

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

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

**CIV-2018-404-000530  
[2020] NZHC 1854**

BETWEEN	ZAINULABIDIN SYED Plaintiff
AND	AMIR FAZAL MALIK First Defendant
AND	TRINITY JOAN WILSON Second Defendant

Hearing: 27 July 2020

Appearances: D A Jacques for Plaintiff  
G A Paine for Defendants

Judgment: 29 July 2020

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**JUDGMENT OF ASSOCIATE JUDGE PAULSEN**

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This judgment was delivered by me on 29 July 2020 at 11.00 am  
pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar  
Date:

[1] This is a defamation proceeding which has yet to be set down for trial. This ruling concerns the plaintiff's applications that:

- (a) the defendants pay costs on an indemnity basis in relation to their unsuccessful application for further discovery;<sup>1</sup> and
- (b) the defendants pay the costs of the proceeding on a 2B basis up to 2 June 2020.

[2] The defendants oppose the applications on the bases that:

- (a) in relation to the discovery application:
  - (i) they are legally-aided;
  - (ii) there are no exceptional circumstances justifying the making of an order of costs against them;
  - (iii) it would not be reasonable to make an award of costs having regard to all the circumstances;
- (b) in relation to the costs of the proceeding to 2 June 2020:
  - (i) costs have already been dealt with by the court; and
  - (ii) it is premature for costs to be awarded when the proceeding has yet to be determined.

## **Background**

[3] The plaintiff and the first defendant had business-dealings, but their relationship soured. From around October 2016, the defendants began distributing on social media defamatory material concerning the plaintiff intending to damage his reputation.

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<sup>1</sup> *Syed v Malik* [2020] NZHC 1303.

[4] The plaintiff commenced this proceeding for defamation. The defendants admitted their statements were defamatory and did not plead the defence of truth. In a written judgment of 30 August 2018, Churchman J entered judgment for the plaintiff under High Court Rule 15.15 as to liability only.<sup>2</sup> He was critical of the plaintiff's claim in certain respects<sup>3</sup> and ordered costs on the application for judgment were to lie where they fell.<sup>4</sup>

[5] Since Churchman J issued his judgment the case has progressed in fits and starts. One reason for this is the defendants have had difficulty obtaining legal aid. There have been several conferences and various interlocutory applications. Notably, on 13 November 2018, the defendants filed an application to set aside the judgment as to liability. After delays, the application was set down to be heard on 11 December 2019. The defendants chose not to pursue it and the application was dismissed by Associate Judge Lester on 9 December 2019. Costs were reserved pending the hearing as to damages.

[6] At a telephone conference on 5 March 2020, the plaintiff sought directions for the hearing to determine damages. The defendants resisted because they wanted to apply for further discovery. I made a direction for the filing of an application for discovery. The defendants filed the application and it was opposed by the plaintiff. Shortly before the discovery application was heard the defendants were granted legal aid.

[7] The defendants' discovery application was dismissed by me in a judgment of 11 June 2020. I held ordering discovery would be oppressive and disproportionate and the application was an abuse of the process of the court.<sup>5</sup> The reasons for those findings are set out in the judgment. There has been no challenge to the judgment.

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<sup>2</sup> *Syed v Malik* [2018] NZHC 2278.

<sup>3</sup> At [51]-[52].

<sup>4</sup> At [72].

<sup>5</sup> *Syed v Malik* [2020] NZHC 1303.

## Costs on the discovery application

### *The legal aid regime*

[8] Section 45(2) of the Legal Services Act 2011 (the Act) provides that an order for costs may not be made against a legally aided person in a civil proceeding unless the court is satisfied there are “exceptional circumstances”.

[9] In s 45(3) there is a list of non-exhaustive factors the court may consider in determining whether there are exceptional circumstances. Section 45(3) includes conduct that causes the other party unnecessary cost, the failure to comply with procedural rules or court orders, misleading or deceitful conduct, and any unreasonable pursuit of issues or refusal to negotiate a settlement.<sup>6</sup> The focus is on any unreasonable conduct on the part of the aided person.

[10] What amounts to exceptional circumstances was considered in *Lowrie v Hutt City Te Awa Kairangi*, where Dobson J said:<sup>7</sup>

The test for exceptional circumstances is a broad one. It takes into account the means of all the parties and their conduct and, to qualify, the circumstances must be “quite out of the ordinary”.<sup>8</sup> In *Reid v Castleton-Reid*, it was noted:<sup>9</sup>

[52] Subsection 3(d) makes it clear that the issues on which the plaintiff failed must have been such that the legally aided person behaved in an unreasonable fashion. Unreasonable conduct could arise in a number of ways. It might be considered that the plaintiff had acted unreasonably by insisting that a claim be brought in the first place. The court making a decision under s 45(2) would have to try and place itself in the position of the party at the time when the decision was made to initiate or continue a proceeding. Retrospective reasoning based only on the fact that the case turned out to be an unsuccessful one would not be enough on its own to attract the operation of s 45. It may be influenced too heavily by the advantage of hindsight. In making a decision under s 45(2), proper weight needs to be given to the consideration that the outcome of litigation is inherently a difficult matter to predict.

[53] The court is required to balance giving effect to the objective of the Legal Services Act to promote access to justice against the harm that can be done if a litigant who has been armed by state funding misuses his or her position. Such a person could cause considerable damage to his or

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<sup>6</sup> *Ngati Tama Custodian Trustee Ltd v Phillips* [2020] NZCA 252 at [2].

<sup>7</sup> *Lowrie v Hutt City Te Awa Kairangi* [2019] NZHC 1030 at [4].

<sup>8</sup> *Laverty v Para Franchising Ltd* [2006] 1 NZLR 650 (CA) at [31], applying *Awa v Independent News Auckland Ltd (No 2)* [1996] 2 NZLR 184 (HC) at 186.

<sup>9</sup> *Reid v Castleton-Reid* [2016] NZHC 1609 (footnote omitted by Dobson J).

her opponent in litigation particularly by bringing complex and expensive litigation which calls for a proportionate expenditure by the opposite party in obtaining assistance in the formulation and advancing of his or her case when it comes to court.

[11] In *Ngati Tama v Custodian Trustee Ltd v Phillips* the Court of Appeal considered that for circumstances to be exceptional, they must be quite out of the ordinary.<sup>10</sup> The court must be cautious not to assess the reasonableness of conduct with the benefit of hindsight.<sup>11</sup> A legally aided person may only be made liable for an amount that it is reasonable to pay, having regard to all the circumstances including the means of all the parties and their conduct in connection with the dispute.<sup>12</sup> This is a separate limb of the test, and under it the court may consider circumstances such as the assets and income of the aided person.<sup>13</sup>

[12] Under s 45(4) of the Act, any order for costs made against an aided person must specify the amount the person would have been ordered to pay if s 45 had not affected his or her liability.

[13] If, because of s 45, no order for costs is made against an aided person, an order may be made specifying that the aided person would have incurred a liability for costs with respect to the proceeding if their liability had not been so affected.<sup>14</sup> In such a case, the party thereby prejudiced may, under s 46(1) and 46(2) of the Act, apply to the Legal Services Commissioner for payment of some or all of the difference between the costs actually awarded to that party and the costs that would have been ordered but for s 45.

#### *The plaintiff's submissions*

[14] The plaintiff argues there are exceptional circumstances justifying an award of indemnity costs against the defendants because:

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<sup>10</sup> *Ngati Tama v Custodian Trustee Ltd v Phillips*, above n 6, at [7] citing *Laverty v Para Franchising Ltd*, above n 8, at [31].

<sup>11</sup> *Ngati Tama Custodian Trustee Ltd v Phillips*, above n 6, at [7] citing *Reid v Castleton-Reid*, above n 9, at [52].

<sup>12</sup> Legal Services Act 2011, s 45(1).

<sup>13</sup> *Ngati Tama Custodians Trustee Ltd v Phillips*, above n 6 at [3].

<sup>14</sup> Legal Services Act 2011, s 45(5).

- (a) the application for particular discovery was misconceived;
- (b) the application was pursued in a manner that needlessly added to the plaintiff's costs;
- (c) the application was an abuse of process;
- (d) the orders sought were both oppressive and disproportionate seeking a wide range of irrelevant documents of the plaintiff, his family trust and related companies; and
- (e) the application was a continuation of the defendants' repeated defamatory publications.

[15] It is accepted the plaintiff is in a better financial position than the defendants, but Mr Jacques submits that should not deprive him of his entitlement to costs.

[16] Originally the plaintiff sought indemnity costs of \$6,460 and has supplied a bill of costs rendered by his solicitors for that sum. Mr Jacques advises the plaintiff was billed in advance for the work on the discovery application and that a disbursement of \$600 for counsel's travel was not incurred. The amount sought is therefore \$5,860.

#### *The defendants' submissions*

[17] Mr Paine argues there are no exceptional circumstances to justify making an award of costs against the defendants and it would not be reasonable to do so given their financial difficulties. He notes the fee account relied upon by the plaintiff provides no detailed breakdown of the work and submits that GST should not be included in any costs award that is made.

#### *Discussion*

[18] I consider there are exceptional circumstances justifying the making of a costs award in this case. I rely on s 45(3)(a), (d) and (f) of the Act. The discovery application was misconceived. It was an attempt to find proof of misconduct by the

plaintiff to collaterally challenge the judgment of Churchman J and an abuse of the process of the court. The scope of the application was oppressively broad, relating to financial records of the plaintiff, 15 companies and a family trust spanning a period of 16 years. The application was also advanced in an unreasonable manner. The defendants made late applications for adjournments and relied upon a largely irrelevant affidavit of Mr Malik containing hundreds of pages of unhelpful exhibits. The defendants supported the application with an amended statement of defence making serious allegations against the plaintiff which counsel responsibly acknowledged should never have been made.

[19] There is support for the plaintiff's submission the defendants wished to use the discovery application to continue their repeated defamatory publications. In the first defendant's affidavit of 19 May 2020 he acknowledged the allegations of the plaintiff's misconduct the defendants wished to rely on could not be raised in defence of the claim. Despite this, the defendants pleaded them in their statement of defence and sought proof of them through discovery.

[20] It is not unreasonable to make an award of costs due to the defendants' financial circumstances because there is no evidence of those circumstances other than that they are in receipt of legal aid. There is no evidence that the making of an award of costs might curtail the defendants' ability to run their defence.

[21] The defendants' conduct is worthy of disapproval and an award of costs should be made. The plaintiff claims indemnity costs and disbursements of \$5,860 (including GST). The plaintiff's status for Goods and Services Tax purposes is unknown. Had I been minded to award indemnity costs it would have been on the basis he is GST registered and can recover the GST component.<sup>15</sup>

[22] However, I am not minded to award indemnity costs. The plaintiff was billed in advance and it is not clear whether the billed costs reflect actual attendances. No breakdown of attendances has been provided. In addition, the papers filed in opposition to the discovery application and the arguments presented were very brief

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<sup>15</sup> *New Zealand Venue and Event Management Ltd v Worldwide NZ LLC* [2016] NZCA 282, (2016) 27 NZTC 22-058 at [16]-[17].

and a comparatively small amount of time would have been required to prepare them. The plaintiff should be awarded costs on a 2A basis and I so order.

### **Application for costs generally**

[23] The plaintiff also seeks costs of the proceeding generally up to 2 June 2020. Mr Jacques argues it is an appropriate time to fix costs as the defendants are now in receipt of legal aid and their liability for future costs is limited. I do not accept that submission. Although the defendants are now in receipt of legal aid they may still have a liability for costs as this judgment demonstrates.

[24] There is force in Mr Paine's argument that Churchman J intended to deal with all costs issues up to that point in the proceeding. Since then many steps have been taken but costs have generally not been sought or the parties have agreed costs would be reserved. It is not reasonable to expect the court will now review each step to determine whether costs should be awarded, to whom and on what basis. There is insufficient information provided to attempt that exercise. The matter must await the final resolution of the proceeding.

### **Result**

[25] The plaintiff is awarded costs in respect of the defendants' application for particular discovery on a 2A basis to be fixed by the Registrar if not agreed. For the purposes of s 45(4) of the Act, this is the same order as I would have made had the defendants not been in receipt of the grant of legal aid.

[26] The plaintiff's application for costs of the proceedings up to 2 June 2020 is dismissed.

[27] Counsel are to file by **3 August 2020** a joint memorandum of the timetable orders sought to trial. I propose to make suitable directions on the papers.

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O G Paulsen  
Associate Judge



**Solicitors:**

Legal Associates, Auckland (Plaintiff's solicitor)

Guest Carter Law Ltd (S M D Guest), Dunedin (Defendants' solicitor)

(Counsel: G A Paine, Barrister, Dunedin)