

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

**CIV-2015-404-2273
[2016] NZHC 2041**

BETWEEN	KENNETH EDWIN WILLIS First Plaintiff
AND	LEANNE GAY WILLIS Second Plaintiff
AND	LASER DIRECT 2011 LIMITED Third Plaintiff
AND	AMCOS NEW ZEALAND LIMITED First Defendant
AND	APRA NEW ZEALAND LIMITED Second Defendant

On the papers

Judgment: 1 September 2016

JUDGMENT AS TO COSTS OF THOMAS J

*This judgment was delivered by me on 1 September 2016 at 3.30 pm
pursuant to Rule 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Date:

Introduction

[1] The plaintiffs are suing AMCOS New Zealand Ltd and APRA New Zealand Ltd (the defendant companies) for copyright infringement and breaches of the Fair Trading Act 1986. The plaintiffs allege that the defendants authorised and contributed to third party breaches of various copyrights the plaintiffs hold in relation to their karaoke sound recordings.

[2] Initially, the plaintiffs joined four individuals as defendants to the proceedings. These individuals are directors of the defendant companies (the directors). However, the plaintiffs subsequently discontinued the proceedings against the directors. The proceedings remain on foot against the defendant companies.

[3] The defendants now apply for scale and increased costs against the plaintiffs in respect of the discontinued proceedings against the directors. In response, the plaintiffs maintain that the individuals were not independently represented and so cannot be said to have incurred any actual costs on their own behalf. The plaintiffs also submit it would be more appropriate to determine costs after the substantive proceedings have been decided at which stage it will be possible to isolate any wasted costs involved in responding to the original pleadings.

Factual background

[4] The relevant chronology of facts is as follows:

- (a) On 24 July 2015, the first and second plaintiffs, as lay persons, wrote to the defendants' solicitors threatening to file proceedings.
- (b) The defendants' solicitors replied asking the plaintiff to provide particulars of their allegations. There was further email correspondence between the plaintiffs and the defendants' solicitors but the parties failed to resolve the dispute.

- (c) On 6 October 2015, the plaintiffs filed their claim. It contained allegations of negligence, fraud and copyright infringement. The directors were named as defendants.
- (d) On 3 November 2015, the defendants wrote to the plaintiffs saying there was no basis for any of the claims against the directors.
- (e) On 10 November 2015, the defendants filed their statement of defence.
- (f) On 24 February 2016, the plaintiffs amended their statement of claim. The amended statement of claim documented the email correspondence between them and the defendants' solicitors.
- (g) On 7 March 2016, the defendants filed a statement of defence to the amended statement of claim.
- (h) On 12 April 2016, the plaintiffs further amended their statement of claim. The amended statement of claim omitted the fraud allegations but added allegations concerning the Trade Marks Act, Companies Act and Fair Trading Act.
- (i) On 4 May 2016, the defendants applied to strike out the proceedings.
- (j) On 23 May 2016, the plaintiffs obtained legal representation.
- (k) On 12 July 2016, Toogood J made an order under r 15.20 that the plaintiffs could formally discontinue their claims against the directors.¹
- (l) On 14 July 2016, counsel for the plaintiffs filed a further amended statement of claim (the third amended statement of claim). The third amended statement of claim omitted the negligence, Companies Act

¹ *Willis v AMCOS New Zealand Ltd* HC Auckland CIV-2015-404-227, 12 July 2016 (minute of Toogood J).

and Trade Mark Act claims. It alleged copyright right infringement by authorisation and breaches of ss 9 and 11 of the Fair Trading Act. The directors were not named as defendants.

Submissions

Defendants' submissions

[5] The defendants refer to r 15.23, which provides that a plaintiff who discontinues a proceeding must pay costs to the defendant of and incidental to the proceeding. The defendants submit that this rule applies and that the following scale costs are claimable:

Item	Step	Rate	Time	Total
2	Commencement of defence	\$2,230	2	\$4,460
26	Pleading to amended claim	\$2,230	0.6	\$1,338
10	Preparation for first case management conference	\$2,230	0.4	\$892
11	Filing memorandum for first case management conference	\$2,230	0.4	\$892
22	Filing interlocutory application	\$2,230	0.6	\$1,338
				\$8,920

[6] The defendants also claim the following disbursements:

Filing fees	\$110
Statement of defence	\$110
Statement of defence to first amended statement of claim	\$500
Interlocutory application	\$720
	\$9,640

[7] The defendants further submit that costs should be subject to a 25 per cent uplift because:

- (a) The statement of claim and first amended statement of claim which the defendants took steps to defend did not comply with the rules, significantly increasing the costs burden.
- (b) The defendants consistently recommended that the plaintiffs take legal advice.

- (c) The defendants sought on multiple occasions that the plaintiffs articulate their issues with a view to resolution.
- (d) The plaintiffs refused to give further information and instead threatened various media releases about their concerns.
- (e) The defendants described the defects in the plaintiffs' claim in detail, intending to be helpful to them as lay litigants.
- (f) The defendants invited the plaintiffs to discontinue their claims prior to strike out and offered to not seek costs; and
- (g) The plaintiffs made unsubstantiated fraud allegations.

Plaintiffs' submissions

[8] The plaintiffs' position is that:

- (a) It is well-settled that the Court's general discretion in rule 14.1 as to costs can override general principles relating to discontinuance.
- (b) The directors were not independently represented so cannot be said to have incurred any actual costs on their own behalf.
- (c) The more appropriate time to determine an application for costs under r 7.77(8) is upon determination of the substantive proceeding at which stage it will be possible to isolate the wasted costs involved in responding to the original pleading.
- (d) The costs regime contemplates that there should not be more than one set of costs in any proceeding.
- (e) In the present circumstances, a strict application of the costs on discontinuance rule will provide the directors with an unwarranted windfall, with the result that it would not be just and equitable for the

plaintiffs to be called upon now to pay the notional costs of the directors for the entire cost of the proceeding to date consequent on their no longer being included as parties.

Analysis and decision

[9] The defendants rely on r 15.23 which provides:

Unless the defendant otherwise agrees or the court otherwise orders, a plaintiff who discontinues a proceeding against a defendant must pay costs to the defendant of and incidental to the proceeding up to and including the discontinuance.

[10] The legal principles applicable to costs on a discontinuance are uncontroversial. The statutory presumption in favour of awarding costs may be displaced if it just and equitable to do so.² However, the Court will not review the merits unless they are so immediately obvious they ought to be considered.³ Nor will it speculate on the strengths and weaknesses of the respective cases. The reasonableness of the parties' conduct is relevant to determining where appropriate the reasons for which the proceedings were brought, continued and defended.⁴

[11] Part 14 of the High Court Rules deals with the issue of costs generally. Rule 14.1 provides that all matters are at the discretion of the Court if they relate to costs of a proceeding or incidental to a proceeding or of a step in a proceeding. The general discretion as to costs is still applicable in costs on a discontinuance.⁵

[12] The plaintiffs submit that generally only one set of costs is appropriate in any proceeding. They refer by analogy to r 14.15 which provides:

The court must not allow more than 1 set of costs, unless it appears to the court that there is good reason to do so, if—

(a) several defendants defended a proceeding separately; and

² *Kroma Colour Prints Ltd v Tridoniatco NZ Ltd* [2008] NZCA 150, (2008) 18 PRNZ 973 at [12]; *North Shore City Council v Local Government Commission* (1995) 9 PRNZ 182 (HC) at 188.

³ *FM Custodians Ltd v Pati* [2012] NZHC 1902 at [11].

⁴ *Human Resources Institute of New Zealand Incorporated v Elephant Training and HR Limited* [2016] NZCA 347 at [13].

⁵ *FM Custodians Ltd v Pati* [2012] NZHC 1902 at [12].

- (b) it appears to the court that all or some of them could have joined in their defence.

[13] Here, the directors were not independently represented and were joined in their defence with the defendant companies. The plaintiffs maintain that, as a result, all of the legal work undertaken on behalf of the defendant companies was also undertaken on behalf of the directors. In those circumstances, the costs regime contemplates the award of a single set of costs, they say.

[14] It may well be that the directors incurred costs over and above those incurred by the defendant companies given the different considerations which applied to their positions. For example, I note that the dates on which two of the named directors were appointed directors of APRA NZ impact on their involvement in the allegations. However, when the other costs issues are taken into account, it is clear that the better course is for all costs issues to be dealt with following the result of the substantive proceedings.

[15] The defendants submit that *all* of the defendants suffered wasted costs in responding to the original proceedings because the third amended statement of claim is essentially a fresh claim. It would therefore not be difficult to isolate costs in respect of responding to the original pleadings. On this basis, the defendants say that an award of costs would not be an unwarranted windfall for the directors but “merely a contribution towards the steps all the defendants had to take to consider and respond to the original proceedings and to the independent issues arising from them”.

[16] The effect of this submission is to characterise the costs application as a “contribution” to the unnecessary steps taken by all of the defendants. This emphasises that any costs award would be recognition that the defendants were collectively put to unnecessary expense by virtue of the plaintiffs’ original statements of claim.

[17] The defendants’ submissions would be better directed at r 7.77(8) which requires a party who amends their pleadings to bear all the costs of and occasioned by the original pleading and any application for amendment unless the court

otherwise orders. I note the decision of *Jones v Norterra Rural Resources Ltd* where Woolford J considered that it was inappropriate in that case to make a costs award under r 7.77(8) before the substantive proceedings had been resolved.⁶ His Honour noted that it may be quite difficult to isolate the wasted costs involved in responding to an original pleading unless and until the amended pleading goes to trial.⁷

[18] In my view, the defendant's submission that the third amended statement of claim is a "fresh" claim by the plaintiffs overstates the true position. The original statement of claim, whilst deficient, went into considerable detail as to the factual background surrounding the substantive dispute. That background remains relevant despite the changes made to the pleadings by way of the third amended statement of claim.

[19] In respect of the claim for increased costs, the matters relied on by the defendants relate to the proceedings generally and are not specific to the discontinued claim against the directors.

[20] For these reasons, I accept the plaintiffs' submission that the more appropriate time for the Court to determine the present application for costs is upon determination of the substantive proceedings.

Thomas J

⁶ *Jones v Norterra Rural Resources Ltd* [2014] NZHC 2855.

⁷ At [32].