

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

**I TE KŌTI MATUA O AOTEAROA  
TĀMAKI MAKĀURAU ROHE**

**CIV-2022-404-2218  
[2024] NZHC 456**

BETWEEN GAUTAM JINDAL  
Plaintiff/Applicant

AND CHERAG DARUWALLA  
Defendant/Respondent

Hearing: On the papers

Appearances: Gautam Jindal the Plaintiff/Applicant is self-represented  
D H McLellan KC / S O H Coad for the Defendant/Respondent

Judgment: 6 March 2024

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**COSTS JUDGMENT OF ASSOCIATE JUDGE C B TAYLOR**

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*This judgment was delivered by me on 6 March 2024 at 3:00pm  
pursuant to Rule 11.5 of the High Court Rules*

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*Registrar/Deputy Registrar*

***Solicitors:***

Gautam Jindal, Greenlane, Auckland, Plaintiff/Applicant

Anthony Harper (Dan M Hughes/Emma E Hughes), Auckland, for the Defendant/Respondent

## Introduction

[1] By a judgment delivered by the Court on 24 November 2023, the Court determined three interlocutory applications (the **Judgment**).<sup>1</sup> The interlocutory applications were determined by the Court as follows:

- (a) Strike out – the defendant succeeded in his application to strike out the plaintiff’s first to fourth causes of action in defamation. The first and second causes of action were struck out on the basis that they were time-barred, and the third and fourth causes of action were struck out on the grounds of absolute privilege.
- (b) Security for costs -- the Court declined to order security for costs.
- (c) Evidence objection – the plaintiff’s application seeking exclusion of parts of Ms Williams’ affidavit filed in support of the defendant’s security for costs application was resolved as follows:
  - (i) The defendant did not rely upon paragraphs [4] and[5] of the affidavit, so no determination was made in the Judgment in respect of those paragraphs;
  - (ii) the Court excluded paragraph 6 of Ms Williams’ affidavit as it referred to without prejudice correspondence;
  - (iii) the balance of the plaintiff’s application was dismissed in relation to Ms Williams’ affidavit.

[2] The parties were directed to seek to agree costs and if costs could not be agreed were to file memoranda. Counsel for the defendant filed a memorandum dated 22 January 2024 and the plaintiff filed a memorandum dated 29 January 2024.

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<sup>1</sup> *Jindal v Daruwalla* [2023] NZHC 3315.

## **Defendant's position**

### *Strike out application*

[3] Mr McLellan KC, for the defendant, submits that costs should be determined as follows:

- (a) for the strike out application, the plaintiff should pay the defendant costs on a combination of a 2B and 2C basis, together with second counsel, in the sum of \$10,934.25;
- (b) costs should lie where they fall on the security for costs application and the evidence objection application.

[4] The defendant also seeks disbursements of \$500.00 for filing the interlocutory application on notice for strike out.

[5] In relation to the strike out application, Mr McLellan submits that a combination of 2B and 2C basis and second counsel is justified as the strike out application involved novel legal issues regarding the scope of absolute privilege in New Zealand law. He submits that the preparation of submissions should be calculated on a 2C basis as he submits that counsel's submissions in support of applying the privilege to the Law Society's process for certifying candidates for admission relied on close statutory construction of the Lawyers and Conveyancers Act 2006, legislative history, extensive common law authority on the nature of absolute privilege and analogies to existing privileges in the law of defamation. For the remainder of the steps after the preparation of the submissions in the schedule attached to Mr McLellan's submissions, costs are sought on a 2B basis.

[6] Mr McLellan also submits that the strike out application resulted in striking out four of the five causes of actions by the plaintiff and therefore a large majority of the proceeding has been determined in favour of the defendant by the strike out application.

### *Security for costs*

[7] Mr McLellan submits that costs ought to lie where they fall in respect of the security for costs application. He submits that when the defendant brought the application there were reasonable grounds to believe the plaintiff would not be able to pay a costs award. As the Judgment records, the plaintiff conceded impecuniosity and his notice of opposition acknowledged this. He submits that the defendant had a strong basis for commencing the application, and it was reasonable in the circumstances to proceed to a hearing, and if it were not for the plaintiff's updating affidavits, a finding of impecuniosity was inevitable, and it is probable the Court would have exercised its discretion in favour of an order for security for costs.

### *The evidence objection*

[8] Mr McLellan submits that costs ought to lie where they fall on the plaintiff's evidence objection as the parties had a similar measure of success. The plaintiff succeeded in seeking the exclusion of a reference to an email and the defendant succeeded in opposing the exclusion of evidence which it was alleged constituted impermissible opinion evidence, expert evidence, and evidence in breach of s 50 of the Evidence Act 2006.

### **The plaintiff's position**

#### *Strike out application and security for costs*

[9] Mr Jindal, who is self-represented, submits in relation to the security for costs application that he made a Calderbank offer which was superior to the result obtained by the defendant, and accordingly seeks costs against the defendant for the security for costs portion of the application and for this to be uplifted by 50 per cent. He submits the security for costs and strike out were equal-weighted parts of the application at the hearing, and required an equal amount of time, and accordingly the

net result is that 25 per cent of the standard application costs be awarded to the plaintiff on a 2B basis. His calculation is:

$$(\text{Security} \times 1.5) -- (\text{strike out}) = (0.5 \times 1.5) -- (0.5) = 0.75 -- 0.5 = 0.25.$$

[10] The second reason he submits for approving the 25 per cent indulgence in his favour is that, contrary to rr 7.39(4) and 7.39(7), the defendant's submissions were 26 pages long which he objected to at the time and the Court noted in its minute of 8 September 2023. In my view the length of the submissions on behalf of the defendant were appropriate to the complexity of the issues dealt with during the hearing and do not need to be taken into account in fixing costs.

[11] Mr Jindal also submits that a further reason for awarding 25 per cent of costs in his favour is that the initial interlocutory application dated 10 March 2023 was amended on 26 May 2023 by the defendant, and the amendment required him to file an amended notice of opposition. He submits that the amended notice of opposition was opposed on the basis that his financial position was improving and an order for security for costs should not be made, which the Court ultimately accepted.

[12] Mr Jindal also rejects the defendant's argument that he succeeded in avoiding an order for security for costs based on his evidence of 7 August 2023 and 18 September 2023. He submits that once the amended application and notice of opposition were filed, all subsequent evidence was in line with defences raised in the amended notice of opposition. As his financial position improved between April 2023 and July 2023, it was necessary for him to bring those facts before the Court.

#### *Wasted costs*

[13] Mr Jindal alleges that the defendant caused wasted costs by filing an amended interlocutory application on 26 May 2023 which superseded the original interlocutory application dated 10 March 2023 and therefore he seeks wasted costs on a 2B basis for filing his notice of opposition dated 23 March 2023 to the defendant's original application dated 10 March 2023. He refers to r 7.77(8) of the Rules which requires a party amending a pleading to bear all costs of and occasioned by the original pleading.

*Categorisation/time allocation*

[14] Mr Jindal opposes the defendant seeking costs for the strike out application on a mix of 2B and 2C bases, with second counsel being approved. He submits it is rare for a standard strike out or security for costs application to be awarded anything other than 2B costs, and rarer for second counsel to be allowed in 2B interlocutory applications dealing with typical matters. He submits the interlocutory applications did not warrant the second counsel and must be assessed on a 2B costs basis.

*Evidence objection*

[15] Mr Jindal submits that he should be considered as a successful party in relation to the objection to the affidavit evidence of Ms Williams. He submits that paragraphs [4], [5] and [6] were excluded, and the objection to paragraph [15] which was not successful did not add any significant time or costs to the application hearing.

[16] He submits that an effort was made to resolve the matter out of Court by offering the defendant an opportunity to amend the affidavit and re-file without any issue. He also submits the affidavit related to the issue of security for costs which the Court did not order, and therefore the Court did not consider the affidavit useful for that purpose.

[17] He seeks 2B scale costs with a 50 per cent uplift in respect of his application to exclude evidence.

[18] In summary, Mr Jindal seeks the following:

- (a) Costs for the security for costs and strike out applications in his favour in the amount of \$1,673.00, being 25 per cent of a standard interlocutory application;
- (b) costs on objecting to the affidavit and evidence in his favour, with a 50 per cent uplift, amounting to \$12,189.00;

- (c) wasted costs for filing a notice of opposition dated 23 March 2023 on a 2B basis, amounting to \$1,434.00.

[19] The net result of this calculation is Mr Jindal is seeking that the defendant pay to him an amount of \$15,296.00 plus disbursements of \$105.00.

## **Result**

[20] Having considered the submissions of Mr McLellan and Mr Jindal, I consider that costs should be awarded as follows:

- (a) The defendant is entitled to costs on the strike out application calculated on a 2B basis with second counsel approved. I do not accept the proposed 2C basis for preparation of submissions which, while extensive, were not in my view sufficiently complex to justify a 2C classification. However, to recognise the extra work involved in those submissions over and above a less complex strike out application, in my view, second counsel is justified.
- (b) Mr Jindal is entitled to costs on a 2B basis with a 25 per cent uplift in respect of the security for costs application. I accept Mr McLellan's point that when the application was brought Mr Jindal had admitted impecuniosity and therefore it was reasonable for the defendant to bring the application. I also accept Mr Jindal's point that as his financial circumstances improved from April 2023 to the date of the hearing, he was entitled to update the Court as to this improvement. The 25 per cent uplift is to reflect Mr Jindal's Calderbank offer which was not accepted by the defendant.
- (c) Costs should lie where they fall on the application for exclusion of evidence. In my view, after the defendant had conceded that paragraphs [4] and [5] of Ms Williams' affidavit were not to be relied on, the parties had approximately an equal measure of success with one paragraph of Ms Williams' affidavit excluded and one paragraph accepted.

- (d) Pursuant to r 7.77(8) of the Rules, Mr Jindal is entitled to wasted costs on a 2B basis for filing his opposition to the original interlocutory application filed by the defendant on 10 March 2023.
- (e) Each of the parties is to pay disbursements as sought, with Mr Jindal paying the \$500 disbursement and the defendant paying the \$105 disbursement.

[21] The parties are directed to promptly calculate and pay costs as set out at [20] of this judgment. Leave is granted to the parties to come back to Court if there are any further disputes between the parties on costs.

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**Associate Judge Taylor**