IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2023-485-48
[2024] NZHC 2709

UNDER	the Defamation Act 1992
BETWEEN	GAUTAM JINDAL Plaintiff
AND	IMRAN MOHAMMED KAMAL First Defendant
	LIQUIDATION MANAGEMENT LIMITED Second Defendant
	KEVIN JOHN DAVIS Third Defendant
	PRINCIPLE INSOLVENCY GP LIMITED Fourth Defendant

Hearing:	On the papers
Appearances:	Plaintiff in Person S Price for First and Second Defendants F E Geiringer for Third and Fourth Defendants
Judgment:	19 September 2024

JUDGMENT OF ASSOCIATE JUDGE SKELTON
[Costs]

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[1] In my judgment dated 18 April 2024 (Judgment),[1] I dismissed the plaintiff's application challenging my previous costs judgment in respect of the defendants'

[1] *Jindal v Kamal* [2024] NZHC 827.

applications for security for costs,[2] including dismissing the plaintiff's application for leave to appeal the costs judgment.[3]

[2] I encouraged the parties to agree on costs. Unfortunately, the parties have been unable to agree and have filed memoranda. The plaintiff contends that costs should lie where they fall. The first and second defendants seek increased costs. The third and fourth defendants seek indemnity costs.

[3] The plaintiff applied to the Court of Appeal for leave to appeal my costs judgment. That application has been declined and one set of costs awarded on a Band A basis.[4]

Legal principles - costs

[4] Costs are ultimately a matter of the court's discretion, the overall objective being to achieve an outcome that best meets the interests of justice.[5] However, that discretion is qualified by the applicable costs rules, contained in pt 14 of the High Court Rules 2016. The primary principle applying to the determination of costs is that costs follow the event – meaning that a party who is unsuccessful pays costs to a party who is successful.[6] Costs are usually to be assessed on the basis of the schedule by applying the appropriate daily recovery rate to the time considered reasonable for each step reasonably required in relation to the proceeding or interlocutory application.[7]

[5] The Court may order a party to pay increased costs where that party has contributed unnecessarily to the time or expense of the proceeding or a step in it.[8] Increased costs may be awarded where there is a failure by the paying party to act

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2 *Jindal v Kamal* [2023] NZHC 2990.

3 The plaintiff's application included an application for recall of the costs judgment, an application seeking reversal, discharge or variation of the costs judgment and an application for leave to appeal the costs judgment.

4 *Jindal v Kamal* [2024] NZCA 423.

5 High Court Rules 2016, r 14.1; *Manukau Golf Club Inc v Shoye Venture Ltd* [2012] NZSC 109, [2013] 1 NZLR 305 at [7] and [16]; *Glaister v Amalgamated Dairies Ltd* [2004] 2 NZLR 606 (CA) at [21]–[24] and [28]; and *Mansfield Drycleaners Ltd v Quinny's Drycleaning (Dentice Drycleaning Upper Hutt Ltd)* (2002) 16 PRNZ 662 (CA) at [27].

6 Rule 14.2(1)(a).

7 Rule 14.2(1)(c).

8 Rule 14.6(3)(b).

reasonably.[9] Increased costs will generally not be appropriate where there are "at least available starting points" for the argument — where its pursuit is not "unreasonable" nor "hopeless".[10]

[6] The Court may also award the actual costs reasonably incurred by a party (indemnity costs).[11] Indemnity costs may be awarded where a party has behaved either badly or very unreasonably.[12] For example, indemnity costs may be ordered if the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or step in a proceeding.[13]

[7] Applications to depart from a standard award of costs based on the schedular approach are discouraged unless there is a clear basis for such departure in accordance with the High Court Rules.[14]

Successful/unsuccessful party

[8] As recorded in the Judgment, the defendants were successful in opposing the plaintiff's application challenging my costs award. The plaintiff appears to accept this in his memorandum.

[9] However, the plaintiff contends that costs should lie where they fall because:

(a) there should only be one set of costs awarded for the four defendants pursuant to r 14.15 High Court Rules because the defendants had a common position while opposing the application and should have "joined efforts";

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9 See *Bradbury v Westpac Banking Corp* [2009] NZCA 234, [2009] 3 NZLR 400 at [27].

10 *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZCA 684 at [16], citing *New Zealand Carbon Farming Ltd v Mighty River Power Ltd* [2016] NZCA 624, (2016) 23 PRNZ 789 at [39].

11 Rule 14.6(1)(b).

12 *Bradbury v Westpac Banking Corp*, above n 9, at [27]–[28]; and *Prebble v Awatere Huata (No. 2)* [2005] NZSC 18, [2005] 2 NZLR 467 at [6].

13 High Court Rules, r 14.6(4)(a).

14 *Lepionka & Company Investments Ltd v Gibson Sheat* [2023] NZHC 2745 at [3] and [7].

(b) the third and fourth defendants adopted a position which led to an increase in costs and there should be a reduction in scale costs otherwise payable under r 14.7(d); and

(c) there is no basis for an award of increased or indemnity costs against the plaintiff.

How many sets of costs?

[10] Rule 14.15 of the High Court Rules provides:

> The court must not allow more than 1 set of costs, unless it appears to the court that there is good reason to do so, if—
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> (a) several defendants defended a proceeding separately; and
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> (b) it appears to the court that all or some of them could have joined in their defence.

[11] Rule 14.15 is directed towards the defence of substantive proceedings. However, the rule has been found to apply to interlocutory applications even where the defendants are applicants. In *Houghton v Saunders,* the Court stated in respect of r 14.15:[15]

> Although all defendants were applicants in respect of most of the interlocutory issues, the same approach to costs in favour of multiple parties should apply. This rule reflects the policy requiring the Court to exercise some caution before awarding costs in favour of multiple parties, particularly when there is some overlap or community of interest in the litigation position of those parties. In exercising this discretion the Court will consider whether parties have common or overlapping interests and, if so, to what extent; and the extent to which one party did or could have relied upon the evidence or submissions of another. This approach should apply discretely to interlocutory steps, even where it is clear that separate representation of the defendants is appropriate on the substantive issues. The need for separate representation substantively is likely to impact on the extent to which defendants would otherwise be expected to share the burden on interlocutory steps.

[12] Here, the four defendants are already represented in two defendant groups. In the Judgment,[16] I confirmed that the plaintiff's substantive case against each defendant group is different, and there is the potential for different and possibly conflicting

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15 *Houghton v Saunders* [2013] NZHC 3452 at [36].
16 At [41]-[43].

positions to be taken by the two defendant groups in defending the plaintiff's claims. I confirmed that it was clear to me that the defendant groups had to make separate applications for security for costs, including affidavit evidence and submissions, and be separately represented. Further, I noted that it was clear to me that there was no unnecessary duplication of evidence in the affidavits filed on behalf of the two defendant groups, and that counsel for the defendant groups had cooperated to avoid unnecessary duplication of submissions. The Court of Appeal has confirmed that two sets of costs were appropriate in respect of the applications for security for costs.[17]

[13] Regarding the plaintiff's application challenging my costs judgment, I consider that it remained appropriate for the two defendant groups to separately defend the separate costs awards made in their favour and therefore to be separately represented at the hearing. This is particularly so as the two defendant groups have taken different approaches in that the third and fourth defendants contend that the plaintiff deliberately attempted to mislead the Court, which also leads to divergent approaches to the cost consequences.

[14] However, there was overlap in the positions of the two defendant groups regarding the issues of recall of the costs judgment, reversal, discharge or variation of the costs judgment, leave to appeal the costs judgment and alleged errors with the costs decision as is apparent from the written submissions. The defendants contend that they tried to avoid duplication but that has not always been possible and the plaintiff's lateness in filing submissions and authorities left little scope for co-operation between the defendants in opposing the applications. The plaintiff filed submissions and a bundle of authorities on 4 March 2024. This was late as submissions were due three working days earlier on 28 February 2024. However, based on the timetable, the plaintiffs were to have five working days to respond and could have sought a direction from the Court that they wished to confer and file their submissions in response after the timetabled date. In the event, the third and fourth defendants filed submissions on 6 March 2024 and the first and second defendants filed submissions covering some of the same ground on 11 March 2024. It seems to me that more could have been done

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17 *Jindal v Kamal,* above n 4, at [37].

by the two defendant groups to confer and reduce the overlap in the written and oral submissions.[18]

[15] In the circumstances, I consider it is appropriate to reduce any award of costs for each defendant group by 25% to reflect the overlap.

Should there be a reduction in costs under r 14.7(d)?

[16] The plaintiff contends that there should be a reduction in costs awarded to the defendants under r 14.7(d) of the High Court Rules because allegations were introduced about him misleading the Court and, because of the implications for him, this necessitated an in-person hearing rather than the matter being dealt with on the papers.

[17] I do not consider that this issue warrants a reduction in costs that the two defendant groups are otherwise entitled to under r 14.7(d). The defendant groups have not failed on a cause of action or issue which significantly increased the plaintiff's costs.

[18] The plaintiff put the *Calderbank* offer in issue and claimed that the offer was made separately to each defendant group; a total offer of $60,000. In doing so, the plaintiff put forward a copy of the *Calderbank* offer email dated 26 June 2023 with his memorandum dated 24 October 2023; this copy of the email was incomplete because it did not show the email header showing who the offer had been sent to which was clearly relevant. The third and fourth defendants alleged that the production of this incomplete copy of the email was an attempt to mislead the Court in their notice of opposition and memorandum dated 23 November 2023. After the plaintiff had requested an in-person hearing and a minute had been issued setting the timetable for the hearing, the plaintiff filed an affidavit dated 5 December 2023 which attached another copy of the *Calderbank*

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[18] I note that the two defendant groups proposed a single joint response to the plaintiff's application to the Court of Appeal for leave to appeal which was determined on the papers. This was to "minimise costs and avoid repetition" in a situation where "[t]heir positions overlap, but are not identical". The application to the Court of Appeal was for leave to appeal and therefore of narrower ambit than the application before me. I do not consider that a single joint response was required for the application before me, but as stated, I consider that more could have been done to confer and reduce overlap in the written and oral submissions.

offer email dated 26 June 2023 showing that it had been addressed and sent to the solicitors and counsel for both defendant groups.

[19] Ultimately, I found that the *Calderbank* offer was clearly made to the defendants collectively and not on the basis that it could be accepted by one defendant group. The defendants succeeded on this issue. I did not need to determine the subsidiary allegation that the plaintiff had attempted to mislead the Court. Further, the allegations of attempting to mislead the Court only arose because the plaintiff filed an incomplete copy of the email dated 26 June 2023 which did not show the email header. The plaintiff only filed a copy of the email showing the email header after the allegation had been raised and after the application had been scheduled and timetabled for an in-person hearing at his request. Despite submitting that the allegations that he had attempted to mislead the Court put his livelihood at stake and had serious implications for him, and that the reason he requested an in-person hearing was to put forward evidence to counter the allegations "in open court", the plaintiff did not put forward any evidence countering the allegations and did not address the allegations in his written submissions for the hearing. At the hearing, the plaintiff submitted that he had been unable to include a complete copy of the email in his 24 October 2023 memorandum because of difficulties cutting and pasting the email into his memorandum while he was overseas.

Increased or indemnity costs

[20] The first and second defendants claim increased costs (an uplift of 50% on 2B scale costs) because the plaintiff made three applications in the same document and each application required consideration and research on separate areas of law and distinct submissions. The first and second defendants submit that while the applications are to be treated as one application for costs purposes in the first instance, adjustments should be made as appropriate under the general discretion in r 14.1 to increase or reduce costs under rr 14.6 or 14.7.[19]

[21] The first and second defendants submit that they are entitled to an uplift because of the additional time required to respond to the three applications, requiring consideration and research of separate areas of law and distinct submissions. I do not consider that is appropriate in this case. That is because although the plaintiff

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19 *Staples v Freeman* [2020] NZHC 1124 at [57]–[58].

advanced three different procedural outcomes, they were advanced essentially on the same grounds. Therefore, while the defendant groups had to articulate the legal tests for each procedural outcome, the bulk of the work was in responding to the grounds which applied across all three applications.

[22] The first and second defendants also say they are entitled to increased costs under r 14.6(3)(b)(ii) — "taking or pursuing an unnecessary step or an argument that lacks merit". The first and second defendants submit that the grounds advanced by the plaintiff were largely a "re-run" of arguments previously put before the Court prior to the costs judgment which had not found favour, including as to the effect of the *Calderbank* offer and the quantification of security for costs. The first and second defendants say that the plaintiff also pursued an application for recall where it was clearly unavailable.

[23] While the plaintiff did seek to re-run some arguments with regard to the *Calderbank* offer and the quantification of security for costs, he also raised new arguments to support his position being "mathematical objectivity", the decision in *Grow Build NZ Ltd (in liq) v Timber Cabins Group Ltd*,[20] and the allegation that the defendants took a "Rolls Royce" to the litigation and had been awarded "Rolls Royce" costs. The plaintiff also raised a new issue regarding r 14.15 and awarding two sets of costs in support of his applications. With regard to the application for recall, although the costs judgment had been sealed prior to the application being made, the Court has inherent jurisdiction to correct errors in exceptional circumstance even after a judgment has been sealed, and the recognised categories of exception are not exhaustive.

[24] Overall, I do not consider that this is a case where increased costs are warranted on the basis that the plaintiff pursued unnecessary arguments that lacked merit. It seems to me that there were at least available starting points for the new issues raised by the plaintiff referred to above such that the pursuit of the arguments was not "unreasonable" or "hopeless".[21]

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20 *Grow Build NZ Ltd (in liq) v Timber Cabins Group Ltd* [2024] NZHC 26.
21 *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZCA 684 at [16].

[25] The third and fourth defendants claim indemnity costs on the basis that the plaintiff's applications rested on assertions that were intended to mislead the Court. Further, the third and fourth defendants say the plaintiff has not paid the challenged costs orders made in this proceeding, and has not paid outstanding costs awards in separate proceedings[22] and attempted to mislead the Court in this regard.

[26] With regard to the first ground, the allegation that the plaintiff attempted to mislead the Court relates to the plaintiff's argument that the *Calderbank* offer was made separately to each defendant. It does not relate to the other arguments or grounds raised by the plaintiff in support of his application, for example the argument based on r 14.15. The plaintiff filed a copy of the email offer without the email header with his memorandum dated 24 October 2023. He put forward a further copy of the offer showing the email header with his affidavit dated 5 December 2023, after the allegation of attempting to mislead the Court had been raised. The plaintiff submitted at the hearing that he had difficulty including a complete copy of the email in his 24 October 2023 memorandum while he was overseas. Mr Geiringer takes issue with the plaintiff's explanation, but I am not prepared to make a finding on the allegation of deliberately misleading the Court when the position has not been fully examined and tested. The third and fourth defendants also allege that statements made by the plaintiff in his 6 November 2023 memorandum that the *Calderbank* offer was made to each defendant group individually were a further attempt to mislead. However, it seems to me that these statements reflect the plaintiff's interpretation and understanding of the *Calderbank* offer, which I found to be wrong.

[27] With regard to the second ground, I am not in a position to determine whether the plaintiff had paid all outstanding costs awards in separate proceedings by 13 March 2024 based on submission and information as to the position on costs in those proceedings as at 28 November 2023. I do not consider this is relevant to the issue of costs on the subject application. It is also submitted that the plaintiff has not yet paid the costs award which he challenged in the subject application, and which has recently been confirmed by the Court of Appeal. If the plaintiff has not paid this costs award, I do not consider that this warrants an award of indemnity costs on the subject

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[22] Mr Geiringer filed a memorandum in this regard dated 13 March 2024.

application. The consequence of the plaintiff's failure to pay the costs award is that the defendants are not required to progress any further steps in the proceedings unless and until the costs are paid.[23]

[28] Finally, in the circumstances, because the two defendant groups have not been entirely successful on their applications for costs, I do not consider it is appropriate to award costs for their costs memoranda filed.

Result

[29] The two defendant groups are each entitled to costs on a 2B basis, reduced by 25% to account for avoidable overlap, and reasonable disbursements.

[30] The first and second defendants are entitled to costs in the sum of $5,736 and disbursements in the sum of $155.51.

[31] The third and fourth defendants are entitled to costs in the sum of $5,736 and disbursements in the sum of $124.20.

[32] The order made under r 7.48 of the High Court Rules in my costs judgment dated 25 October 2023[24] is extended to include the costs awards made in this judgment if the costs are not paid within 14 days of the date of this judgment.

Associate Judge Skelton

Solicitors and Counsel:
Darroch Forrest, Wellington for First and Second Defendants
Langford Law, Wellington for Third and Fourth Defendants

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23 *Jindal v Kamal*, above n 2, at [19].
24 At [19].