IN THE DISTRICT COURT
AT MANUKAU

CRI-2014-044-001724
[2016] NZDC 3266

JEHANNE DENHAM (neé JACKMAN)
Informant

v

PETER LAWRENCE CLAGUE
Defendant

Hearing:	5 February 2016
Appearances:	Ms M Dyhrberg QC for Informant Mr M Lloyd for Defendant
Judgment:	1 March 2016

RESERVED JUDGMENT OF JUDGE D J McNAUGHTON
Application for Costs

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[1] Following dismissal of the charges at the conclusion of the informant's case, the defendant applies for costs pursuant to the Costs in Criminal Cases Act 1967, being full indemnity costs in the sum of $145,811.37.

[2] Section 5 of the Costs in Criminal Cases Act provides:

> **5 Costs of successful defendant**
>
> (1) Where any defendant is acquitted of an offence or where the charge is dismissed or withdrawn, whether upon the merits or otherwise, the court may, subject to any regulations made under this Act, order that he be paid such sum as it thinks just and reasonable towards the costs of his defence.
>
> (2) Without limiting or affecting the court's discretion under subsection (1), it is hereby declared that the court, in deciding whether to grant costs and the amount of any costs granted, shall have regard to all relevant circumstances and in particular (where appropriate) to—
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> (a) whether the prosecution acted in good faith in bringing and continuing the proceedings:
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> (b) whether at the commencement of the proceedings the prosecution had sufficient evidence to support the conviction of the defendant in the absence of contrary evidence:
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> (c) whether the prosecution took proper steps to investigate any matter coming into its hands which suggested that the defendant might not be guilty:
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> (d) whether generally the investigation into the offence was conducted in a reasonable and proper manner:
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> (e) whether the evidence as a whole would support a finding of guilt but the charge was dismissed on a technical point:
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> (f) whether the charge was dismissed because the defendant established (either by the evidence of witnesses called by him or by the cross-examination of witnesses for the prosecution or otherwise) that he was not guilty:
>
> (g) whether the behaviour of the defendant in relation to the acts or omissions on which the charge was based and to the investigation and proceedings was such that a sum should be paid towards the costs of his defence.
>
> (3) There shall be no presumption for or against the granting of costs in any case.

> (4) No defendant shall be granted costs under this section by reason only of the fact that he has been acquitted or that any charge has been dismissed or withdrawn.
>
> (5) No defendant shall be refused costs under this section by reason only of the fact that the proceedings were properly brought and continued.

[3] Section 7(2) CCA provides the cost are payable by the person who commenced the proceedings and may be recovered as a debt.

[4] Section 13 provides for the making of regulations providing maximum scales of costs. The Court may order payment of costs in excess of scale

> "… If it is satisfied that having regard to the special difficulty, complexity, or importance of the cost, the payment of greater costs is desirable."

[5] Mr Lloyd submitted that the Court should follow a three step process in considering an application by a successful defendant for costs.

(a) Applying the criteria in s 5(2) whether it was appropriate to award costs.

(b) If costs are appropriate, whether the case was of special difficulty, complexity or importance justifying payment of costs in excess of scale.

(c) If costs above scale are justified to assess an amount which was "just and reasonable" in the circumstances.

[6] Mr Lloyd submitted the Court has a very wide discretion to award costs to a successful defendant. Section 7(2) of the CCA recognises the need for deterrent by way of costs when there is bad faith in the conduct of criminal proceedings. *Yoon v Kaye* 21/8/08 High Court Auckland Woodhouse J at para [42] bad faith on the part of the prosecution may be a special difficulty falling within the ambit of s 13(3). *Reriti v Police* 18/4/94 Judge Erber District Court Christchurch CRN 3009023671. Bad faith/abuse of process may also be matters of special importance under s 13(3) *Yoon.* Where the prosecution has acted in bad faith, costs at or towards an indemnity level are more likely to be appropriate. *T v Collector of Customs* HC Christchurch

AP 167/94 28/2/95 Tipping J. The award of costs in a private prosecution should be assessed at private rates not according to scale. *Yoon (*supra) at para [48].

Court's discretion to award costs to the defendant

[7] Mr Lloyd emphasised my findings of bad faith in dismissing the charges and in particular that the purposes of the prosecution were to inflict maximum damage on the defendant's reputation, to damage Kristin School and to bring pressure to bear on the defendant to settle a relationship property claim in the complainant's favour. Further I found the informant's orchestrated media campaign was a concerted effort to subvert and undermine the Court's discretionary power to order non publication of name and identifying details constituting an abuse of process and so too the complainant's refusal to provide relevant material on discovery to the defence in that regard.

[8] Quite apart from the Court's findings in relation to bad faith and abuse of process, Mr Lloyd submitted that the manner in which the prosecution had been conducted through its various procedural stages should be taken into account. He listed 13 separate points under this heading.

1) Providing untrue information in support of the initial application for the issue of summons, and in particular the victim impact statement.

2) Refusing to supply disclosure in particular the attachment to the summary of facts, ie the victim impact statement.

3) Insisting that the defendant appear in person to enter his plea of not guilty.

4) Requiring bail conditions, notwithstanding that the defendant had had no contact with the complainant for the previous two years and that when the informant had contacted the defendant she had been warned off by his lawyer on several occasions.

5) Providing a victim impact statement to the Court to substantiate those bail conditions without disclosing a copy to counsel, or indicating that the document even existed.

6) Opposing the defendant's first application for dismissal of the charge without filing evidence in response.

7) Requiring Inspector Paterson to be called to give evidence in person at the first dismissal application to justify a decision not to prosecute the defendant on the part of the police.

8) Not responding to disclosure requests between September 2014 and March 2015.

9) Opposing a request for additional disclosure without any reasonable basis.

10) Not complying with the order for further disclosure and failing to provide documents which were said to be "conspicuously missing".

11) Requiring a further application for dismissal and then providing the documents requested.

12) Refusing to sign authorities which would have enabled counsel to obtain relevant documents at their source.

13) Providing fresh evidence on the eve of trial.

[9] In addition, Mr Lloyd sought to emphasise what he described as a sustained vicious and untrue media campaign on the part of Carrick Graham and Cameron Slater culminating in articles in the UK press as the defendant arrived there in August 2014 to take up a new position. He emphasised the collateral damage to the Kristin school community and submitted there was a very strong need for deterrents of bad faith prosecutions of this sort.

[10] Mr Lloyd submitted that the defendant had behaved with dignity and professionalism throughout. He had entered his plea of not guilty at the earliest opportunities. He had complied with his Court ordered bail conditions, had met every deadline imposed upon him and returned at his own expense from the UK to answer the charges and had never responded in kind through the media.

Special difficulty or complexity

[11] Mr Lloyd submitted if costs were to be awarded at scale the defendant would be entitled to costs in the sum of $1,130 being $226 for the five half days occupied by the trial. Essentially he submitted that difficulty and complexity arose from the amount of written material which required analysis against the background of a six year relationship, an earlier failed attempt to initiate prosecution through the police, attempts to reverse that decision through the Police Complaints Authority, Ministers of Parliament and other branches of the Police followed by three years of Family Court litigation and a media campaign over a period of three years. Mr Lloyd submitted that the total volume of material he was required to analyse was in excess of 1200 pages and that reducing that material to a core bundle of relevant documents of 227 pages was a hugely time consuming process and represented the "tip of the iceberg". He submitted that the preparation and analysis required for this relatively brief three day trial was far in excess of what had been required for a four week serious fraud prosecution in the High Court. He submitted that this was made all the more difficult by the informant's destructive attitude regarding disclosure at every step.

[12] Mr Lloyd accepted that the actual costs were very high for what was essentially a single allegation of male assaults female, but the volume of documents generated, particularly in the Family Court litigation to which the criminal prosecution was inextricably linked, required analysis and reduction.

Costs above scale

[13] Mr Lloyd submitted that the informant was warned at various stages regarding an award of costs if the prosecution were ultimately unsuccessful. Counsel at one stage had indicated that costs would not be sought if the prosecution

were withdrawn, as late as March 2015. Further Judge Wade in his decision ordering disclosure had indicated to the informant that there were serious costs implications should the defendant be found not guilty. Those warnings were ignored.

[14] Mr Lloyd submitted that *Yoon* was an example of a bad faith prosecution justifying an award of full indemnity costs and that although a full indemnity award was rare, this was an exceptional case of bad faith or other gross misconduct. He referred also to *Davidson v Rogerson* High Court Wellington 30/3/09 Dobson J as another example of full indemnity costs in a bad faith prosecution brought to apply pressure in a Family Court dispute and also *Frith v H&B* High Court Rotorua 29/2/08 Allen J.

[15] He submitted that none of those cases included the additional aggravating features of the present case being the use of media campaigns to inflict reputational damage on the defendant and others and to subvert the Court's power to prohibit publication and to apply pressure to settle and accompanying civil claim.

[16] Mr Lloyd submitted that the defendant could never be adequately compensated for the damage caused to his reputation or the embarrassment and suffering inflicted on him and his family, but he should be compensated for his direct financial losses in defending the charges.

Informant's submissions opposing costs

[17] Ms Dyhrberg conceded that given the Court's findings, an award of costs in excess of scale was likely. She submitted that full indemnity costs were not justified on the basis that there was evidence to support the charges brought and that the quantum of costs sought was grossly excessive for a prosecution involving a single allegation of male assaults female. She also referred to *Yoon, Frith* and *Davidson,* but submitted that in each of those cases in awarding full indemnity costs the Court had emphasised that there was never any credible evidence to support the prosecution's award.

[18] She referred also to *Francis v MacDonald* CA101/01/29 August 2001 in which full indemnity costs were awarded in a private prosecution against the

Rotorua Crown Solicitor were the allegations were described as baseless and without foundation. Ms Dyhrberg submitted that whilst the informant was bound by the Court's findings of bad faith, that did not extend to fabrication of allegations or pursuing allegations for which there was no evidential foundation. She submitted that was relevant to two of the factors set out in s 5 whether the prosecution acted in good faith in bringing and continuing the proceedings and s 5(2)(b) whether at the commencement of the proceedings the prosecution had sufficient evidence to support the conviction of the defendant in the absence of contrary evidence.

[19] She submitted there was strong evidence to support the prosecution based on the defendant's admissions contained in two affidavits filed in the Family Court proceedings and his police interview where he admitted shaking the informant. She submitted that on the basis of those admissions, conviction was inevitable where there was no consent on the part of the complainant.

[20] Ms Dyhrberg submitted that the prosecution had only ever sought to prove that allegation being one charge of male assault female. This was made clear in counsel's opening to the jury when she said "It is not necessary that you go on and find Mr Clague intentionally Ms Denham by knocking her to the ground". The additional allegation of throwing the informant onto the stairs was at the Court's request on the second day of the trial and therefore it would be unfair to attach any significant weight for cost purposes to the Court's determination that there was no prima facie evidence on that charge which the Court had itself initiated.

[21] Ms Dyhrberg submitted that the evidence of the complainant was supported by the defendant's admissions together with a medical report, a physiotherapist's treatment of the injury and also evidence of recent complaint to a counsellor. She submitted that the dismissal of the stay application by Judge Sinclair implicitly required a finding that there was sufficient evidence to put the evidence on trial. She submitted that the informant's investigation into the offence was conducted in a reasonable and proper manner having obtained the police file at an early stage.

[22] As to disclosure, Ms Dyhrberg submitted that the bulk of the material sought by the defendant on the first application for disclosure was legally privileged and

correspondence between the informant and her lawyer. In counsel's view, other material relating to Mr Graham was also privileged on the basis that he was acting on counsel's instructions. Counsel's view was that it was for the Court to decide what should be disclosed and all of the material had been brought to Court for a Judge to review and as soon as the order for disclosure was made, the material was promptly disclosed. In relation to the second disclosure application relating to communications with Yvonne Chisholm from Metro magazine, that material was provided without the need for a Court order. A second category of material sought related to communications between the informant and her previous lawyer, Mrs Christine Armstrong. Counsel for the informant had hoped that documents showing copying of affidavits filed opposing the informant's relationship property claim, were coincident with the initial complaint of assault. When Ms Dyhrberg advised Mr Lloyd that there were no such communications, he accepted her undertaking and the second application for disclosure was withdrawn.

[23] It was submitted that the defendant had not demonstrated his innocence and there was no dispute that the informant was injured and given the defendant's admissions of shaking, any defensive accident was unlikely to succeed.

[24] Further Ms Dyhrberg was aware of alleged admissions made to a counsellor, Ms Denham, during a joint counselling session in which the defendant admitted losing control, grabbing the complainant and pushing her on the stairs and causing the injury, and apologising for the incident. Mr Lloyd had initially sought copies of the counsellor's notes expressing the view that there was no privilege attaching but then subsequently indicated he did not waive privilege in respect of the notes.

[25] Ms Dyhrberg then decided not to lead evidence of any admissions made in the course of the counselling session given the confidentiality issues arising. Subsequent to the trial she sought a waiver from counsel for the defendant for release of the notes for the Court's consideration on a costs application. No waiver has been received and the Court is asked to take that into account in assessing the overall merits.

[26] As to the defendant's behaviour, it is submitted that an earlier offer made by Ms O'Donnell who was then acting for the defendant proposing a resolution on the basis that relationship property would be settled upon immediate withdrawal of the criminal prosecution amounted to an attempt to pervert the course of justice.

[27] It was submitted that an award of costs in excess of scale was likely but that indemnity costs are not appropriate because all of the authorities where full indemnity costs were awarded, there was no cogent evidence to support the charges brought. It was submitted that but for the findings of bad faith at the conclusion of the prosecution case the matter would have been left to the jury and there was a high likelihood of convictions. It was submitted that despite the Court's view that the offending was not at a serious level, that was not a basis for dismissal of the charge and that any consideration as to ultimate sentence in the form of a s 106 discharge, did not change the analysis. It was submitted that a costs award significantly below indemnity level was appropriate.

[28] Finally it was submitted the cost claim was manifestly excessive given the nature and duration of the hearing and the preliminary matters dealt with. It was submitted that the Court's should determine the reasonableness of the costs actually incurred relative to the scale of the task that a successful defendant had to undertake. The informant's costs were $52,000 plus GST plus $3,000 for junior counsel. It was submitted that the disparity in fees between the prosecution and the defence were stark, being a difference of 260 hours or 6½ full working weeks.

Decision

[29] On the face of it, a claim for full indemnity costs in the sum of $145,811.37 would appear to be out of all proportion to the length of the trial and the nature of the charge but I am satisfied that a great deal of investigative work was required in order to prepare for the trial and the various applications which preceded it. It is artificial to compare the relative cost of prosecution and defence given that their respective approaches to the trial were entirely different. The prosecution were preparing for a relatively short hearing with a limited number of witnesses and any additional work was in response to applications pursued by the defence.

[30] I have no reason to doubt Mr Lloyd's detailed record of work done. I am satisfied it was necessary in order to initially obtain the information which then had to be analysed collated and edited in order to prepare the detailed cross examination of the informant, which ultimately led to dismissal of the charges.

[31] It is unfortunate that the first application for dismissal did not result in a stay of the charges but that was because no evidence was filed on behalf of the informant opposing the application, and there was no opportunity to cross examine the informant on the affidavit which otherwise should have been filed and even at that stage Mr Lloyd was still not in possession of all of the relevant information which the informant actively resisted disclosing until compelled to do so by the Court.

[32] Whether there was any evidence to support the informant's allegations, in the end I have decided carries very little weight. The informant's claims were grossly and maliciously exaggerated in order to destroy the defendant's reputation, to inflict damage on the Kristin School and to obtain the advantage in the informant's relationship property claim. It is difficult to imagine a worse case of bad faith. I agree with Mr Lloyd that the various media campaigns including the UK campaign are an extraordinary aggravating feature of the case which take it well beyond the conduct described in any of the other reported cases involving the award of full indemnity costs on the basis of bad faith.

[33] Finally, although Judge Wade in his decision ordering disclosure of relevant material on 17 April 2015, did not specifically address a warning to the informant regarding costs, it was a factor he reiterated during the course of his decision at paragraph [12]

> "I also observe that at the same time the informant was saying she was unable to remunerate a legal adviser and therefore required "pro bono" assistance, she was quite prepared to pay substantial fees to Mr Graham for his assistance in her approaching the media. She has also apparently decided to continue with these proceedings despite no doubt having been warned of a very serious cost implication should the defendant be found not guilty."

[34] Undoubtedly an award of costs in excess of scale is justified in this case given the multitude of issues which the defendant was required to deal with. Full indemnity costs are appropriate given the extensive preparation work that was

required, given the degree of bad faith which is extreme and given the clear warning as to the consequences if the defendant was found not guilty. I award full indemnity costs in the sum of $145,811.37.

D J McNaughton
District Court Judge