IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2024-404-706
[2025] NZHC 592

UNDER	the Defamation Act 1992
BETWEEN	PHILLIP RAYMOND NOTTINGHAM, ROBERT EARLE MCKINNEY and GEORGE BULLOCK Plaintiffs
AND	ATTORNEY-GENERAL First Defendant
	PATTERSON HOPKINS LAW, WILLIAM PATTERSON and ROBYN HOPKINS Second Defendants
	WARREN ERNEST BEERE Third Defendant

Hearing:	On the papers
Appearances:	Plaintiffs in person (with D Nottingham as McKenzie Friend) D J Watson and R M Fistonich for First Defendant L G Cox for Second Defendants
Judgment:	20 March 2025

JUDGMENT OF ASSOCIATE JUDGE PAULSEN
(Costs)

This judgment was delivered by me on 20 March 2025 at 4.15 pm
pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar
Date:

[1] In a judgment of 3 December 2024, I granted the first defendant's application for summary judgment against the plaintiffs.[1] I held the first defendant was entitled to costs.[2] Since my judgment was issued, I have received memoranda in relation to costs.

[2] The first defendant has sought 2B scale costs with a 50 per cent uplift in an amount of $27,604.50 and disbursements of $575.34.

[3] The plaintiffs argue that costs should lie where they fall.

Principles in relation to costs

[4] All issues of costs are discretionary, but the discretion must be exercised judicially having regard to the principles set out in the High Court Rules 2016 (the Rules). Rule 14.2 sets out general principles applying to the determination of costs. Particularly relevant in this context are:

(a) the party who fails with respect to a proceeding should pay costs to the party who succeeds;[3]

(b) an award of costs should reflect the complexity and significance of a proceeding;[4] and

(c) as far as possible the determination of costs should be predictable and expeditious.[5]

[5] A party seeking increased costs bears the onus of demonstrating that such costs are justified.[6] In asking the Court to depart from scale costs the first defendant relies on r 14.6(3) of the Rules, which relevantly provides as follows:

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1 *Nottingham v Attorney-General* [2024] NZHC 3644.
2 At [135]–[136].
3 High Court Rules 2016, r 14.2(1)(a).
4 Rule 14.2(1)(b).
5 Rule 14.2(1)(g).
6 *Strachan v Denbigh Property Ltd* HC Palmerston North CIV-2010-454-232, 3 June 2011 at [27].

14.6 Increased costs and indemnity costs

...

(3) The court may order a party to pay increased costs if—

...

(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 …

(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 a proceeding; 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.

...

[6] Rule 14.6(3)(b) is concerned with improper or unreasonable conduct on the part of the party against whom increased costs are sought. Increased costs will not be appropriate where there is some reasonable explanation for the losing party's conduct.[7]

[7] An uplift on scale costs is justified only to the extent that a party's failure to act reasonably contributed to the time and expense of the proceeding or some step in it. The correct approach usually involves the party applying identifying particular steps in respect to which the other party's unreasonable conduct contributed to increased costs.[8] However, where increased costs are sought because the losing party's position lacked merit, it may be appropriate for increased costs to apply to all steps.[9]

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7 *Valmar Trustee Ltd v Smart Water Technology* [2016] NZHC 1583 at [12].

8 *Holdfast NZ Ltd v Selleys Pty Ltd* (2005) 17 PRNZ 897 (CA) at [44]–[47].

9 *NR v MR* [2014] NZCA 623, (2014) 22 PRNZ 636 at [50]–[53]; and *Broadspectrum (New Zealand) Ltd v Nathan* [2017] NZCA 434, [2017] ERNZ 733 at [57].

Discussion

[8] The plaintiffs' submission that costs should lie where they fall overlooks that I have already determined that the first defendant is entitled to costs. The only issue to be determined is the quantum of those costs. Notwithstanding that, there is no basis for the position taken by the plaintiffs.

[9] In support of their submission the plaintiffs seek to relitigate issues raised in their unsuccessful defence of the summary judgment application, such as whether they were defamed, the importance of the right to protect one's reputation and the obligations of lawyers. None of these matters engaged with the fundamental difficulty facing the plaintiffs, which was that the first defendant had a statutory immunity to the claim and a defence of qualified privilege.

[10] The plaintiffs also submit that costs should not be awarded because an appeal has been filed from my decision. If the plaintiffs are successful on appeal the issue of costs in this Court will be revisited, but presently the first defendant is entitled to the benefit of its judgment and the costs award.

[11] The plaintiffs appear to be arguing that the case raised an issue of public interest and say that the result does not reflect the wishes of the taxpayers. The defences available to the first defendant were well established and the plaintiffs cannot speak for the general body of taxpayers.

[12] Turning to quantum, the first defendant has submitted a schedule calculating costs on a 2B basis, which it submits is the appropriate categorisation for this proceeding and the steps taken in it. The plaintiffs have not specifically challenged that calculation. I accept this is a category 2 proceeding for costs purposes and that band B is appropriate for each of the steps taken in the proceeding.

[13] I also accept that the first defendant is justified in seeking a 50 per cent uplift on scale costs. The plaintiffs were put on notice that their claim could not succeed at an early stage. This should have been obvious to them from correspondence with Land Information New Zealand's principal solicitor before the proceeding was commenced. Then, on 23 May 2024, counsel for the first defendant wrote the plaintiffs a

comprehensive letter setting out why the claim could not succeed. The letter explained that the first defendant had defences of qualified privilege and statutory immunity, both of which I recognised in granting summary judgment.[10] The letter also invited the plaintiffs to withdraw the claim, in which case costs would not be sought against them. Notwithstanding that, the plaintiffs persisted.

[14] The first defendant submits, and again I accept, that the manner in which the plaintiffs conducted their claim contributed unnecessarily to the time and expense of the proceeding, justifying the uplift on costs. Matters relevant in this regard include that the plaintiffs:

(a) relied on an amended statement of claim filed shortly before the hearing commenced and which had not been served on the parties;

(b) filed a 138-page document of supplementary materials very late the night before the hearing, contrary to a direction that submissions were to be filed five working days before the hearing;

(c) made unmeritorious applications for Associate Judges to recuse themselves; and

(d) filed documents containing scandalous allegations for which there was no factual foundation and which should never have been made but were advanced to support the contention that the Registrar-General had acted in bad faith.

[15] A further feature of this case is that the plaintiffs chose to issue the proceeding when they were aware there was a process to apply for the removal of the caveat under s 143 of the Land Transfer Act 2017. This was also explained to them in the first defendant's counsel's letter of 23 May 2024. Their failure to take such action is incongruent with their expressed concern about reputational damage.

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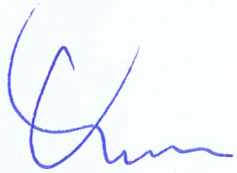
[10] The defence of absolute privilege which the Attorney-General later sought to rely on in the alternative to those defences was not addressed in the letter but was ultimately not accepted.

[16] Given the lack of merit in the plaintiffs' position, the fact they were on notice of that but refused an offer to withdraw the proceeding without costs consequences, and that they conducted the proceeding in an unreasonable and improper manner which contributed unnecessarily to the time and expense of the proceeding, a 50 per cent increase on scale costs is appropriate. It should apply to all steps in the proceeding.

Result

[17] The first defendant is awarded costs in the amount of $27,604.50 and disbursements of $575.34.



O G Paulsen
Associate Judge

Solicitors:
Crown Law, Wellington

Copy to:
The Plaintiffs