where a plaintiff in defamation proceedings obtains judgment for a lesser amount than that claimed, and the Judge is of the opinion that the damages claimed were

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3 High Court Rules 2016, r 20.19(1)(c).
4 Rule 14.8(3).
5 See *NZI Bank Ltd v Philpott* [1990] 2 NZLR 403 (CA).
6 *Schmidt v Registrar-General of Land* [2015] NZHC 2438, (2015) 22 PRNZ 794.

grossly excessive, the Court must award the defendant the solicitor and client costs of the defendant in the proceedings. In *Deliu v Hong*, Associate Judge Osborne noted that this applied to the whole of the proceeding, and not just particular steps.[7]

[10] In *Deliu v Hong*, Mr Hong argued that given s 43(2), all costs ought to be reserved until the substantive proceeding, as it would only be at that time when the Court would have all information before it to form a view on whether s 43(2) had been triggered. Associate Judge Osborne noted that but for r 14.8(2), that argument would have had some merit.[8] But he concluded that given the terms of r 14.8(2), which permit costs on interlocutory applications subsequently to be reversed, discharged or varied, it was appropriate to determine costs on such applications at the time of their determination, with those costs awards able to be reversed or discharged at the conclusion of trial, should s 43(2) have been triggered.[9]

The parties' further submissions

[11] Counsel acknowledged that the costs of the proceedings, at least in relation to the appeal, were appropriately determined under r 20.19 and not r 14.8. However, in substance, their positions have not changed.

[12] Mr Craig maintains his position that he was entirely successful on both the strike-out application in the District Court and the subsequent appeal. On the latter, Mr Craig submits there is no reason, on ordinary costs principles, why he ought not to be awarded costs on his successful appeal. And on the strike-out application in the District Court, Mr Craig submits that r 14.8(3) does not apply to strike out applications. He further submits that even if Ms Stiekema's application in the District Court was looked at through the lens of r 14.8(3), unlike unsuccessful *plaintiffs'* applications for summary judgment, authorities confirm that costs of a defendant's unsuccessful application for summary judgment are ordinarily determined at the time the application is determined.

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7 *Deliu v Hong* [2013] NZHC 1119 at [12]–[14].
8 At [13].
9 At [14].

[13] In relation to the appeal costs, Ms Stiekema invites the Court to exercise its discretion under r 20.19 and reserve costs for determination at the conclusion of the substantive claim. Counsel for Ms Stiekema relies on the same grounds advanced under r 14.8 to show it would be in the interests of justice to defer costs (as set out at [19] below).

[14] In relation to costs in the District Court, Ms Stiekema submits that as a defendant's summary judgment application is analogous to a strike out application, the Court of Appeal's approach to deferring costs on summary judgment applications in *NZI Bank Ltd v Philpott* should apply, because the reasons identified in that judgment are also applicable here:[10]

(a) Mr Craig was successful in resisting strike out but this did not determine the final proceeding;

(b) if Mr Craig ultimately succeeds, Ms Stiekema will be liable for costs on both proceedings;

(c) if Ms Stiekema ultimately succeeds, the Court can reduce or eliminate Mr Craig's costs in these proceedings in light of that success;

(d) the strike-out proceeding in this case was not hopeless; and

(e) the ultimate outcome of the case may affect overall costs fixed, taking into account conduct of the parties and potential abuses of process.

[15] In relation to *Deliu v Hong*, Ms Stiekema submits that given it will not be known until the close of trial whether s 42(3) has been triggered, it would be prudent to defer consideration of all costs until that point in time.

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10 *NZI Bank Ltd v Philpott* [1990] 2 NZLR 403 (CA).

Evaluation

Should costs be deferred?

[16] Having reviewed the parties' initial memoranda and subsequent memoranda received on the issues discussed above, I have reached the conclusion that costs should not be deferred and should be dealt with now.

[17] First, and in terms of the costs in the District Court, though it is conceptually plausible to approach an unsuccessful strike-out application by analogy to a defendant's unsuccessful application for summary judgment, the Court does not consistently do so.[11] I am additionally reluctant to draw such an analogy where r 14.8(3) does not apply on its face to strike out applications.

[18] Second, *Deliu v Hong* lends support to the argument that it is desirable to determine costs as proceedings are decided and to revisit costs at a later date in the event s 43(2) becomes relevant. I respectfully agree with that approach. The Judge dealing with an interlocutory application will be best placed to make a fair and accurate assessment of where costs should fall on that application. Section 42(3) of the Defamation Act can still be accommodated by the exercise of the power given by r 14.8(2), namely to reverse, vary or discharge any earlier order on costs.

[19] Finally, and in relation to the costs of the appeal in this Court, I am not convinced it is in the interests of justice to reserve those costs until the substantive proceedings are finalised. Ms Stiekema argued that the appeal costs should be deferred due to four factors:

(a) the power imbalance between the parties;

(b) the age, health and circumstances of the respondent;

(c) the strength of the respondent's case (at trial); and

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[11] See the authorities referred to in *Schmidt v Registrar-General of Land* [2015] NZHC 2438, (2015) 22 PRNZ 794 at [19]–[21] and the decision itself, at [21], which declined to follow that approach.

(d) the "success" of the appellant's claim.

[20] I am not satisfied these matters mean costs ought to be deferred. It is not clear if there is a "power imbalance" between the parties, let alone how this would warrant a deferral of costs. And although I sympathise with Ms Stiekema's personal circumstances, it has not been shown why these would make it unjust to determine costs on this appeal now, rather than at the end of the proceedings.

[21] Several points made for Ms Stiekema focus on issues of impecuniosity. It is alleged Mr Craig has pursued his claims against Ms Stiekema despite knowing she has no ability to pay the sum sought. That is, however, irrelevant in circumstances where Mr Craig has successfully appealed a decision that was defended by Ms Stiekema, based on an application she brought in the District Court. No evidence has been presented supporting Ms Stiekema's contentions about her financial situation. And financial hardship, though a relevant factor, is not "an answer" to a claim for a costs award.[12]

[22] Further, it is generally unusual to examine the merits of a case when determining costs on interlocutory matters,[13] and I do not consider I am any better placed to do so on an appeal from an interlocutory matter.

[23] Lastly, I disagree that Ms Stiekema found a degree of success on the appeal, at least which would merit a deferral of the costs award. Mr Craig was ultimately successful in overturning the District Court decision. And as I observed at the end of my substantive judgment:[14]

> [82] I should emphasise that the result on this appeal is not necessarily a reflection of the merits of the underlying claim. I have concerns as to the cost and time already incurred in relation to this proceeding, and the cost and time no doubt to be incurred. **The result on this appeal reflects the high bar for a strike-out application and the cautious approach to be taken when applying the *Jameel* principle**.
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> (Emphasis added)

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12 *Gibson v Fisher* HC Auckland CIV-2006-404-103, 17 July 2007 at [9]; see also *Tuck v Keedwell* [2016] NZHC 794 at [11].

13 See *MV Celebre Ltd v Airwork Flight Operations Ltd* [2015] NZHC 1400 at [11]–[13].

14 *Craig v Stiekema* [2018] NZHC 838, [2018] NZAR 1003.

[24] It is not necessary for me to elaborate any further on the meaning of my judgment, save to observe that I disagree with the Ms Stiekema's submission that I made observations in the judgment which could give rise to a "special reason" to defer costs. There was insufficient factual material before me on the appeal to have allowed me to form a view on the substantive merits of the defamation claims, such that I could be satisfied costs are better determined at a later date.

[25] For these reasons, I have concluded that costs, both in the District Court and on the appeal, ought to be determined now.

Quantum

[26] The parties disagree on quantum. First, Ms Stiekema argues that Mr Craig did not prepare the bundle for the District Court hearing and also should not be awarded costs for filing an affidavit in the District Court, which was supplementary and filed without leave. $712.00 is claimed in relation to each item. Mr Craig has acknowledged the first point and concedes that $712.00 was included in error.[15] But he has provided evidence that Judge Harrison granted leave for him to file his affidavit. As such, costs on the second affidavit may be awarded.

[27] Second, Ms Stiekema says the disbursement of $13.80 claimed for courier fees should not be awarded. No reasons were given for the disagreement. The figure is reasonable and should be allowed.

[28] Third, Ms Stiekema says an award lower than scale should be made under r 14.7 of the Rules, for the same reasons given in support of a deferral under r 14.8. Those reasons appear to fall within only the last ground of r 14.7, "some other reason" that could justify a reduction in costs.[16] This point was not argued to any great degree in the memoranda and for the reasons expressed above I do not consider the four factors raised by Ms Stiekema as sufficiently compelling to depart from an ordinary costs approach. At least in this case and based on the evidence before me, reducing

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15 See above n 2.
16 Rule 14.7(g).

scale costs given any one or more of the four factors advanced by Ms Stiekema would create inroads into the principle that determination of costs ought to be predictable.

Conclusion

[29] I make an order that costs are to be determined now, rather than at the resolution of the substantive proceedings.

[30] Mr Craig is entitled to the $18,177.80 of costs and disbursements in accordance with the costs schedule filed with his first memorandum, as adjusted by his second memorandum. There is an order to that effect.

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Fitzgerald J