IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2016-409-000309
[2020] NZHC 1124

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:	23 April 2020
Appearances:	P A Morten for Plaintiffs (via VML) L C Bercovitch for Defendants (via VML)
Judgment:	26 May 2020

JUDGMENT OF DUNNINGHAM J

This judgment was delivered by me on 26 May 2020 at 3.30 pm, pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date: 26 May 2020

[1] The plaintiffs are suing the defendants in defamation. However, that claim has yet to be heard. Instead, the parties have been embroiled in a series of interlocutory applications, one of which was the subject of an appeal to the Court of Appeal.

[2] The parties have had mixed success on those applications and could not agree on costs. Costs were ultimately determined by Associate Judge Lester in his judgment of 14 June 2019.[1]

[3] The plaintiffs now apply for review of two aspects of the Judge's costs decision, pursuant to s 26P(1) of the Judicature Act 1908. They assert the Judge erred when he:

(a) awarded the full costs of $15,295 (including GST) of the defendants' expert accounting witness, as a disbursement;

(b) determined that costs should lie where they fall on the interlocutory applications which were heard in June 2018, and where the plaintiffs were successful in two of the three issues raised in the applications.

[4] The defendants' position is that the Judge's decision on both issues was a plainly defensible exercise of discretion in costs matters and the application for review should be dismissed.

Background

[5] Mr Staples and his company, Claims Resolution Service Limited (CRS), are in the business of providing assistance to property owners with unresolved Earthquake Commission (EQC) and insurance claims for properties damaged in the Christchurch earthquakes. The proceedings involve a claim that the defendants defamed Mr Staples and CRS when they made allegations of fraudulent or illegitimate practices in providing such assistance. The relief sought includes special damages for a claimed loss of profits in the six months after the impugned statements were published.

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

[6] The claim was filed in 2016. Since then, a number of interlocutory applications have been made which are relevant to the costs judgment under review. The interlocutory applications involve only the second, third and fourth defendants who, for convenience, are referred to collectively as the media defendants.

[7] The media defendants made two applications. The first was an application for further and better discovery in respect of the plaintiffs' special damages claim. It was filed on 14 December 2017. The defendants sought discovery of all documents relating to CRS clients for the period 1 June 2013 to 1 July 2016. The plaintiffs resisted that application, noting CRS's claim for special damages was only for losses suffered in the period 1 August 2014 to 31 January 2015.

[8] The media defendants progressively refined their application for particular discovery and, by 1 November 2018, they had reduced the range of CRS client documents sought to those from 1 January 2014 to 30 September 2015. They also applied, at the same time, for a judge-alone trial.

[9] Just prior to the hearing on 26 March 2019, a memorandum of counsel was filed advising that the media defendants' applications had been resolved by consent. Orders were made confirming that the proceeding would be by judge-alone hearing and that the plaintiffs would provide further and better discovery to the extent described.

[10] The plaintiffs, too, pursued interlocutory applications. The first that are relevant were the applications which were heard by Associate Judge Matthews in June 2018 and determined in his judgment dated 2 July 2018 ("the June 2018 applications").[2] The June 2018 applications sought the following orders:[3]

(a) the media defendants file and serve an amended statement of defence giving further particulars in relation to their defence of honest opinion;

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2 *Staples v Freeman* [2018] NZHC 1604.
3 At [12].

(b) the media defendants file an affidavit of documents which properly identified each of the documents which was claimed in part 3 of the schedule to the affidavits to be confidential on the grounds of protecting journalists' sources;

(c) the media defendants properly identified documents described in part 4 of their affidavits as being no longer in their possession or control.

[11] The plaintiffs were successful in those applications before Associate Judge Matthews and were awarded costs in a judgment dated 13 September 2018.[4]

[12] The media defendants appealed one aspect of the 2 July 2018 judgment of Associate Judge Matthews, being the decision that the media defendants could not avail themselves of the protection for journalists' sources under s 68(1) of the Evidence Act 2006.

[13] In the Court of Appeal, the Court quashed the decision requiring the media defendants to disclose full details of each of the documents listed in part 3 of the schedule to their discovery affidavits.[5] Instead the Court upheld the media defendants' claim of privilege in respect of their sources saying "we have reached the view that the weighing process comes out firmly in favour of protection, and against disclosure under s 68(2)".[6] The judgment also quashed the costs orders made by Associate Judge Matthews in the High Court and directed that if the parties could not agree on costs, the issue should be determined in the High Court.

[14] By the time the matter was referred back to the High Court to deal with costs, Associate Judge Matthews had retired, and Associate Judge Lester was seized of the matter. He also had further interlocutory applications to determine. The media defendants pursued:

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4 *Staples v Freeman* [2018] NZHC 2406.

5 *Mediaworks TV Ltd v Staples* [2019] NZCA 133. It was not recognised until after the case had been heard, that the Judicature Act 1908 applied to the proceedings and the decision should have been challenged by way of review under that Act. Having heard the case, the Court of Appeal concluded that it was in the interests of justice that they determine the case as a review application heard before three High Court Judges and proceeded to do so.

6 At [70].

(a) an application for a judge-alone trial; and

(b) the still unresolved application for further and better discovery related to the plaintiffs' special damages claim.

Both applications were resolved by consent orders made at the hearing, with costs reserved.

[15] The plaintiffs pursued three applications. These were described in Associate Judge Lester's judgment of 16 April 2019 as follows:[7]

> …
>
> (iii) An application for further and better particulars of "Publication Facts" pleaded in accordance with s 38 of the Defamation Act 1992, along with an application for an unless order in respect of that application.
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> (iv) An application that four paragraphs of the Schedule of Publication Facts pleaded in support of the honest opinion positive defence be struck out.
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> (v) An application in respect of the adequacy of discovery said not to satisfy an order for discovery made by Associate Judge Matthews in his Judgment of 2 July 2018.

[16] The outcome of the plaintiffs' applications were as follows:

(a) the application for further and better particulars of Publication Facts was described as having "limited success, but success nonetheless";[8]

(b) the strike-out application had limited success with the Judge noting that while the pleadings were not struck out, the media defendants were required to replead Publication Facts 6 and 7;

(c) the plaintiffs were successful in their application for further and better discovery.

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7 *Staples v Freeman* [2019] NZHC 839 at [3].
8 *Staples v Freeman*, above n 1, at [16].

[17] Although noting the limited success the plaintiffs had on some issues, the Judge found that the plaintiffs were entitled to costs on a 2B basis in respect of their applications, treating them as one application.

[18] Likewise, in awarding costs to the media defendants for the applications for the judge-alone trial and for further and better discovery, the Judge made a 2B costs award on the basis that they were treated as one application. In addition, and which is contested in this hearing, the Judge allowed the fees of the expert accounting witness, Mr Lazelle, as a disbursement.

[19] In dealing with costs from the June 2018 applications which had been determined by Associate Judge Matthews, and revising those in light of the outcome of the Court of Appeal decision, Associate Judge Lester determined that costs should lie where they fall, saying "the plaintiffs achieved a level of success, and the defendants successfully resisted one of the applications".[9]

[20] The consequence was that the plaintiffs were to refund the defendants the costs award made by the Judge.

Jurisdiction to review

[21] The parties were agreed on the principles that apply on review. As was said by Fisher J in *Wilson v Neva Holdings Ltd*:[10]

(a) The hearing is appellate in nature. The applicant has the burden of persuading the court that the decision was wrong.

(b) On matters involving the exercise of a judicial discretion, the appellate court will intervene only if there has been an error of principle, a failure to take into account some relevant matter or taking into account an irrelevant consideration, or where the Judge was plainly wrong.

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9 At [33].
10 *Wilson v Neva Holdings Ltd* [1994] 1 NZLR 481 (HC).

(c) The court's readiness to intervene will vary according to the circumstances, including the extent of the argument presented in the court below, the existence and thoroughness of reasons for the decision, and whether significant fresh evidence or argument has been presented for the first time on appeal.

[22] Bearing these principles in mind, I turn to consider the two issues raised on review.

Should the Judge have awarded the fees of Mr Lazelle, an expert witness for the media defendants, as a disbursement?

[23] Mr Lazelle gave expert accounting evidence for the media defendants to support their application for further discovery of documents relating to the second plaintiff's claim for special damages for losses suffered in the period 1 August 2014 to 31 January 2015.

[24] The application was made on 14 December 2017 with the media defendants wanting discovery of "all documents" relating to CRS clients for the period 1 June 2013 to 1 July 2016. The media defendants claimed that the documents provided to date did not substantiate the claimed average profit per client, nor the claimed loss of 28 clients in the specified period, which were central to the claimed loss of profits totalling $1,032,780.

[25] The plaintiffs regarded the breadth of the date range sought as oppressive and not required to properly assess the second plaintiff's claim for special damages. However, on 20 February 2018, the plaintiffs provided an updated affidavit of documents, providing some further documents, but opposed the application for further discovery on the grounds that it was not necessary.

[26] By mid 2018, the media defendants had modified their application to limit the documents sought, and the second plaintiff agreed to provide discovery for the period 1 January 2014 to 31 March 2015. The application was not dealt with by Associate Judge Matthews when he heard other applications on 19 June 2018. Instead, that was adjourned by consent for further consideration.

[27] In a minute dated 20 June 2018, Associate Judge Matthews recorded that:[11]

> There is force in the arguments presented for the defendants that this date range is inadequate. On the other hand, the plaintiffs maintain it is sufficient and also speak of proportionality favouring further discovery being limited as proposed by Mr Hendren. With this in mind the Court will require some expert evidence in relation to the further documents that are required, when taking up the application again. This seems appropriate given that once the material is provided to the defendants' experts, they will doubtless consider it and then advise exactly what further documents are sought, if any, with reasons for their view. This can then be considered by experts for the plaintiffs.

[28] Over the balance of 2018, and into 2019, there were further amendments to the media defendants' application for further discovery and both Mr Hendren (CRS's general manager) and Mr Lazelle provided affidavits in support of the parties' respective positions. The plaintiffs reduced the date range of documents they sought, while the plaintiffs incrementally provided further discovery, until, as already noted, agreement was finally reached with the plaintiffs agreeing to provide further and better discovery to the extent described, but for a much smaller date range than originally sought.

[29] In his costs' judgment, Associate Judge Lester had accepted the plaintiffs' submission that the two media defendants' applications which were resolved by consent, should be treated as one interlocutory application and awarded the defendants 2B costs on that basis. He also awarded the full costs incurred by Mr Lazelle as a disbursement saying, "I accept that the disbursement claim for [his] expert fees are appropriate for the reasons given by the media defendants".[12]

[30] Mr Lazelle's fees were itemised in two invoices. The first invoice was rendered in October 2018 for 16.31 hours which, with a modest discount, totalled $5,500 plus GST. The second invoice was for services rendered up until 28 February 2019 which, with a modest discount, totalled $7,800 plus GST. The narrative in the accounts show in general terms the type of work Mr Lazelle did, including assessing the adequacy of the plaintiffs' discovery, giving the media defendants professional advice about the special damages claim and reviewing the

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11 *Staples v Freeman* HC Christchurch CIV-2016-409-309, 20 June 2018.
12 *Staples v Freeman*, above n 1, at [14].

discovered documents to determine compliance with what had been agreed to be provided.

Plaintiffs' submissions

[31] The plaintiffs challenge the award of Mr Lazelle's fees as a disbursement. They submit that r 14.12(2) of the High Court Rules 2016 requires a disbursement to be:

> (b) specific to the conduct of the proceeding; and
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> (c) reasonably necessary for the conduct of the proceeding; and
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> (d) reasonable in amount.

They also point out that a disbursement is defined in r 14.12(1) to mean "an expense paid or incurred for the purposes of the proceeding that would ordinarily be charged for separately from legal professional services in a solicitor's bill of costs".[13] Thus, the High Court Rules require a disbursement to relate to a "proceeding" which is defined in r 1.3 to mean "any application to the court for the exercise of the civil jurisdiction of the court other than an interlocutory application".[14] For this reason, the plaintiffs submit that the expert witness fees should not have been awarded as a disbursement in a defended interlocutory hearing as it is not a "proceeding" as defined. The plaintiffs rely on *Chapman v Badon Ltd* to support this submission, where the Court of Appeal observed that the distinctive treatment of costs on interlocutory applications and on substantive claims, reflect the fact that interlocutory applications and substantive claims may have different merits.[15]

[32] However, even if I reject this submission, the plaintiffs submit the requirements of r 14.12(2) have not been met here. Mr Lazelle's attendances were not demonstrated to be reasonably necessary for the conduct of the proceeding, nor was the sum claimed for those attendances reasonable. First, the plaintiffs note that much of Mr Lazelle's work is work that he would have done in any event in preparing for the substantive proceeding, which is to consider the plaintiffs' claim for loss and to develop the media

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13 High Court Rules 2016, r 14.12(1)(a).
14 Rule 1.3(1).
15 *Chapman v Badon Ltd* [2010] NZCA 613, (2020) 20 PRNZ 83 at [12].

defendants' own loss calculations. They object to meeting the costs for Mr Lazelle to "come up to speed" on the substantive claim for special damages. This is work that the media defendants could claim for if they were successful in the substantive proceedings, but they should not be able to claim these attendances in the context of an interlocutory application.

[33] Furthermore, the plaintiffs argue that some of the work done by Mr Lazelle should have been done in-house by the defendants' own solicitors. This includes collation of contract numbers and identifying missing contracts and reviewing discovered documents to determine compliance with what had been agreed to be provided to date.

[34] Furthermore, the plaintiffs argue that there is little detail provided to determine whether the costs are reasonable. For example, there is no breakdown of time taken in relation to various stages of the work done by Mr Lazelle, there are no timesheets, there is no independent evidence as to the usual basis on which someone might charge for this work, there is no information about the normal range of charge-out rates, or whether the hours spent and the fees charged were in fact reasonable.

[35] For all these reasons, they say the Judge's decision to award these costs as a disbursement is wrong, particularly when the Judge has provided no independent reasoning for awarding it.

Media defendants' submissions

[36] The media defendants submit that witness fees can be awarded as a disbursement in an interlocutory application. They note first, that in the High Court Rules, the defined terms apply "unless the context otherwise requires", which they say is the case in r 14.12. They point out that if the plaintiffs' argument was accepted, then no disbursements relating to interlocutory applications, including filing fees, could be recovered. This would mean that although r 14.8 requires costs on interlocutory applications to be fixed when the application is determined, related disbursements such as filing fees could not be recovered because they would not be captured under r 14.12. That interpretation is unprincipled, and is not how the rule is applied in practice.

[37] The media defendants point out that expert fees have been awarded in interlocutory applications, citing a range of examples to illustrate this.[16] They submit that *Chapman v Badon*, the case relied on by the plaintiffs, does not suggest that expert fees such as Mr Lazelle's are only properly recoverable after trial.[17] It simply makes it clear that interlocutory applications and substantive claims have different merits which justifies fixing and paying costs on an interlocutory application once it has been determined.

[38] In support of their submission that Mr Lazelle's fees are a reasonable disbursement, the media defendants point out that Associate Judge Matthews directed them to provide expert evidence to enable the Court to fully address the discovery application, and that is recorded in the minute dated 20 June 2018.[18] In order to assess what documents, if any, the media defendants would need to adequately respond to the plaintiffs' special damages claim, Mr Lazelle had to review the material that was already discovered. Furthermore, his evidence on the appropriate extent of further discovery was accepted by the plaintiffs and led to the discovery application being resolved by consent prior to the hearing.

[39] In terms of the quantum of the fees, the media defendants say Mr Lazelle's invoices explain his tasks in significant detail. There was no requirement to provide evidence of fair rates for such work. Rather, it is a matter for the Court to assess whether the value was reasonable, which it did in this case.

Discussion

[40] I accept, without hesitation, the media defendants' argument that disbursements, including expert witness fees can be awarded on interlocutory applications, as long as they meet the requirements of being specific to, and reasonably necessary for, the conduct of that application, and are reasonable in amount. To suggest otherwise, would be to preclude related disbursements from being awarded

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16 *Body Corporate 169791 v Auckland City Council* HC Auckland CIV-2004-404-5225, 25 February 2011; *Body Corporate No 198245 v Auckland City Council* HC Auckland CIV-2006-404-2651, 26 August 2009; *Americhip, Inc v Dean* [2015] NZHC 1871; *Teak Construction Ltd v Andrew Brands Ltd* [2015] NZHC 2924; and *TTAH Ltd v Koninklijke Ten Cate N. V.* [2016] NZHC 761.

17 *Chapman v Badon*, above n 15.

18 *Staples v Freeman*, above n 11.

when an interlocutory application had been determined, and that is clearly inconsistent with both the purpose of r 14.8, and the general practice of this Court.

[41] The real issue is whether the attendances of Mr Lazelle were specific to, and reasonably necessary for, the conduct of the interlocutory application. In my view, that query is largely addressed by the minute of Associate Judge Matthews stating that the Court would require expert evidence in relation to the application for further and better discovery. He envisaged that the expert would consider the materials discovered to date and then "advise exactly what further documents are sought, if any, with reasons for their view."[19]

[42] While the plaintiffs argue that this direction was made with a view to identifying the appropriate date range only, the expert witness would still have had to have understood both the plaintiffs' claim for loss and the defendants' contentions against that, in order to understand what further client documents, and over what period, were required to respond to the plaintiffs' claim. While, inevitably, that work would overlap with the work which would be done to prepare the substantive evidence for the media defendants, I do not see how the media defendants could have assessed what was relevant and what further documents were required, without doing such an analysis. In other words, it was necessary for Mr Lazelle to undertake work towards preparation of the media defendants' substantive evidence, in order to decide whether the discovery given by the plaintiffs to date was adequate to assess their claim for special damages.

[43] The utility of this work was demonstrated by the fact the media defendants amended the scope of their application in light of Mr Lazelle's evidence, substantially reducing it, and by the fact he was also able to demonstrate to the plaintiffs why further discovery was required, which was given, in part through agreement, and in part, by the final documents being provided under the terms of the consent order.

[44] The next query is over whether Mr Lazelle should have undertaken any attendances checking the documents provided for compliance. However, because it was envisaged by Associate Judge Matthews minute that Mr Lazelle would provide

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[19] At [3].

affidavit evidence to the Court about what he considered was missing and why, I consider this work was relevant to the application, and is properly claimed.

[45] That simply leaves the question of whether the costs were reasonable. I consider the plaintiffs overstate what information is normally required for this purpose. The suggestion that the invoices provided also need to be supported by timesheets, charge-out rates, independent evidence as to the usual basis on which someone might charge for this work and a breakdown of time taken in relation to various stages of the work, would be to place an unduly onerous obligation on a party claiming for expert witness fees.

[46] The courts are well used to reviewing accounts for such fees. Judges are familiar with the usual charge-out rates for such professional services and with the relative time involved in undertaking such tasks. While the court has the power to solicit further information under r 14.12(5) to determine whether a fee is reasonable, this should only be required where there is some reason to be concerned about the quantum of the fee. In this case, the charge-out rate is readily calculated from the hours spent and the fee incurred, there has been a modest discount on both accounts, and the fees charged appear reasonable for the extent of attendances over the time period in question.

[47] For all these reasons, I decline the application to set aside the award of Mr Lazelle's fees as a disbursement.

Did the plaintiffs succeed in their June 2018 application, thus entitling them to costs?

[48] As outlined in [10] above, the plaintiffs had sought three different orders in their June 2018 applications. In the High Court the plaintiffs were successful on all issues, but on appeal, the media defendants were successful in resisting disclosure of their sources in the discovery process.

[49] The gist of the plaintiffs' argument is that Associate Judge Lester's decision determining that costs should lie where they fall was wrong "simply on a numbers basis" as they succeeded on two of the three issues raised. They point out that "success

on more limited terms is still success"[20] and "the loser, and only the loser, pays."[21] For this reason, the plaintiffs assert they are entitled to costs, albeit reduced to take account of the media defendants' success on the confidentiality issue.

[50] The plaintiffs acknowledge that where there has been approximately equal success, the applicable principles are set out in *Packing In Ltd (in liquidation) v Chilcott* as follows:[22]

> Costs in a case such as this should rather be based on the premise that approximately equal success and failure attended the efforts of both sides. To that starting point should be added issues such as how much time was spent on each transaction or group of transactions in issue, and any other matters which can reasonably be said to bear on the Court's ultimate discretion on the subject of costs. In the end, as in all costs matters, the Court must endeavour to do justice to both sides, bearing in mind all material features of the case.

[51] However, the plaintiffs say that those considerations are not relevant here because the parties in this case have not achieved similar success. In any event, they note that the first issue about honest opinion particulars occupied just under an hour and a half of the hearing. The submissions on part 3 (documents no longer in the parties' possession) and part 4 (the confidentiality issue) occupied a further hour and a half in the morning and just over two hours in the afternoon. By implication, the plaintiffs' position is that it could not be said that the part 3 issue, on which the media defendants were ultimately successful, was of such significance or took up such a large proportion of the hearing time that it warranted treating the parties as if they had achieved similar success.

[52] The plaintiffs say, therefore, they are entitled to costs on the applications, albeit reduced by 40 per cent to take account of the media defendants success on the confidentiality issue.

Media defendants' submissions

[53] The media defendants accept that partial success still amounts to success in terms of costs, but that does not mean that the court must award the plaintiffs' costs as

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20 *Weaver v Auckland Council* [2017] NZCA 330, (2017) 24 PRNZ 379 at [26].
21 *Shirley v Wairarapa District Health Board* [2006] NZSC 63, [2006] 3 NZLR 523 at [19].
22 *Packing In Ltd (in liquidation) v Chilcott* (2003) 16 PRNZ 869 (CA) at [5].

the plaintiffs assume. Instead, when the issues at stake were of little significance and where the successful party has failed in relation to a cause of action or issue which significantly increased the cost of the party opposing costs, the court can order that costs can be reduced or refused altogether.[23]

[54] The media defendants say that Associate Judge Matthews recognised that the argument concerning s 68 of the Evidence Act was a "complex issue" that required "extensive analysis"[24] and occupied considerable hearing time. Given they were successful on the most time consuming and significant issue, the decision to let costs lie where they fall was open to the Judge.

[55] This approach was supported by the Court of Appeal in *Water Guard NZ Ltd v Midgen Enterprises Ltd* when the Court said "[t]hat factor [hearing time occupied] can be properly recognised in other ways, such as reducing costs otherwise payable or ordering costs to lie where they fall."[25]

> [t]hat factor [hearing time occupied] can be properly recognised in other ways, such as reducing costs otherwise payable or ordering costs to lie where they fall.

[56] The defendants say that there was no error in the Judge weighing the relative significance of the different matters resolved in the application and determining that costs should lie where they fall.

Discussion

[57] The starting point is adopting the approach in *Kite v May*, that the June 2018 applications which sought three different orders, are to be treated as one application for the purpose of costs.[26]

[58] If there is a need to make any specific adjustment, because of a lack of success in obtaining one or more of the orders sought, then that can be dealt under the general

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23 High Court Rules, r 14.7(c)-(d).
24 *Staples v Freeman*, above n 4, at [12].
25 *Water Guard NZ Ltd v Midgen Enterprises Ltd* [2017] NZCA 36 at [13].
26 *Kite v May* (2000) 14 PRNZ 296 at [11].

discretion given in r 14.1, or under the discretion to increase or reduce costs under rr 14.6 and 14.7.

[59] What is at issue here is whether it was within the scope of the Judge's discretion to reduce the costs awarded to the plaintiffs to zero (by ordering that costs lie where they fall), when the plaintiffs were successful on two of their three applications.

[60] The starting point, as was reiterated in *Weaver v Auckland Council*, is that while costs are discretionary, the party that loses must pay costs to the party that won, unless there are exceptional reasons.[27] One reason to reduce, or even refuse to award costs to the successful party as if "that party has failed in relation to a cause of action or issue which significantly increased the costs to the party opposing costs".[28] The Court of Appeal acknowledged that there will be cases where "approximately equal success and failure attended the efforts of both sides",[29] and where it is appropriate that costs lie where they fall. However, the Court in *Weaver* saw the case of *Packing In Ltd* as confined to its facts where, in the context of the particular statutory procedure involved for voidable transaction notices, it was not at all clear how to identify a winner. The Court emphasised that the usual rule would be that the party who fails with respect to a proceeding should pay costs to the party who succeeds and it should not be routine for a Judge dealing with costs to be required to unpick what happened in detail.[30]

[61] In the present case, I accept that Associate Judge Matthews described the confidentiality issue as complex and requiring "extensive analysis".[31] I also accept that he described the application for discovery related to particulars of the disposal of documents as being "not a matter of the same complexity as the issue raised in relation to Schedule 3".[32] However, it is impossible to discern from his judgment, or from the documents filed, that the confidentiality issue was of such sophistication and complexity, and took such a significant time to argue, that the defendants' success in resisting that order should entirely cancel out the plaintiffs' success on the other

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27 *Weaver v Auckland Council*, above n 20, at [19]-[20].
28 High Court Rules, r 14.7(d).
29 *Packing In Ltd (in liquidation) v Chilcott*, above n 22, at [5].
30 *Weaver v Auckland Council*, above n 20, at [24] and [26].
31 *Staples v Freeman*, above n 4, at [12].
32 At [12].

two applications. Similarly, I cannot discern from Associate Judge Lester's costs judgment whether he considered success on the confidentiality issue to be of such significance in the context of the hearing overall that it justified treating the parties as if they had achieved similar levels of success.

[62] In my view, as articulated in *Weaver*, the more principled approach where success has been limited, is to reduce the costs payable by the losing party. In this case, I consider the appropriate course is to award costs to the plaintiffs, but to reduce them by 50 per cent to reflect the fact they failed on the application which was identified by Associate Judge Matthews to be the most legally complex.

[63] I note that the plaintiffs proposed discounting only the time allocated to the steps for preparing submissions and appearing in Court. In my view, the discount should also apply to the step of filing the interlocutory application because that, too, involved time spent on the confidentiality issue. However, in all other respects, I accept the claims for costs and disbursements as set out in paragraph 47 of the plaintiffs' submission.

[64] Accordingly, the plaintiffs are awarded the following costs and disbursements, with some steps discounted by 50 per cent in accordance with r 14.7(d) of the High Court Rules.

Step	**Narration**	**Time**	**Amount ($2,230 per day)**	**Reduction**	**Amount Awarded**
22	Filing interlocutory application	0.6	$1,338.00	50 per cent	$669.00
24	Submissions	1.5	$3,345.00	50 per cent	$1,672.50
25	Bundle of documents	0.6	$1,338.00	None	$1,338.00
26	Appearance	1.0	$2,230.00	50 per cent	$1,115.00
29	Sealing judgment	0.2	$446.00	None	$446.00
	Total Costs				**$5,240.50**

[65] In addition, I award disbursements totalling $1,049.84 as set out in the plaintiffs' submissions.

Costs

[66] Given the mixed success the parties have had on the two issues raised in this application for review, it is appropriate that costs on this application lie where they fall, and I so order.

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