IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2018-404-539
[2020] NZHC 1299

BETWEEN	STEVEN LEONARD JOYCE Plaintiff
AND	MATTHEW OWEN HOOTON First defendant (discontinued)
	FOURTH ESTATE HOLDINGS (2012) LIMITED Second defendant
	TODD ALLEN SCOTT Third defendant

Hearing:	On the papers
Appearances:	Z G Kennedy and H M Jaques for the plaintiff PWG Ahern for the second and third defendants
Judgment:	11 June 2020

JUDGMENT OF JAGOSE J
[Costs]

This judgment was delivered by me on 11 June 2020 at 12.00pm.
Pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Counsel/Solicitors:
Zane Kennedy Barrister, Auckland
MinterEllisonRuddWatts, Auckland
Morrison Kent, Auckland

[1] My 17 December 2019 judgment declared Fourth Estate and Mr Scott separately each are liable to Mr Joyce in defamation. I awarded Mr Joyce solicitor and client costs against separately each Fourth Estate and Mr Scott.[1]

[2] Those were remedies provided in terms of s 24 of the Defamation Act 1992. As such, on the declaration's "primary vindication", costs are "a consequential right to indemnity".[2] Notably, although declaratory relief is discretionary,[3] the right to indemnity is not.[4] The right to indemnity is a factor to be considered in exercise of the declaratory discretion.[5] I did not order "otherwise".[6] Factors relevant to awards of indemnity costs under the High Court Rules are immaterial.[7]

[3] Mr Joyce's solicitor and client costs amount to $268,291.55 (including GST, as Mr Joyce is not GST-registered).[8] He supports the quantification with extracts from his solicitors' time records and copies of invoices, together with evidence of the perceived comparability of his solicitors' hourly rates with those charged by other large New Zealand law firms. He omits costs incurred on his unsuccessful interlocutory applications for determination of separate questions and strike out, and seeking leave to file a second amended statement of claim.

[4] Fourth Estate and Mr Scott (together, for convenience, the "NBR") contend some of the sought costs are "not properly recoverable" because they relate to aspects of the proceeding for which the NBR should not be held responsible, and are besides "entirely unreasonable for the work involved".

[5] Under the former category, the NBR resists paying:

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1 *Joyce v Hooton* [2019] NZHC 3356 at [60].

2 *Williams v Craig* [2018] NZCA 31, [2018] 3 NZLR 1 at [32]. The Supreme Court, in *Craig v Williams* [2019] NZSC 38; [2019] 1 NZLR 457 overturned the Court of Appeal's decision, on unrelated grounds.

3 *Salmon v McKinnon* [2007] NZCA 516 at [47], approved in *Smith v Dooley* [2013] NZCA 428 at [95].

4 *Smith v Dooley*, above n 3, at [101]–[102]. But compare *Television New Zealand Ltd v Keith* [1994] 2 NZLR 84 (CA) at 88: "By proceeding in this way, the plaintiff can now achieve the result which the jury sought to achieve in the present case, but it is achieved without the jury intruding into the area of costs, and while preserving the ultimate discretion of the Judge."

5 *Salmon v McKinnon*, above n 3, at [49].

6 Defamation Act 1992, s 24(2).

7 *Smith v Dooley*, above n 3, at [128].

8 *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC* [2016] NZCA 282 at [13]–[16].

(a) something in excess of $17,000 incurred by Mr Joyce in connection with "the aborted first trial";

(b) an undefined amount incurred by Mr Joyce in seeking leave to have Mr Price's evidence admitted for trial; and

(c) anything in excess of a contended agreement on costs payable in relation to the NBR's abandoned application to call further evidence and to issue further subpoenas.

[6] Under the latter category, the NBR would reverse-engineer "actual and reasonable costs to be incurred in litigation" from the High Court Rules' "an appropriate daily recovery rate should normally be two-thirds of the daily rate considered reasonable in relation to the proceeding or interlocutory application".[9]

[7] 'Indemnity' means what it says: the NBR's liability coterminous with the solicitors' costs incurred by Mr Joyce.[10] Mr Joyce's solicitors progressively advised the NBR of his incurred costs. If the NBR proposed 'other' than solicitor and client costs should be ordered in remedy, the time for that was at trial.[11] I see nothing in the NBR's proposed deductions to reduce quantification of the sum of solicitor and client costs awarded to Mr Joyce.

[8] If I am wrong in that:

(a) my vacation of the initial trial date explicitly was done to avoid risk to either Mr Joyce or the NBR. Both parties agreed "repleading was the only acceptable alternative".[12] There is no foundation for the proposition Mr Joyce should have to bear associated costs;

(b) even if an indulgence, Mr Joyce nonetheless incurred costs in obtaining leave to adduce Mr Price's evidence late. The evidence was relevant,

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9 High Court Rules 2016, r 14.2(d).

10 Daniel Greenberg and Yisroel Greenberg *Stroud's Judicial Dictionary of words and phrases* (9th ed, Sweet and Maxwell, London, 2016) at 1239.

11 *Lange v Atkinson* [1998] 3 NZLR 424 (CA) at 433, citing *Lange v Atkinson* [1997] 2 NZLR 22 (HC) at 48.

12 *Joyce v Hooton* (minute, 13 May 2019) at [7].

and also in the NBR's possession (but not discovered to Mr Joyce). Again, there is no foundation for the proposition Mr Joyce should have to bear the costs incurred; and

(c) the NBR may be entitled to costs and disbursements in the amount of $5,726.50 arising out of my 29 October 2019 decision, dismissing Mr Joyce's application for determination of separate questions and strike out. That turns on if the parties either are to be taken to have accepted my preliminary view, or otherwise agreed.[13] No timely application was made for my determination of those costs, and leave is not now sought for such. And such is not for deduction from Mr Joyce's entitlement to solicitor and client costs overall (which claim omits his costs incurred on the unsuccessful application).

[9] Last, if 'reasonableness' is to be implied into the award of solicitor and client costs, it can only be from the nature of that relationship, in which:[14]

> A lawyer must not charge a client more than a fee that is fair and reasonable for the services provided, having regard to the interests of both client and lawyer and having regard also to the factors set out in rule 9.1.

The NBR's complaints under this head painstakingly contest the reasonableness of costs incurred step-by-step in the proceeding, for me to "identify what are the reasonable solicitor client costs of the plaintiff", from the perspective:

> The commentary in McGechan goes on to discourage an unjustified "Rolls Royce" approach to cases. Mr Joyce is well entitled to whatever approach he can afford and choose to afford – but when it comes to recovering solicitor client costs, he can only recover so much as are reasonable to his adversary.

[10] That is not correct. The NBR stands to indemnify Mr Joyce for his solicitor and client costs. Whether those are reasonable to the NBR is irrelevant. Neither does s 24(2)'s "against the defendant in the proceedings" operate to limit those costs to such as may be awarded on a costs application in the proceeding. Grammatically, "in the proceedings" attaches "against the defendant", rather than to "solicitor and client costs". And the Act expressly entitles a plaintiff to seek retraction or reply pre-

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13 *Joyce v Hooton* [2019] NZHC 2761 at [24].
14 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 9.

commencement, for solicitor and client costs indemnity if published.[15] That indemnity would be a nonsense if those costs could not also be recovered on ultimate litigation success.

[11] To the extent reasonableness has application here, it is only that the costs are "fair and reasonable for the services provided, having regard to the interests of both client and lawyer".[16] Again, I see nothing in the costs claimed to render them unfair or unreasonable for the services provided, having regard to the interests of both Mr Joyce and his solicitors. Standing back, the proceeding's:

(a) expenditure of nearly 500 hours of lawyers' time and labour over the course of some 22 months at just less than a $480 blended hourly rate;

(b) specialised and technical area of law justifying significant experienced senior input;

(c) self-evident importance and success to Mr Joyce;

(d) pursuit with initial and relative subsequent expedition; and

(e) use of a substantial commercial firm, charging fees calculated at competitive rates—

together justify the costs to be indemnified by the NBR.

[12] Mr Joyce has apportioned the costs between each Fourth Estate and Mr Scott as incurred identifiably for one or other, and otherwise on a 60/40 division between them. The NBR complains the latter division is arbitrary, and Mr Scott's "republication" liability only should see that reduced to an 80/20 division. Such a characterisation unduly diminishes Mr Scott's guiding role as the NBR's sole director, shareholder, and publisher, and "the separate defamatory nature of [his] endorsement" of the truth of the article's defamatory comments.[17] If left to my own devices I may have been tempted to propose a 67/33 division, but such would be tinkering at the

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15 Defamation Act 1992, s 25(2).

16 Similarly, Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, above n 14, r 9.2.

17 *Joyce v Hooton*, above n 1, at [3], [8], and [52].

margins without any foundation for the distinction, and I have no basis on which to anticipate Fourth Estate's and Mr Scott's respective resources as justifying it.

[13] I therefore **order** in terms of paragraph 63(a)–(e) inclusive of the plaintiff's reply memorandum dated 17 April 2020.

—Jagose J