

**IN THE DISTRICT COURT  
AT AUCKLAND**

**CIV-2016-044-000329  
[2017] NZDC 2366**

BETWEEN

COLIN CRAIG  
Plaintiff

AND

SOCIAL MEDIA CONSULTANTS  
LIMITED  
JORDAN WILLIAMS  
Defendants

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Dated: 9 February 2017

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**JUDGMENT OF JUDGE M-E SHARP  
[On costs]**

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**Introduction**

[1] Consequent upon my strike out of the plaintiff's statement of claim against one defendant and entry of summary judgment for the other defendant against the plaintiff, the successful defendants seek indemnity costs. Whilst the plaintiff does not oppose an award of costs to the defendants, accepting that costs will normally follow the event, he submits that as the claim against the defendants was a "relatively straightforward copyright proceeding", the proceeding should be classified as either category 1 or category 2. In addition, he submits that it should be Band A or Band B.

### **Scale costs**

[2] The scale costs for steps taken by the defendants are set out in Schedule A to the District Court Rules. The plaintiff submits that if the Court awarded the defendants only 1A costs, they would each be entitled to \$2,060; 1B costs \$2,987; 2A costs \$3,100; 2B costs \$4,495. All would be plus disbursements. In addition the plaintiff argues that this is not a case susceptible to an award of either indemnity or increased costs.

### **The defendants' position**

[3] Both seek awards of indemnity costs. Whilst I do not have a memorandum from Mr Henry on behalf of the first defendant (because he is otherwise occupied rehabilitating from recent shoulder surgery), as I apprehend from what I was advised in Court after delivering my oral judgment in this proceeding, the submissions which have been made on behalf of the second defendant apply equally to the first defendant although of course I am unaware of the first defendant's costs. The second defendant's costs are \$27,938.75.

### **Judgment on the strike out/ summary judgment applications**

[4] It is true that I found that the plaintiff's proceeding was vexatious. I see from correspondence attached to the costs memorandum of counsel for the second defendant that prior to hearing the plaintiff was invited to discontinue the proceeding – each party to bear their own costs. Notwithstanding those matters, I consider that this is not a matter which would justify an award of indemnity costs. In particular, whilst I considered that the proceeding was vexatious and an abuse of process, the plaintiff appeared to have been bona fide in filing it. However he was misguided. I am concerned that he declined the defendants' offer of settlement by way of discontinuance without costs, although that was unlikely ever to be the type of settlement the plaintiff, considering himself to be justified in bringing the proceeding, would countenance. The plaintiff submits that his conduct in commencing and pursuing the proceeding against the defendants does not meet the

high threshold required to justify an order for indemnity costs:- no truly exceptional circumstances exist here. I agree.

### **Scale costs**

[5] Costs should be awarded to the defendants on a 2B basis, this being a category 2 proceeding of average complexity with a normal amount of time required.

### **Increased costs**

[6] By r 14.6(3) District Court Rules 2014 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 the proceeding by—

...

(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;

[7] I found that copyright may vest in the plaintiff in the “love poem” but it is more probable than not that the defendants dealt fairly with it. It was by no means difficult for the defendants to reach that threshold. I considered the defence arguments to be meritorious and the plaintiff’s otherwise. It should have been apparent to the plaintiff from the start that he was misguided in bringing the proceeding. When the defence of “fair dealing” was pointed out to the plaintiff and the settlement offer made, he would have been wise to accept it. His failure to do so along with pursuing arguments that lacked merit lead me to conclude that an increase in costs is justified. I set that increase at 75% which though sounding large, in fact amounts to a costs award of less than one third of the second defendant’s actual costs. The second defendant’s costs, I consider, exceed reasonable fees in a matter such as this.

## **Conclusion**

[8] Both defendants are awarded category 2B costs increased by 75%, plus reasonable disbursements.

M-E Sharp  
**District Court Judge**