IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2016-409-309
[2019] NZHC 1347

BETWEEN	BRYAN DOUGLAS STAPLES First Plaintiff
AND	CLAIMS RESOLUTION SERVICE LIMITED Second Plaintiff
AND	RICHARD LOGAN FREEMAN First Defendant
AND	MEDIAWORKS TV LIMITED Second Defendant
AND	KATE McCALLUM Third Defendant
AND	TRISTRAM CLAYTON Fourth Defendant

Hearing:	(Determined on the papers)
Counsel:	P A Morten and A L Austin for First and Second Plaintiffs Nothing filed for First Defendant J W J Graham, T F Cleary and L C Bercovitch for Second, Third and Fourth Defendants
Judgment:	14 June 2019

JUDGMENT OF ASSOCIATE JUDGE LESTER

Introduction

[1] Counsel have filed numerous memoranda seeking to deal with costs issues arising from my judgment of 16 April 2019,[1] and the costs arising from the decision

[1] *Staples v Freeman* [2019] NZHC 839.

of the Court of Appeal dated 3 May 2019[2] reversing in part an earlier decision of Associate Judge Matthews dated 2 July 2018 between the parties.[3]

[2] The Court of Appeal decision quashed the costs orders made by the Associate Judge on 13 September 2018[4] and directed that if the parties could not agree High Court costs, then the matter was to be determined by this Court.

Judgment of 16 April 2019[5]

[3] The parties do not disagree about the applicable principles. Under r 14.8 of the High Court Rules, costs on opposed interlocutory applications are to be fixed when the application is determined and become payable when they are fixed.

[4] *McGechan on Procedure* at HR14.8.02 notes that determination includes determination by the Court or by another mechanism such as agreement of the parties.

Costs following the event

[5] The principal debate in respect of the various applications that were dealt with on 16 April 2019 is: who was successful. *McGechan* at HR14.2.01(1)(b) under the heading "Partial success" records:

> The starting point is that "success on more limited terms is still success": *Weaver v Auckland Council* [2017] NZCA 330 at [26]. The requirement to focus on the success of the successful party is emphasised in *Water Guard NZ Ltd v Midgen Enterprises Ltd* [2017] NZCA 36 at [13] affirmed in *Midgen Enterprises Ltd v UV Water Systems Ltd* [2017] NZSC 68...

[6] As recorded in my judgment, six applications were before the Court at the commencement of the hearing on 26 March 2019.

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2 *Mediaworks TV Ltd v Staples* [2019] NZCA 133.
3 *Staples v Claims Resolution Services Ltd* [2018] NZHC 1604.
4 *Staples v Freeman* [2018] ZHC 2406.
5 Above n 1.

Defendants' applications

[7] There were two separate applications by the defendants before the Court: an application for a direction that the trial be a Judge-alone trial; and an application for further and better discovery from the plaintiffs.

[8] As recorded in my judgment, immediately prior to the hearing a memorandum of counsel was filed advising that the defendants' applications were being dealt with by consent. Accordingly, orders were made by consent that the substantive proceeding be determined at a Judge-alone trial and there was an order that the plaintiffs were to provide further and better discovery.

[9] Applying the principles set out at the outset as the applications were granted, the applicants were successful and are therefore entitled to costs on these applications on a 2B basis.

[10] The issue here is whether the applications should have been combined, or at the very least, whether the Court should treat them as one application.

[11] Both applications were dated 1 November 2018.

[12] In my view, they should both be treated as one application.

[13] The applicants maintain that the subject matter of the applications were clearly distinct and arose on different occasions. That may well be right, but procedurally there is no reason why they should not have been dealt with in one application.

[14] I have not ignored the matters set out at para 7 of the media defendant's memorandum of 23 May 2019. That the discovery application had a history, in my view, would not have prevented their amended application for further discovery being included in the application for a Judge-alone trial. I am not convinced that the uplift of 50 per cent sought is justified. Conversely, I accept that the disbursement claim for Mr Lazelles' expert fees are appropriate for the reasons given by the media defendants.

[15] Accordingly, there is a ***costs award*** on a 2B basis to the media defendants for the applications for the Judge-alone trial and further and better discovery on the basis that they are treated as one application. There is an allowance for the expert's disbursement as noted.

Plaintiffs' applications

Further and better particulars of Publication Facts

[16] The application for further and better particulars of Publication Facts was met with limited success, but success nonetheless. The outcome was described at [125] of my judgment in the following terms:[6]

> To the extent that the application has achieved the acknowledgment from Mr Miles that the reference to further particulars being provided after discovery will be abandoned, the application has succeeded …

[17] This was a concession only made at the hearing. It was a matter expressly put in issue by the application and the submissions. I consider that the applicants had limited success in their particulars application.

The strike out application

[18] Again, the applicants had limited success in respect of the strike out application. Other than the defects found in Publications Facts 6 and 7, the strike out applications were dismissed. The pleadings were capable of being saved by amendment and so were not struck out but the media defendants were required to re-plead Publications Facts 6 and 7 as referred to in my judgment at [120].

[19] The limited success of the plaintiffs in respect of these two applications stands squarely against any claimed uplift.

[20] Overall, in relation to these two applications, the applicants, however, succeed to a limited extent in achieving a concession that was only offered at trial and in an order requiring an amendment to the pleading.

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6 *Staples v Freeman*, above n1.

[21] I do not accept the submission in the media defendants' memorandum of 23 May 2019 at para 4.3(c) that the strike out failed completely.

[22] I accept that the steps the Media defendants were directed to take represented a limited success when judged against the application, but to suggest that the outcome of the strike out was *procedural only* ignores that this was fundamentally a procedural application.

Application for further and better discovery

[23] I consider the plaintiffs were successful in this application. The order made was not the confirmation of the existing position as asserted by the media defendants at para 16 of their costs memorandum of 23 May 2019. The reasons why orders were made in the applicants' favour are summarised at [63] – [67] of my judgment. I consider that in substance the applicants were successful and whether the resulting lists of documents resulted in further disclosure is not the point. The issue was whether the lists provided complied with the directions given by Associate Judge Matthews in June 2018. I consider the applicants are entitled to costs on a 2B basis in respect of this application.

[24] Because I intend to treat the plaintiffs' three applications as one application, that will in a practical sense deal with the varying degrees of success across the applications.

[25] I find that the plaintiffs are entitled to costs on a 2B basis in respect of its applications to be treated as one application. As I have said, there is no basis for an uplift given the limited success that the plaintiffs had.

[26] In short, I am treating both the plaintiffs' and defendants' applications as if each had brought one application.

[27] Counsel will need to revisit their costs schedules in light of this judgment.

[28] As an observation, I have considered what the media defendants have said about what amounts to success. Treating the plaintiffs' applications as one application

takes into account the limited success on the strike out and particulars applications. I consider the discovery application was successful. That I also note the absence of any offers by the media defendants to address the discovery application prior to the plaintiffs' applications being heard. The defendants now wish to categorise the discovery issue as being merely procedural. If that is the way they were perceived, then one would have expected counsel to have worked through such matters without the intervention of the Court.

Costs arising from Court of Appeal decision

[29] As noted, the Court of Appeal quashed the costs orders made by Associate Judge Matthews in the High Court.[7]

[30] Matthews AJ treated the plaintiffs' application for what he recognised as three separate and distinct orders as one interlocutory application. He ordered the defendants to pay the plaintiffs' costs of $13,380.[8]

[31] The Court of Appeal dealt with the appeal as if it were a review sitting as a full court of the High Court. In respect of the review/appeal, the plaintiffs were ordered to pay costs on a 2B basis.

[32] I accept that the Court of Appeal classification of costs on the issue before them as 2B cuts across the defendants' submission that costs on the same issue before Associate Judge Matthews should be dealt with on a 2C basis.

[33] The outcome that I consider appropriate in respect of the Associate Judge's judgment is that costs lie where they fall. The plaintiffs achieved a level of success, and the defendants successfully resisted one of the applications.

[34] The effect of the order that costs lie where they fall is that the plaintiffs will have to refund the costs that they were awarded by Associate Judge Matthews.

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7 *Mediaworks TV Ltd v Staples*, above n2.
8 *Staples v Freeman*, above n4.

[35] Accordingly, in respect of Associate Judge Matthews' judgment from July 2018, there is no order as to costs, with the consequence that the plaintiffs are to refund to the defendants the costs award made by the Associate Judge but quashed by the Court of Appeal.

Associate Judge Lester

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