

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

**I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE**

**CIV-2016-409-309
[2019] NZHC 1745**

BETWEEN

BRYAN DOUGLAS STAPLES
First Plaintiff

CLAIMS RESOLUTION SERVICE
LIMITED
Second Plaintiff

AND

RICHARD LOGAN FREEMAN
First Defendant

MEDIAWORKS TV LIMITED
Second Defendant

KATE MCCALLUM
Third Defendant

TRISTRAM CLAYTON
Fourth Defendant

Hearing: 22 July 2019

Appearances: P A Morten for the Plaintiffs
No appearance by or for the First Defendant
L C Bercovitch for Second to Fourth Defendants

Judgment: 23 July 2019

RULING OF DUNNINGHAM J

[1] The plaintiff has filed an application for review of the costs judgment of Associate Judge Lester dated 14 June 2019.¹

¹ *Staples v Freeman* [2019] NZHC 1347.

[2] The second to fourth defendants oppose the application. They also seek leave to file the following further evidence in opposition:

- (a) An affidavit from Mr Denton, a solicitor, which calculates the parties' liability for costs as a consequence of the judgment of Associate Judge Lester.
- (b) An affidavit by Mr Lazelle, a chartered accountant. It is the award of his fees as a disbursement that is being challenged by the plaintiffs. His affidavit briefly outlines the scope and nature of his work as an expert witness and the fees charged for his services.

[3] Ms Bercovitch says that Mr Denton's evidence is helpful and relevant to the review hearing because it "provides the necessary context of what the costs judgment means for the parties regarding payment of costs". In respect of Mr Lazelle's evidence she says this is required to respond to the plaintiffs' claim that his services were not specific to the conduct of the application, were not reasonably necessary for the conduct of the application, were not reasonable in amount, and were disproportionate in the circumstances. She says the only way to properly respond to the plaintiffs' claims is for Mr Lazelle himself to explain the work undertaken and the fees charged.

[4] Ms Bercovitch pointed out that the threshold for considering the admission of new evidence on an application review is lower than on an appeal and involves an assessment of the relevancy and cogency of the evidence.²

[5] Mr Morten opposes that admission of the evidence. In his view, Mr Denton's evidence is both irrelevant and, in any event, his costs calculation is disputed on at least two points by the plaintiffs.

[6] In respect of Mr Lazelle's evidence, he points out that the exhibits are all already available to the Court and the scope of Mr Lazelle's work is apparent from his invoices and any additional evidence on that is "self-serving".

² *Re McCullagh v Robt Jones Holdings Ltd* [2016] NZHC 263 at [40].

[7] In any event, the issue of whether Mr Lazelle's fees were recoverable as to disbursement was the subject of a number of costs memoranda to the Court filed in advance of the Associate Judge making his costs decision. In circumstances where the application for review is a rehearing, it would not be in the interests of justice to receive further information when that was not deemed necessary in the initial hearing despite the explicit challenges made by the plaintiffs in their costs memoranda to the recovery of this distribution.

Discussion

[8] The application is to be considered under the High Court Rules 2016, r 2.3(4). That rule provides that if a decision by an Associate Judge is reviewed following a defended hearing and is supported by documented reasons, the Judge may receive further evidence if he or she thinks it is in the interests of justice.

[9] I accept that in the circumstances, Mr Denton's affidavit is not necessary. It is not obvious that the overall costs payable by the plaintiffs is relevant. More importantly though, because Mr Denton's calculations are disputed, it is not clear that his affidavit would be of utility to the Court. In any event, should the quantum of costs payable by the plaintiffs be considered relevant by the defendants, then those calculations can be annexed as a schedule to submissions, perhaps pointing out where the costs calculation is disputed by the plaintiffs.

[10] In respect of Mr Lazelle's affidavit, I do not consider it should be admitted:

- (a) It largely replicates material that is already before the Court including in his fee notes; and
- (b) It addresses an issue which was squarely before the Court in the parties' costs memoranda filed in the original hearing.

It is not, in my view, in the interests of justice to allow a further explanation of the purpose of Mr Lazelle's work to be introduced now, when the evidence as to his work was largely before the Court in the original hearing and, to the extent it was not, the

defendants should not be allowed, at this late stage, to augment that evidence with Mr Lazelle's explanation.

[11] Accordingly, the application for leave to adduce this further evidence is declined.

Solicitors:
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