

**IN THE DISTRICT COURT  
AT AUCKLAND**

**CIV 2016-044-000329  
[2017] NZDC 7007**

BETWEEN COLIN CRAIG  
Plaintiff

AND SOCIAL MEDIA CONSULTANTS  
LIMITED  
JORDAN WILLIAMS  
Defendants

Dated: 5 April 2017

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

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**Introduction**

[1] On 6 December 2016 I delivered an oral judgment striking out the plaintiff's statement of claim against the first defendant and granting summary judgment to the second defendant. The defendants made application for costs but wanted time to file written submissions. A timetable was direct. After consideration of their submissions I duly delivered a further judgment. Unfortunately that judgment was premised on a misunderstanding on my part and was reached without reference to some documents which became separated from the submissions of counsel for the second defendant and thus were not considered by me. After receiving further submissions from counsel and Mr Craig, I recalled it for error and required to hear the parties in Court. This is my judgment on costs.

[2] The successful defendants seek indemnity costs pursuant to DCR 14.6(4)(a); they also refer the Court to s 130 Copyright Act 1994 which provides that where a

person brings proceedings alleging an infringement of copyright or a contravention of s 226A, the Court may on the application of any person against whom the proceedings are brought, make an order for the payment of damages for any loss suffered by the person against whom the proceedings are brought. In the alternative the defendants seek an increase in scale costs. The plaintiff appears now to acknowledge that some increase of scale costs is justified, however opposes an award of indemnity costs; disputes some attendances as not being “incidental to the proceeding” and submits that any percentage uplift should be moderate only.

### **Indemnity costs**

[3] DCR 14.6(4)(a) provides for indemnity costs where the party against whom costs is sought “has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing or defending a proceeding or a step in a proceeding”. Counsel for the defendants submits that my substantive findings “cast Mr Craig’s proceeding as archetype (sic) abuse of process, having regard to the principles collated by the Human Rights Review Tribunal in *New Zealand Private Prosecution Service Limited v John Key* [2015] NZHRRT 48 at paras [40], [45].” That is a correct summary of my findings. In addition I found this to be a proceeding involving a deception on the Court where the processes of the Court had not been fairly or honestly used. I found that they were being employed for an ulterior and improper purpose – that being to protect the plaintiff’s reputation. I found the proceeding to be manifestly groundless and without foundation.

[4] Those findings apply equally to the plaintiff’s commencing and continuing the proceeding as well as defending the defendants’ applications for summary judgment and/or to strikeout of the statement of claim.

[5] Attached to the memorandum in reply of the second defendant on costs dated 15 December 2016, as document 4, is a collation of correspondence from counsel for the second defendant to the plaintiff urging him to discontinue the proceeding. Inter alia, in a letter of 4 April 2006, the plaintiff was urged to either discontinue the District Court proceeding or stay it until such time as the High Court proceeding (in defamation) was determined in September 2016 because “there are so many obvious defences to our client in relation to the District Court proceeding” and further on:

[3] Quite obviously the matters that Mr Craig wishes to canvas in the District Court proceedings will form part of the High Court proceedings in which our client is the plaintiff

...

[4] In such circumstances it is totally inappropriate for your client to be, first embarking upon such a separate proceeding as he has done; and further, making public statements in that regard. We remind you or your client that this matter is going before a civil jury in September 2016.

On 18 May 2016 on behalf of the second defendant Mr McKnight entreated the plaintiff to:

Please give careful consideration to this proceeding in likelihood that you may face significant costs orders in relation to them

...

Quite obviously “the poems” are part of the High Court proceeding both in which Mr Williams is the plaintiff and the other in which Mrs Slater is the defendant; and from what you are saying part of the HRRT matter.

Surely that is where the issue should be canvassed.

Then again on 1 December 2016, Mr McKnight wrote to the plaintiff:

I ask you again to seriously consider the use of the valuable court time with such a matter; not to mention of the lawyers (and clients) involved.

On November 28 2016 Mr McKnight emailed the Court, the plaintiff and counsel for the first defendant, inter alia:

Of course Mr Craig may choose to file a discontinuance which would save all concerned time and trouble.

On 2 December 2016, Mr McKnight emailed the plaintiff on a “without prejudice save as to costs basis”:

Mr Williams has instructed us to make an offer of settlement of the above copyright proceedings (CIV 2016-044-329) as they relate to Mr Williams.

Mr Williams will settle the proceeding on the basis that, if you discontinue the proceeding against Mr Williams forthwith, he will take no issue as to costs. Obviously considerable costs have already been incurred for this matter, so the offer is considered exceedingly reasonable

...

If the offer is declined (and no response will be taken as the offer having been declined) then Mr Williams reserves his right to seek increased or indemnity costs.

[6] Since my earlier judgment has brought the proceeding to an end, the costs awards that I now make will be on the whole proceeding and not just on the applications for summary judgment and to strike out.

[7] The first defendant's actual costs amount to the sum of \$32,593.75. For the second defendant: \$27,938.75. Both amounts include GST and disbursements.

### **Determination**

[8] Having reconsidered the defendants' costs applications in the light of all their submissions (oral and in writing) and against the background of the findings that I made in this case, I have reached the view that it would be contrary not to grant indemnity costs to the defendants. The plaintiff acted vexatiously in continuing this proceeding, particularly given that the "love poem" was within the public domain by virtue of the High Court defamation proceeding in which the second defendant was the plaintiff and the now plaintiff, the defendant. The plaintiff acted improperly in defending the summary judgment and strike out applications when there were available to the defendants such clear defences and he had been put on notice about the implications of losing.

[9] The principles for awarding indemnity costs are set out in *Bradbury v Westpac Banking Corp* [2009] 3 NZLR 400 at para [29], adopting Sheppard J's summary in *Colgate-Palmolive Company & Colgate-Palmolive Pty Limited v Cussons Pty Limited* [1993] FCA 536 at para [24]:

... it listed the following circumstances in which indemnity costs have been ordered:

- (a) the making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud;
- (b) particular misconduct that causes loss of time to the Court and to other parties;
- (c) commencing or continuing proceedings for some ulterior motive;
- (d) doing so in wilful disregard of known facts or clearly established law;
- (e) making allegations which ought never to have been made or unduly prolonging a case by groundless contentions, summarised in French J's "hopeless case" test.

[10] I found that this proceeding was brought for a collateral purpose:- breach of confidence and concern to protect reputation on the part of the plaintiff. I found that the process was not fairly or honestly brought; it was manifestly groundless and without foundation.

[11] From the beginning, the plaintiff was warned by the defendants that the proceedings were groundless and the “love poem” in respect of which the plaintiff alleged breach of copyright, was better dealt with in the High Court defamation proceeding which was underway, given that it would be the subject of trial in any event (history now records that it was the subject of evidence in the High Court and became public knowledge as a result). Right up until almost the eve of the hearing in this Court of the strike out and summary judgment applications, the plaintiff was invited to discontinue without incurring costs. He chose to proceed with knowledge that the defendants would be seeking indemnity costs if they were successful. The plaintiff was always on notice.

[12] The threshold principles having been met in this case, I now order the unsuccessful plaintiff to pay indemnity costs to the defendants. I have reviewed the tax invoice of Mr McKnight, counsel instructed on behalf of the second defendant, the tax invoice of Mr Langford solicitor for Mr Williams and the calculation of costs for the first defendant, exhibited as document 6 to the memorandum in reply of the second defendant on costs dated 15 December 2016. I am satisfied that under all of the circumstances, the fees charged to both defendants were reasonable and all attendances billed (or steps taken in the proceeding) were necessary and incidental to the proceeding. In reaching that determination, I bear in mind that Mr Craig conducted the proceeding in such a way as to require a good many, otherwise, unnecessary attendances and memoranda to the Court from the defendants. A prime example was his seeming determination to place before the District Court a transcript of the proceedings between he and Ms McGregor in the Human Rights Tribunal. Yet, now, he asks the Court to discount those attendances and memoranda as not being “steps taken in the proceeding”.

### **Section 130 Copyright Act 1994**

[13] Counsel for the defendants argue that had they not sought to strike out the plaintiff's claim or enter summary judgment, they could have sought a declaration that the bringing of proceedings by the plaintiff was unjustified and an order for the payment of damages for their losses. Whilst there has been no argument on that matter, particularly from the plaintiff and there appears to be a dearth of relevant authority on – particularly s 130(1)(b) - it does appear, given the findings that I made in the substantive judgment against the plaintiff, that he was unlikely to have been able to prove that he had a genuine belief in a justified claim for infringement of copyright (reasonable belief based on sound legal advice) nor convince the Court that the bringing of proceedings was justified.

[14] Nor, given my finding in the substantive judgment, do I consider it likely that the plaintiff could have proved that the acts complained of constituted an infringement of his copyright. That is another way of saying that I consider that had an application been brought for an order for the payment of damages for loss suffered by the defendants, under the circumstances, it would probably have succeeded. There appears to be no authority on the term “any loss” in this context, but a commonsense interpretation of that term leads me to consider that it should encompass legal fees.

[15] Accordingly, although I was not required to consider whether to make a declaration that the bringing of the proceeding by the plaintiff was unjustified, or whether to make an order for the payment of damages for loss suffered by the defendants, the matters that I traverse above were also relevant in my decision to grant indemnity costs to the defendants.

M-E Sharp  
**District Court Judge**