

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

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

**CIV-2023-404-2690  
[2024] NZHC 2017**

UNDER The Defamation Act 1992

IN THE MATTER OF A claim against the defendants by James  
John McConnor for defamation

BETWEEN JAMES JOHN MCCONNOR  
Plaintiff

AND AUCKLAND TRANSPORT  
First Defendant

BAYCORP (NZ) LIMITED  
Second Defendant

Hearing: On the papers

Counsel Plaintiff in person  
T C Goatley / I Ieremia for the First Defendant  
J Ussher / C Kim for the Second Defendant

Judgment: 23 July 2024

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**JUDGMENT OF ASSOCIATE JUDGE BRITTAIN  
[Costs]**

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*This judgment was delivered by me on 23 July 2024 at 2 pm  
Pursuant to r 11.5 of the High Court Rules.*

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*Registrar/Deputy Registrar*

Solicitors/Counsel  
United Legal Limited, Auckland  
Bell Gully, Auckland

[1] On 26 June 2024, I entered judgment for the first defendant and the second defendant against the plaintiff, striking out the plaintiff's claim against the first defendant and the second defendant in its entirety (the judgment).<sup>1</sup> The defendants now apply for costs.

[2] The first defendant applies for indemnity costs on the grounds that the plaintiff pursued a hopeless case, took unnecessary steps in the proceeding and the proceeding was an abuse of process. Alternatively, the first defendant seeks an increase in costs above 2B, on the ground that the plaintiff unreasonably refused to accept a settlement offer made on 31 August 2023.

[3] The second defendant seeks an increase in costs above 2B on the grounds that the plaintiff pursued arguments that lacked merit, made unfounded allegations of malice, and refused without reasonable justification to admit facts in evidence and accept legal arguments.

[4] The plaintiff has filed a memorandum dated 8 July 2024, submitting that the judgment is ultra vires on the ground that an Associate Judge does not have jurisdiction to determine an application for summary judgment and/or strikeout in respect of a claim under the Defamation Act 1992. The plaintiff requested that I recall the judgment. The plaintiff has made no submissions on costs.

[5] The jurisdiction argument was not raised when the applications for summary judgment/strikeout were heard. I am satisfied that I had jurisdiction to hear the applications for summary judgment and the applications for strike out, under ss 20(1)(a), 20(5) and 21(1) of the Senior Courts Act 2016.

[6] The plaintiff has appealed the judgment and intends to raise the jurisdiction point on appeal. I am not prepared to recall the judgment. The plaintiff may pursue his jurisdiction argument on appeal.

[7] Rule 14.6 of the High Court Rules 2016 provides:

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<sup>1</sup> *McConnor v Auckland Transport* [2024] NZHC 1709.

#### **14.6 Increased costs and indemnity costs**

- (1) Despite rules 14.2 to 14.5, the court may make an order—
  - (a) increasing costs otherwise payable under those rules (increased costs); or
  - (b) that the costs payable are the actual costs, disbursements, and witness expenses reasonably incurred by a party (indemnity costs).
- (2) The court may make the order at any stage of a proceeding and in relation to any step in it.
- (3) The court may order a party to pay increased costs if—
  - (a) the nature of the proceeding or the step in it is such that the time required by the party claiming costs would substantially exceed the time allocated under band C; or
  - (b) the party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in it by—
    - (i) failing to comply with these rules or with a direction of the court; or
    - (ii) taking or pursuing an unnecessary step or an argument that lacks merit; or
    - (iii) failing, without reasonable justification, to admit facts, evidence, documents, or accept a legal argument; or
    - (iv) failing, without reasonable justification, to comply with an order for discovery, a notice for further particulars, a notice for interrogatories, or other similar requirement under these rules; or
    - (v) failing, without reasonable justification, to accept an offer of settlement whether in the form of an offer under rule 14.10 or some other offer to settle or dispose of the proceeding; or
  - (c) the proceeding is of general importance to persons other than just the parties and it was reasonably necessary for the party claiming costs to bring it or participate in it in the interests of those affected; or
  - (d) some other reason exists which justifies the court making an order for increased costs despite the principle that the determination of costs should be predictable and expeditious.
- (4) The court may order a party to pay indemnity costs if—
  - (a) the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding; or
  - (b) the party has ignored or disobeyed an order or direction of the court or breached an undertaking given to the court or another party; or

- (c) costs are payable from a fund, the party claiming costs is a necessary party to the proceeding affecting the fund, and the party claiming costs has acted reasonably in the proceeding; or
- (d) the person in whose favour the order of costs is made was not a party to the proceeding and has acted reasonably in relation to it; or
- (e) the party claiming costs is entitled to indemnity costs under a contract or deed; or
- (f) some other reason exists which justifies the court making an order for indemnity costs despite the principle that the determination of costs should be predictable and expeditious.

[8] I do not consider that the plaintiff's claim was so hopeless from its inception, or that the plaintiff has behaved so extremely badly, to warrant an award of indemnity costs.

[9] The plaintiff's claim of defamation was underpinned by his allegation that a \$150 ticket issued by the first defendant, Auckland Transport (AT), was ultra vires the relevant legislation. The plaintiff claimed that he was defamed when AT communicated the infringement notice to the second defendant, Baycorp, and the District Court (for enforcement).

[10] The ultra vires issue is the subject of an application for judicial review by the plaintiff in a separate proceeding. In the judgment, I held that there was no defamation even though the plaintiff may yet be able to establish that at the time of AT's communication of the infringement notice to Baycorp there was no infringement fee due.

[11] Even so, there are aspects of the plaintiff's conduct in this proceeding which justify increased costs:

- (a) AT's publication of the infringement reminder notice to the District Court was plainly protected by absolute privilege. That part of the claim should not have been brought.

- (b) It was open to the plaintiff to await the outcome of his judicial review proceeding before commencing his defamation proceeding based on AT's communication with Baycorp and Baycorp Group's internal communications. This would have avoided duplication of the ultra vires issue in two separate proceedings.
- (c) The solicitors for AT wrote to the plaintiff on 31 August 2023 setting out why his claim could not succeed, and offering to accept a discontinuance with costs to lie where they fall. There was no reasonable justification for the plaintiff to decline that offer.
- (d) The plaintiff commenced his defamation proceeding in the District Court, and then filed a duplicate defamation proceeding in the High Court. The only material difference was that the proceeding in the High Court included an inflated claim for damages. This resulted in various unnecessary interlocutory steps, including a transfer of the District Court proceeding to the High Court, consolidation of the proceedings in the High Court, and directions required due to the procedure that had been adopted by the plaintiff.
- (e) When the defendants' affidavit evidence was served, it should have become obvious to the plaintiff that his claim could not succeed, on the ground that there was no evidence of publication of the impugned statement beyond internal communications within each defendant, or between the defendants, for the limited purpose of debt recovery action.
- (f) Undeterred, the plaintiff filed his own application for summary judgement, which stood no chance of success.

[12] In the round, I consider that an uplift of 50 per cent on 2B costs is appropriate for both defendants. The starting point for costs for the steps in the District Court is the time allocations and daily recovery rates on a 2B basis prescribed by the District Court Rules, as directed by the District Court Judge when the transfer was ordered.

[13] For the first defendant, I allow the steps set out in sch A attached to this judgment, which is based on the schedule that was attached to the memorandum as to costs filed on behalf of the first defendant. The steps that I have not allowed or adjusted are highlighted in bold on sch A. I comment further:

- (a) step 9.8 — 17.10.23 memorandum: this was a joint memorandum, so only half of the claim is allowed;
- (b) step 23 — 22.1.24 notice of opposition: the transfer of the proceeding from the District Court to the High Court was inevitable once the High Court proceeding had been filed, and this step duplicates steps taken in respect of other list appearances;
- (c) step 10 — case management conference in the High Court: there was one list call of the cross-applications for summary judgment, and no case management conference;
- (d) step 24 — 10.6.24/11.6.24 submissions: only one set of written submissions was required for the hearing, and one allowance of 1.5 days is appropriate;
- (e) steps under the heading “preparing for affidavit hearing”: these steps are not available on an application for summary judgment. Preparation of the bundle is allowed as step 25.

[14] An award of 2B costs for the first defendant would be \$17,224.75. With an uplift of 50 per cent this is \$25,837.12.

[15] For the second defendant, I allow the steps set out in sch B attached to this judgment, which is based on the schedule that was attached to the memorandum as to costs filed on behalf of the second defendant. The steps that I have not allowed are highlighted in bold on sch B. Items/steps 30 and 32 are not available on an application for summary judgment. An award of 2B costs for the second defendant would be \$13,972.75. With an uplift of 50 per cent this is \$20,959.12.

## **Orders**

[16] I make the following orders:

- (a) the plaintiff shall pay the first defendant's costs of \$25,837.12 together with disbursements of \$972.78; and
- (b) the plaintiff shall pay the second defendant's costs of \$20,959.12 together with disbursements of \$740.

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**Associate Judge Brittain**

Schedule A — 2B costs first defendant

Costs on a 2B basis					
Step	Description	Date	Time allocation	Recovery Rate	Total
<b>Steps claimed for against District Court Rules 2014</b>					
2	Statement of defence by defendant (receiving instructions, researching facts and law, and preparing and serving that document)	4/09/2023	1	\$ 1,910.00	\$ 1,910.00
7	<i>Other pleadings and notices</i>				
7.4	Pleading in response to other party's amended pleading (payable regardless of outcome except where formal or consented to)	21/09/2023	0.4	\$ 1,910.00	\$ 764.00
9.8	Filing and serving memorandum in anticipation of judicial conference	17/10/2023	0.25	\$ 1,910.00	\$ 238.75
9.9	Appearance at judicial conference	25/10/2023	0.3	\$ 1,910.00	\$ 573.00
9	<i>Interlocutory proceedings and related steps - Security for costs application</i>				
9.10	Preparing and filing interlocutory application (excluding summary judgment application) and supporting affidavit	4/09/2023	0.4	\$ 1,910.00	\$ 764.00
9.8	Filing and serving memorandum in anticipation of judicial conference	18/12/2023	0.25	\$ 1,910.00	\$ 477.50
9.9	Appearance at judicial conference	23/01/2024	0.3	\$ 1,910.00	\$ 573.00
10	<i>Summary judgment application (additional to costs in items 1 to 5):</i>				
10.1	Preparing and filing summary judgment application and supporting affidavits	4/09/2023	0.4	\$ 1,910.00	\$ 764.00
10.1	Preparing and filing opposition and supporting affidavits	8/11/2023	0.4	\$ 1,910.00	\$ 764.00
<b>Steps claimed for against High Court Rules 2016</b>					
<i>Interlocutory applications (including applications for summary judgment and for review of interlocutory decisions)</i>					
23	<b>Filing opposition to interlocutory application (Opposition to Plaintiff's application for removal of proceeding from District Court to High Court)</b>	22/01/2024	0.6	\$ 2,390.00	
23	Filing opposition to interlocutory application (Opposition to Plaintiff's application for summary judgment)	15/02/2024	0.6	\$ 2,390.00	\$ 1,434.00
<i>Case management</i>					
11	Filing memorandum for first or subsequent case management conference	12/02/2024	0.4	\$ 2,390.00	\$ 956.00
	or mentions hearing				



10	Preparation for first case management conference		0.4	\$ 2,390.00	
12	Appearance at mentions hearing or callover	20/02/2024	0.2	\$ 2,390.00	\$ 478.00
<i>Other pleadings and notices</i>					
9	Pleading in response to amended pleading ( <i>payable regardless of outcome except when formal or consented to</i> )	7/05/2024	0.6	\$ 2,390.00	\$ 1,434.00
<i>Interlocutory applications (including applications for summary judgment and for review of interlocutory decisions)</i>					
24	Preparation of written submissions ( <i>In support of First Defendant's application for security for costs</i> )	10/06/2024	0.6	\$ 2,390.00	
24	Preparation of written submissions ( <i>In support of First Defendant's application for summary judgment and/or strike out</i> )	10/06/2024	0.6	\$ 2,390.00	
24	Preparation of written submissions ( <i>In response to Plaintiff's application for summary judgment</i> )	11/06/2024	1.5	\$ 2,390.00	\$ 3,585
26	Appearance at hearing of defended application for sole or principal counsel	13/06/2024	0.25	\$ 2,390.00	\$ 597.50
29	Sealing order or judgment	26/06/2024	0.2	\$ 2,390.00	\$ 478.00
<i>Preparing for affidavit hearing</i>					
	Preparation of affidavits, list of issues or authorities; and agreeing common bundle		2	\$ 2,390.00	
	Additional allowance for whichever party prepared common bundle (this is step 25)	11/06/2024	0.5	\$ 2,390.00	\$ 1,434
	Additional allowance for whichever party prepared common bundle ( <i>Claimed in respect of preparation of bundle of authorities bundle on behalf of the parties</i> )	11/06/2024	0.6	\$ 2,390.00	
	Preparation for hearing		2	\$ 2,390.00	
<b>Total 2B costs</b>					<b>\$ 17,224.75</b>

Schedule B — 2B costs second defendant

District Court - \$1,910 per day			
Item	Description	Time allocation	Total
2	Statement of defence	1	\$1,910.00
7.4	Statement of defence to amended SOC	0.4	\$764.00
9.8	CMC memorandum (normally 0.25 - 50% claimed as joint memorandum filed with AT)	0.125	\$238.75
9.9	CMC on 25 October 2023	0.3	\$573.00
9.10	Application for security for costs	0.4	\$764.00
10.1	Application for summary judgment/strike out	0.4	\$764.00
10.2	Notice of opposition to plaintiff's summary judgment application	0.4	\$764.00
9.12	Submissions on security for costs application (reduced amount claimed as indicated in the submissions to District Court)		\$2,101.00
9.14	Appearance at security for costs/removal hearing 23 Jan 2024	0.25	\$477.50
High Court - \$2,390 per day			
Item	Description	Time allocation	Total
11	Memorandum for callover 20 Feb 2024	0.4	\$956.00
12	Appearance at callover 20 Feb 2024	0.2	\$478.00
24	Submissions for strike out/summary judgment/security for costs hearing	1.5	\$3,585.00

<b>30</b>	<b>Preparation of affidavits etc.</b>	<b>2</b>	
<b>32</b>	<b>Preparation for hearing</b>	<b>2</b>	
26	Appearing at hearing 13 June 20024	0.25	\$597.50

**TOTAL 2B COSTS**

**\$13,972.75**