IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

I TE KŌTI MATUA O AOTEAROA
TAURANGA MOANA ROHE

CIV-2021-470-89
[2022] NZHC 861

BETWEEN	HERMANUS STEPHANUS BOSMAN Plaintiff
AND	GRAHAME CHRISTIAN First Defendant
	PAUL ANTONY JAMES BLACKMAN Second Defendant
	BRONWYN SHAW Third Defendant

Cont/d....

Hearing:	On the papers
Counsel:	DJG Cox for the Plaintiff CT Patterson and EJ Grove for the Defendants
Judgment:	28 April 2022

COSTS JUDGMENT OF ASSOCIATE JUDGE SUSSOCK

This judgment was delivered by me on 28 April 2022 at 4pm pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors/Counsel:
Lateral Lawyers, Auckland
Rennie Cox, Auckland, Auckland

CT Patterson, Barrister, Auckland

MILAN LUKIC
Fourth Defendant

CAREN SQUIRE
Fifth Defendant

JUNE FRANCES BENNETT
Sixth Defendant

DANA GARDINER
Seventh Defendant

ALEXANDRA CLAIRE COLE SAMSON
Eighth Defendant

DELI CONNELL
Ninth Defendant

Introduction

[1] The defendants have applied for costs:

(a) in respect of their interlocutory application for summary judgment and strike out; and

(b) in respect of the steps taken by the defendant up until the filing of the amended pleading by the plaintiff pursuant to r 7.7(8).

[2] On 14 September 2021 the defendants brought an interlocutory application for summary judgment of each of the plaintiff's causes of action and, in the alternative, orders for strike out.

[3] The application was opposed and set down for hearing on 28 March 2022. On Friday, 11 March 2022, the plaintiff filed and served an amended statement of claim replacing the original causes of action pleaded.

[4] The defendants' submissions for their summary judgment and strike out application were due to be filed on Monday, 14 March 2022. Instead, the defendants filed a memorandum seeking a telephone conference to discuss.

[5] A memorandum was filed by the plaintiff in reply saying the defendants were aware the plaintiff was going to file an amended pleading referring to an open letter sent by the plaintiff's solicitors on 8 February 2022. The plaintiff's letter was sent following the filing of the plaintiff's notice of opposition and affidavits in support and recorded:

> 2. We believe it is plain that the position taken by our client that a settlement was reached at the meeting between Messrs Rowley and Christian on 23 September 2021, raises questions of fact and credibility that cannot be resolved on the basis of affidavit evidence in the context of a summary judgment application. The authorities in this regard are unequivocal.
>
> 3. In the circumstances please confirm within seven (7) days that the application for summary judgment will be withdrawn by consent on the basis that costs are reserved. It may be sensible to reconsider mediation since the parties' respective positions are now clearly identified.

4. We will file an amended statement of claim to specifically plead the settlement agreement, as well as the defamation published wider than to just the NZLS, the media counsel and the partners at Rennie Cox, within the next fourteen (14) days.

5. We reserve the right to produce this letter to the Court in support of a claim for indemnity costs in the event that the application for summary judgment is pursued further – refer *Little v Warwick* [2019] NZHC 1622.

[6] Counsel for the defendants responded to that letter on 9 February 2022 saying counsel had started a three-week trial the previous day (which the plaintiff was well aware of) and recording that he had yet to consider the opposition but would do so as soon as time permits. The email finished by saying "if there is some prejudice to your client, please advise". There was no further response by defendants' counsel.

[7] The defendants did however file 10 affidavits in reply to the evidence filed by the plaintiff in opposition.

[8] The defendants accepted in their memorandum on 15 March 2022 that the plaintiff advised that it would be adding a pleading in relation to the alleged settlement but recorded that the plaintiff's letter expressly advised that it would be adding to not removing the remaining claims. The defendants advised that now that the causes of action had been replaced rather than added to, the hearing on 28 March 2022 was no longer required except to hear from the parties in relation to costs if that were necessary.

[9] Directions were made by Minute dated 16 March 2022 for costs memoranda to be filed to allow costs to be determined on the papers. I do so now.

Are costs payable in respect of the defendants' interlocutory application?

Relevant costs principles

[10] Rule 14.1 of the High Court Rules 2016 provides that any award of costs is at the discretion of the Court. Rule 14.2 then sets out the general principles applying to the determination of costs including at r 14.2(1)(a) the primary principle that the party

who fails with respect to a proceeding or interlocutory application should pay costs to the party who succeeds.

[11] The presumption that a party who discontinues a proceeding will be liable for costs applies by analogy to interlocutory applications.[1] The presumption will be displaced where the Court considers that it is just and equitable to do so.[2] In considering whether it is just and equitable, the Court will not usually consider the merits of the respective cases unless the merits are so obvious they should influence the costs outcome.

Discussion

[12] The defendants submit that given the plaintiff's withdrawal of all of the causes of action in respect of which the defendants were seeking summary judgment or strike out, the defendants can fairly be regarded as having been the successful party.

[13] The defendants rely on *MV Celebre Ltd v Airwork Flight Operations Ltd* which concerned an application for particular discovery where the respondent had provided the discovery sought prior to the hearing of the application.[3] Associate Judge Doogue had little difficulty in concluding that the applicant was the successful party.[4] Costs were therefore awarded to the applicant despite it withdrawing the application.

[14] The plaintiff says in response that because the plaintiff's original causes of action and statement of claim no longer appear in the amended statement of claim, it does not mean that those causes of action had no prospect of succeeding. The plaintiff accepts that those causes of action have been replaced but submits that they have "been replaced with a new cause of action relating to events subsequent to the filing of the original statement of claim: in particular, the settlement agreement …". The plaintiff says that the settlement rendered the need to further pursue those original causes of action unnecessary and that to do so would be inconsistent with and in breach of the settlement agreement reached.

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1 High Court Rules 2016, r 15.23; and *MV Celebre Ltd v Airwork Flight Operations Ltd* [2015] NZHC 1400 at [9].

2 *Kroma Colour Prints Ltd v Tridonicatco NZ Ltd* [2008] NZCA 150, (2008) 18 PRNZ 973 at [12].

3 *MV Celebre Ltd v Airwork Flight Operations Ltd*, above n 1 at [14] – [15] and [25].

4 At [16].

[15] As submitted in the defendants' memorandum in reply, the plaintiff's submission is inconsistent with the plaintiff's amended pleading. That pleading, in addition to pleading the settlement agreement, pleads in the alternative causes of action in defamation relying on publications pre-dating the date of the alleged settlement.

[16] In my view, therefore, the defendants have succeeded in respect of their interlocutory application as the causes of action for which they were seeking summary judgment or strike out have all been replaced.

[17] The defendants are therefore entitled to costs in respect of the steps taken in relation to that application.

Quantum for summary judgment/strike out application

[18] The defendants submit that costs ought to be awarded on a 2B basis totalling $10,277 plus a fee for sealing the costs order of $50.[5]

[19] The steps claimed are:

Step	Time Allocation	Amount (at $2,390 per day)
22. Filing interlocutory application	0.6	$1,434
11. Preparing and filing joint memorandum for first call of interlocutory application	0.4	$956
11. Preparation and filing of memorandum (24.11.21)	0.4	$956
11. Preparation and filing of memorandum (29.11.21)	0.4	$956
24. Preparation of written submissions	1.5	$3,585
11. Preparation and filing of memorandum (14.3.22)	0.4	$956
11. Preparation and filing of memorandum (15.3.22)	0.4	$956
29. Sealing costs order	0.2	$478
Total:	**4.3**	**$10,277**

[5] Originally a filing fee was sought for the filing of the interlocutory application but the defendants' memorandum in reply records that this was claimed in error.

[20] The plaintiff submits that the only steps which the defendants have taken in terms of the time allocations in Schedule 3 to the High Court Rules have been the filing of the interlocutory application and the filing of a memorandum for the first call. The plaintiff submits therefore that the defendants are not able to claim for submissions or the filing of the further four memoranda when there was no case management conference, nor a mentions hearing, as envisaged by a costs order under item 11 of Schedule 3 to the High Court Rules.

[21] Rule 14.2(1)(c) provides that costs should be assessed by applying the appropriate daily recovery rate to the time considered reasonable for each step reasonably required.

[22] Rule 14.5(1) then provides that a reasonable time for a step is either:

(a) the time specified for it in Schedule 3; or

(b) a time determined by analogy with that schedule, if Schedule 3 does not apply; or

(c) the time assessed as likely to be required for the particular step, if no analogy can usefully be made.

[23] I consider below whether the preparation of the submissions and the memoranda were reasonably required and, if so, the reasonable time for that step.

Costs for submissions

[24] The defendants' submissions were due to be filed on Monday, 14 March 2022. The plaintiff's amended statement of claim was served at 2.59 pm on Friday, 11 March 2022. The defendants submit that considerable work had therefore already been undertaken on the submissions. The defendants do not however include any costs for preparation for the bundles for the hearing.

[25] The plaintiff submits that it should have been plain to the defendants following the filing of the plaintiff's notice of opposition and evidence in opposition to the application that the hearing of the defendants' summary judgment application could never proceed. This is because of the factual disputes present, given the plaintiff's claim that the issues in the litigation were settled by agreement on 23 September 2021.

[26] The defendants accept that the plaintiff had advised by letter on 8 February 2022 that the plaintiff would be amending his statement of claim to add new causes of action. However, they submit the plaintiff provided no advance notice that the causes of action that the defendants' application related to would be withdrawn.

[27] Furthermore, I note that in the letter of 8 February 2022, the plaintiff indicated that it was intending to file an amended statement of claim "within the next fourteen (14) days". This would have meant the amended statement of claim was filed by 22 February 2022, sufficiently in advance of the scheduled hearing for the defendants not to have been put to unnecessary costs.

[28] In the circumstances, I consider it is appropriate for there to be a partial allowance for the submissions. As the submissions were not required to be filed, I reduce the amount awarded to two-thirds of the amount claimed (1.0 days rather than 1.5 days).

Costs for memoranda

[29] Each of the memoranda for which costs are claimed relate directly to the defendants' interlocutory application.

[30] The memorandum filed on 24 November 2021 followed the cancellation of the mediation that was scheduled to take place on 8 December 2021. The timetable for the application had been extended to enable mediation to take place. Once the mediation was cancelled, it was entirely appropriate for the defendants to seek earlier dates for the filing of any notice of opposition by the plaintiff and an earlier date for hearing. The memorandum filed on 29 November 2021 was in reply to the plaintiff's memorandum on 24 November 2021. Both memoranda are relatively brief. I consider it is appropriate to reduce the time allocation for the memorandum on 29 November 2021 to band A rather than band B, allowing 0.2 rather than 0.4 of a day.

[31] The memorandum filed on 14 March 2022 followed the filing of the amended statement of claim on 11 March 2022 and the defendants were directed to file the further memorandum on 15 March 2022. Both were reasonably required. Although the memorandum on 15 March 2022 was relatively brief, I allow band B for both of

these memoranda as the decision whether to proceed with the application needed to be made urgently as a result of the plaintiff's late filing of the amended claim and would not necessarily have been straightforward.

[32] I therefore award the costs sought with the reductions discussed above in relation to the written submissions and memorandum on 29 November 2021. The total time allocation reduces to 3.6 days for a total of $8,604 plus disbursements of $50.

Are costs payable for responding to the original statement of claim?

Relevant costs principles

[33] Rule 7.77(8) provides:

> If an amended pleading has been filed under this rule, the party filing the amended pleading must bear all the costs of and occasioned by the original pleading and any application for amendment, unless the court otherwise orders.

Submissions

[34] The defendants claim costs on at least a 2B basis for steps up to the filing of the amended statement of claim (excluding the interlocutory application). The only relevant step claimed for is Step 2, the commencement of their defence. The time allocation for Step 2 on a band B basis is two days, with the amount claimed being $4,780.

[35] The defendants submit that it may be appropriate to award increased or indemnity costs in the circumstances on the basis that the original causes of action comprised "unnecessary steps" as provided for in r 14.6(3)(b)(ii) or alternatively the Court may draw the inference that the plaintiff had no intention to proceed to trial in respect of those causes of action. The defendants further submit that the plaintiff does not plead that the alleged settlement extended to costs and that the defendants have denied throughout that any settlement exists.

[36] The defendants record that they are currently considering whether a further summary judgment application is warranted in relation to the new causes of action. Finally, the defendants note that r 7.77 requires leave before a cause of action arising since the proceedings were commenced is able to be added to the pleading.

[37] The plaintiff in response says the question of costs should be reserved until the outcome of the substantive proceedings is known as if there is a finding that there was an enforceable settlement agreement as alleged by the plaintiff, then it would not be appropriate to make any adverse findings against the plaintiff on costs now.

[38] The plaintiff further submits the presumption in r 7.77(8) ought to be displaced in this case because the amendment was required because of the actions of the defendants occurring subsequent to the filing of the original statement of claim, that is the entry into and then failure to perform the settlement agreement.

[39] Counsel for the plaintiff does not agree that r 7.77 requires the plaintiff to apply for leave to file an amended pleading unless that pleading was filed after the close of pleadings date.

Discussion

[40] In my view, leave is required in respect of those causes of action relying on the settlement agreement and perhaps publication after 19 July 2021 when the claim was first filed. Rule 7.77(5) expressly states that subclause (4) overrides subclause (1). Subclause 4 provides:

> If a cause of action has arisen since the filing of the statement of claim, it may be added only by leave of the court. If leave is granted, the amended pleading must be treated, for the purposes of the law of limitation defences, as having been filed on the date of the filing of the application for leave to introduce that cause of action.

[41] As far as leave after close of pleadings, r 7.77(10) separately provides that r 7.77 is subject to r 7.7 (the rule prohibiting steps after the close of pleadings date without leave).

[42] In my view, it is clear therefore that leave is required. In the circumstances, I consider it is appropriate to reserve the question of costs under r 7.77(8) for determination when leave is determined. The judge considering the leave application may decide that it is more appropriate to await the determination of the substantive proceeding but that is for consideration at that stage. I make directions below on this basis.

Result

[43] I order:

(a) the plaintiff is to pay costs to the defendants in respect of the defendants' interlocutory application for summary judgment or strike out in the amount of $8,604 plus disbursements of $50 for a total of $8,654;

(b) costs in respect of the steps leading up to the filing of the amended pleading are reserved for the determination of the leave application;

(c) the plaintiff is to file an application for leave to file those causes of action arising since the filing of the original statement of claim within **10 working days** of this judgment;

(d) any notice of opposition is to be filed and served within **10 working days** as required by the High Court Rules;

(e) a joint memorandum is to be filed within a further **10 working days** indicating whether the application may be determined on the papers, whether any evidence in reply is to be filed and providing an estimate for a hearing if necessary.

Associate Judge Sussock