IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2021-004-1422
[2023] NZHC 3316

BETWEEN	GURWINDER S BAINS Plaintiff
AND	HARNEK SINGH Defendant

Hearing:	On the papers
Appearances:	Peter McKnight/Ali J Romanos for the Plaintiff Robert Stewart/Neville Woods for the Defendant
Judgment:	23 November 2023

COSTS JUDGMENT OF ASSOCIATE JUDGE C B TAYLOR

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*This judgment was delivered by me on **23 November 2023** at **3:00pm***
pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Solicitors:
Langford Law (J A Langford), Wellington, for the Plaintiff
Rice Craig (Neville Woods), Papakura, for the Defendant

Counsel:
Peter A McKight/Ali J Romanos, Wellington for the Plaintiff
Robert Stewart, Shortland Chambers Auckland, for the Defendant

Introduction

[1] On 23 June 2023 the Court delivered a judgment[1] (the **Judgment**), on the plaintiff's application for leave to appeal the decision of this Court delivered on 28 February 2023 dismissing the plaintiff's application to strike out.[2]

[2] The plaintiff's application for leave to appeal the Judgment to the Court of Appeal was granted and the Court's preliminary view was that costs should follow the event and accordingly the plaintiff was entitled to costs on a 2B basis against the defendant. Counsel were directed to endeavour to agree costs and file memoranda if costs could not be agreed.

[3] Costs were not agreed and counsel for the plaintiff filed a memorandum dated 6 July 2023, and counsel for the defendant filed a response dated 13 July 2023. The Court apologises for the delay in dealing with this issue as the matter has only just been referred to me.

Plaintiff's submissions

[4] Mr Romanos, for the plaintiff, summarises the defendant's ground for resisting costs as being that the defendant successfully opposed the plaintiff's strike-out application. Mr Romanos submits that the issue of costs on the original strike-out application has no bearing on costs on the plaintiff's application for leave, and this provides no basis for the defendant to oppose costs being awarded to the plaintiff. He submits the leave application is a separate interlocutory application to the original strike-out application, involving separate criteria.

[5] Mr Romanos submits the defendant could have consented to leave to appeal, whilst reserving his right to argue that the appeal should be dismissed, but he contested the leave application exposing him to the costs the plaintiff now claims.

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1 *Bains v Singh* [2023] NZHC 1566.
2 *Bains v Singh* [2023] NZHC 332.

[6] Mr Romanos refers to the decision of the *The Gama Foundation v Fletcher Steel Limited*,[3] where the appellant, The Gama Foundation, obtained special leave from the Court of Appeal against the decision of the High Court declining leave to appeal an arbitral award. He submits when The Gama Foundation obtained special leave it was awarded costs and, although the appeal ultimately failed, the Court of Appeal did not reverse the costs award in respect of The Gama Foundation obtaining special leave.

[7] Mr Romano also submits that as the defendant was warned the plaintiff would seek "costs on costs" if the costs could not be agreed and as the defendant provided no reasonable basis to oppose them, the plaintiff should be entitled to costs of preparing the costs memorandum. This cost is assessed at $478.00 as item 11 on a 2A basis. Mr Romanos refers to the decision of *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd*,[4] and the decision in *Pioneer Insurance Company Ltd v Anderson*.[5]

Defendant's submissions

[8] Mr Stewart, for the defendant, submits that costs on the leave application should be reserved, as they were when the plaintiff's strike-out application was determined in favour of the defendant, or alternatively, any costs awarded in favour of the plaintiff should reflect the fact that the defendant successfully opposed the plaintiff's strike-out application in respect of his defences of honest opinion and qualified privilege.

[9] Mr Stewart submits that, referring to the Court's general discretion in relation to costs under r 14.1 of the High Court Rules 2016, it is appropriate to consider the issue of costs on the two applications - namely, the unsuccessful application by the plaintiff to strike out parts of the defendant's defence, and the successful application by the plaintiff for leave to appeal that decision "in the round". On that basis,

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3 *The Gama Foundation v Fletcher Steel Ltd* [2022] NZCA 314 at [18].
4 *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* [2017] NZHC 1599 at [40].
5 *Pioneer Insurance Company Ltd v Anderson* HC Napier CIV-2007-441-882, 22 October 2008 at [12].

Mr Stewart submits that costs should be reserved – each party has had a measure of success and the costs on appeal will be determined by the Court of Appeal.

[10] Mr Stewart submits if the primary submission at [9] is not accepted by the Court, and the Court is minded to make a costs order in favour of the plaintiff, he submits the Court should recognise the fact the defendant successfully opposed the plaintiff's strike-out application and effectively set off the defendant's prima facie entitlement to costs on that application (on the grounds that costs follow the event) against the costs now claimed by the plaintiff's application for leave.

[11] Mr Stewart then provides a calculation of costs and calculates a difference in the plaintiff' s favour of $1,703.50.

Result

[12] I am of the view that the plaintiff is entitled to costs calculated on a 2B basis on the successful application for leave to appeal to the Court of Appeal. In my view, costs should be assessed separately on the defendant's successful opposition to the plaintiff's strike-out application and the plaintiff's successful application for leave to appeal. I am also of the view that the plaintiff is entitled to the costs of preparing the costs memorandum as the defendant's opposition to those costs was not soundly based.

[13] If the parties wish to have costs on the plaintiff's strike-out application fixed, as opposed to leaving these costs reserved until the outcome of the appeal, counsel are directed to file memoranda as to costs within **10 working days** of the date of this judgment. Costs will then be determined on the papers.

[14] Accordingly, the plaintiff is entitled to costs as sought, together with disbursements of $250.00 (together with a further $50.00, if the defendant does not provide an undertaking to pay costs sealing the costs order of $50.00).

Orders

[15] I make the following orders:

(a) The defendant is ordered to pay costs to the plaintiff of $8,604.00 and disbursements of $250.00.

(b) If the defendant does not undertake to pay the costs of sealing this costs order (and the accompanying disbursements of $50.00) within **5 days** of the date of this judgment, the defendant is ordered to pay additional costs of sealing the costs order of $478.00 and the accompanying disbursement of $50.00.

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Associate Judge Taylor