

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV-2017-404-003091
[2019] NZHC 186**

BETWEEN KRISTIN PIA CATO
 Plaintiff

AND MANAIA MEDIA LIMITED
 First Defendant

 ROWAN DIXON
 Second Defendant

 JANE THOMPSON
 Third Defendant

Hearing: 17 December 2018 and 13 February 2019

Appearances: S Mills QC (17 December only) and E Nilsson for the Plaintiff
 T Goatley and E Bello for the Defendants

Judgment: 18 February 2019

**JUDGMENT OF HINTON J
[Costs on abandoned application and timetabling]**

*This judgment was delivered by me on 18 February 2019 at 2.00 pm
pursuant to Rule 11.5 of the High Court Rules*

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Registrar/Deputy Registrar

Counsel/Solicitors:
Lee Salmon Long, Auckland
Stephen Mills QC, Auckland
Bell Gully, Auckland

[1] This judgment relates to two matters following a hearing on 13 February 2019:

- (a) A costs order on a withdrawn application.
- (b) Timetabling.

Background

[2] On 17 December 2018, I adjourned part-heard two interlocutory hearings in this proceeding:

- (a) A half-day hearing to determine whether the article written by the second and third defendants, and published by the first defendant, is capable of bearing any of the defamatory meanings alleged by the plaintiff; and
- (b) A half-day conference under s 35 of the Defamation Act 1992 to determine the plaintiff's application for a correction recommendation under ss 26 and 27 of the Act.

[3] The two hearings had been set down together and had occupied the full day on 17 December 2018. At the point the hearing was adjourned, what substantially remained was reply submissions by the plaintiff in respect of the meanings issue.

[4] On 22 January 2019, the Registry, having already indicated that time would be available in February 2019, set the continued hearing down for 13 February 2019.

Withdrawal of s 26 application

[5] On 7 February 2019, the plaintiff filed a memorandum advising she was withdrawing the s 26 application on the grounds that, due to delays, it was no longer possible to achieve final resolution by way of correction and that additional costs would make it unlikely that settlement would be achieved in any event. The plaintiff wished only to conclude the reply submissions in respect of the meanings issue and otherwise re-timetable the substantive proceeding.

[6] Ms Goatley filed a memorandum on 12 February 2019 saying that she opposed withdrawal of the s 26 application and, if it was withdrawn, the defendants were seeking costs. The memorandum did not indicate the quantum claimed.

[7] On the morning of the hearing the following day, Ms Goatley accepted that this was not one of those rare cases where I might insist that the s 26 application proceed.¹ I therefore had to allow the plaintiff to withdraw that application.

Costs on withdrawal of s 26 application

[8] Although Mr Nilsson objected, I agree with Ms Goatley that costs should be ordered now, rather than reserved. I consider costs appropriate because I do not consider there is any change or delay that would justify abandonment now, particularly as compared to before the hearing on 17 December 2018.

[9] Ms Goatley said the defendants seek increased costs. A question then arose as to whether the defendants could produce Calderbank correspondence at this stage in connection with an interlocutory costs application. I consider that to be a moot point, but it was neatly resolved by Ms Goatley suggesting that 2B scale costs be awarded, with reservation for possible increased costs after the end of the hearing.

[10] Mr Nilsson, while certainly not agreeing, did not raise strong opposition to the concept of an order for scale costs.

[11] Ms Goatley submitted a schedule of 2B scale costs as follows:

- (a) Item 10: Preparation for first case management conference: 0.4 of a day: \$892
- (b) Item 11: Filing memorandum for first or subsequent case management conference or mentions hearing: 0.4 of a day: \$892

¹ Which can happen under r 15.22 where there is an abuse of process. The rule refers to discontinuance of a proceeding, but it has been held also to apply to an interlocutory application.

- (c) Item 23: Filing opposition to interlocutory application: 0.6 of a day: \$1,338
- (d) Item 13: Appearance at first or subsequent case management conference: 0.3 of a day: \$669
- (e) Item 24: Preparation of written submissions: 1.5 days: \$3,345
- (f) Item 25: Preparation by applicant of bundle for hearing: 0.6 of a day: \$1,338
- (g) Item 26: Appearance at hearing of defended application for sole or principal counsel: 1 day: \$2,230

[12] Ms Goatley conceded that, given the s 26 issue had only been set down for half a day, the last entry should be halved to become \$1,115. Other than that, she considered the entries were fairly made and did not require halving.

[13] In terms of item 10, the first case management conference dealt with both issues, the real difficulty being whether they could appropriately be heard together. Ms Goatley says that the plaintiff's election to have a s 35 conference led to the majority of the time incurred in the case management conference and subsequent timetabling, and that there was nothing complicated about the application for determination of meaning per se. It is at least true that if either application had not been on the table, there would have been little to resolve. Being practical about the matter, I have decided to halve each of items 10, 11 and 13.

[14] In terms of item 23, Ms Goatley said there was a separate notice of opposition filed regarding the application for a s 35 conference. However, there was one notice of opposition in relation to the s 35 application and the application regarding the meaning issue. Again, I consider it appropriate to halve this figure.

[15] That leaves "preparation of written submissions" and "preparation of bundle". I accept Mr Nilsson's submission that the bundle was actually prepared by him and the bundle to which Ms Goatley refers must be the case book, which is not a step in

the rules. I therefore make no allowance for item 25.

[16] Item 24 is consistent with the rules in terms of preparation of submissions for a half-day hearing, the allocated time being 1.5 days. Mr Nilsson accepted that and that figure therefore remains at \$3,345.

[17] In total, therefore, I award 2B scale costs to the defendants in respect of the withdrawal of the s 26 application in the sum of \$6,355.

[18] I further record that Ms Goatley intended to seek an uplift from scale on the bases of the Calderbank correspondence and the nature of the late withdrawal. Because of objection taken around whether the Calderbank correspondence can be relied upon, she sought scale costs today. I expressly reserve leave to the defendants to apply for an uplift in respect of the costs that I have just awarded, at a later appropriate stage.

Timetabling

[19] That leaves the question of timetabling from here, which for convenience I include in this judgment.

[20] Obviously, a judgment is required on the meanings point, which was the subject of final argument this morning, occupying something less than one hour of submissions by Mr Nilsson.

[21] Estimating that judgment to be available by approximately Friday, 8 March 2019, I ask that the Registrar allocate a further case management conference by telephone at 9.00 am on Friday, 15 March 2019.

[22] I make the following further directions:

- (a) The close of pleadings date is vacated. A new date will be set at the 15 March 2019 teleconference.
- (b) The timetable will otherwise remain in place, but any steps still

scheduled after 15 March 2019 will be reviewed at the case management conference.

- (c) The hearing date will remain in place. Ms Goatley asked me to expressly note that she is still unable to be present for part of the trial currently allocated. She says she did not object strenuously to the trial date when it was allocated because she was hopeful of resolving this proceeding. That has to some degree at least been taken away from the defendants by the plaintiff's withdrawal of their s 26 application. However, there must still be some hope of resolving this matter, or alternatively of the conflicting matter in which Ms Goatley is engaged resolving.

[23] I will enquire of the Registry whether another hearing date might possibly have freed-up that is earlier than 21 October 2019, but I would not wish, at least at present, to put the matter out beyond October 2019, for the same reasons I gave when I directed the hearing take place then.² Even though the plaintiff could be said to have wasted time because matters would have arguably been further ahead without the s 35 conference, it is still important that a proceeding of this nature be disposed of as promptly as possible. Also, the main difficulty in allocating dates to date has been with Ms Goatley's availability.

[24] I note it is not yet known whether the matter will proceed to a jury trial or Judge-alone hearing.

[25] Finally, the parties are to file either separate or a joint memorandum by 3.00 pm on Wednesday, 13 March 2019 for the 15 March 2019 teleconference. If all matters are agreed, that teleconference can be vacated.

Hinton J

² Refer my Minute 8 November 2018.