

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

**I TE KŌTI MATUA O AOTEAROA  
TĀMAKI MAKĀURAU ROHE**

**CIV-2018-404-2831  
[2019] NZHC 2421**

BETWEEN

JOHN HENRY TAMIHERE  
Plaintiff

AND

MICHAEL NOEL JAMES HOSKING  
First Defendant

NZME RADIO LIMITED  
Second Defendant

NZME PUBLISHING LIMITED  
Third Defendant

Hearing: On the papers

Appearances: T J G Allan for Plaintiff  
A L Ringwood for Defendants

Judgment: 24 September 2019

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**JUDGMENT OF LANG J  
[as to costs on withdrawn application for discovery]**

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*This judgment was delivered by me on 24 September 2019 at 4 pm,  
pursuant to Rule 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar*

*Date.....*

[1] The defendants in this proceeding filed an application for further and better discovery. The plaintiff filed a notice of opposition and four supporting affidavits. The application was then set down for hearing on 24 October 2019.

[2] By email dated 13 August 2019 the defendants advised the Court they would not be pursuing the application and that it was to be treated as having been withdrawn. Counsel have been unable to reach agreement regarding costs and I am required to determine that issue on the papers.

### **The arguments**

[3] The plaintiff contends it was the successful party in relation to the application because the defendants withdrew it after receiving the plaintiff's documents in opposition. The plaintiff therefore seeks costs on a category 2B basis together with disbursements. The plaintiff calculates that costs and disbursements will be payable in the sum of \$1,544.

[4] Mr Ringwood for the defendants opposes any order for costs being made in favour of the plaintiff. He submits that there should be no order as to costs or, alternatively, costs on the application should be reserved.

[5] Mr Ringwood contends the application was properly made and related to documents that were plainly relevant and had not been discovered. Furthermore, he says the application was only filed to meet the deadline imposed by the Court for the filing of further interlocutory applications.

[6] In addition, Mr Ringwood points out that the defendants withdrew the application at an early stage and well before the date of the allocated fixture. He submits it is not usual for costs to be awarded against an applicant who withdraws an interlocutory application well before it is due to be heard. He also contends that arguments as to costs are "not a cost effective thing to do from the perspective of the parties, nor is it an efficient use of the Court's time to have to adjudicate on it".

## Decision

[7] As both counsel acknowledge, costs are at the discretion of the Court.<sup>1</sup> The Court is required, however, to exercise its discretion on a principled basis and, in particular, having regard to the principles set out in r 14.2. To the forefront of these is the principle that a party who fails with respect to an interlocutory application should pay costs to the party who succeeds.<sup>2</sup> Furthermore, r 14.2(1)(g) provides that, so far as possible, the determination of costs should be predictable and expeditious. To reserve costs on a withdrawn application would meet neither of these principles.

[8] I know of no general principle to the effect that it is not usual to award costs against an applicant who withdraws an application well before the allocated fixture date. Once an interlocutory application is filed, both parties are bound to pursue it. If one party capitulates, an order for costs is likely to follow. Whether the determination of costs constitutes a cost effective use of the Court's resources is irrelevant.

[9] I consider the plaintiff was ultimately the successful party because, having obtained a fixture, the defendants withdrew their application. They appear to have done so on the basis that the cost of proceeding to a defended hearing was not an efficient use of their resources. In taking that step, however, the defendants exposed themselves to an award of costs in favour of the plaintiff for all steps taken to that point in defending the application.

[10] I am therefore satisfied the plaintiff is entitled to the award of costs and disbursements it seeks.

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Lang J

Solicitors:  
Grove Darlow & Partners, Auckland  
Bell Gully, Auckland

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<sup>1</sup> High Court Rules 2016, r 14.1(1).

<sup>2</sup> Rule 14.2(1)(a).