IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CRI-2017-404-000402
[2018] NZHC 1004

UNDER	the Criminal Procedure Act 2011
BETWEEN	DERMOT GREGORY NOTTINGHAM Applicant
AND	APN NEWS & MEDIA LTD First Respondent
	KELVIN LYNN PRENTICE Second Respondent

Hearing: On the papers

Judgment: 9 May 2018

COSTS JUDGMENT OF WYLIE J

This judgment was delivered by Justice Wylie
On 9 May 20128 at 4pm
Pursuant to r 11.5 of the High Court Rules
Registrar/Deputy Registrar

Date:……

Solicitors/counsel:
Bell Gully, Auckland
N Tabb, Auckland

Copy to D G Nottingham

Introduction

[1] I refer to my judgment dated 29 March 2018.[1] Mr Nottingham was seeking an extension of time within which to file a notice of application for leave to appeal two rulings and a costs judgment given by Judge Collins in the District Court at Auckland. He was also seeking leave to appeal the rulings and costs judgment. I declined the application for leave to appeal out of time, and dismissed Mr Nottingham's application for leave to appeal.[2]

[2] I recorded in my judgment that both APN News & Media Ltd (APN) and Mr Prentice were entitled to seek costs against Mr Nottingham.[3] I required that any application for costs be filed within 10 working days of the date of the judgment, and that any memorandum in opposition be filed within a further 10 working days.[4]

[3] I have received memoranda from both APN and Mr Prentice. Both sought costs.

[4] Mr Nottingham did not file a memorandum in response. The time for him to do so has run its course. The Registrar has sent emails to him, and to counsel for the other parties, inquiring whether or not there are any submissions in reply. Mr Nottingham has not responded. Counsel for both APN and Mr Prentice have advised that they have not received any submissions on costs from Mr Nottingham.

[5] I note that Mr Nottingham has filed a notice of appeal with the Court of Appeal. The notice of appeal is dated 20 April 2018. He seeks leave to appeal my judgment. Relevantly, he asks the Court of Appeal to stay any costs orders issued by me until his application for leave to appeal is determined.

[6] In the absence of any response from Mr Nottingham, I proceed to consider the costs applications.

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1 *Nottingham v APN News & Media Ltd* [2018] NZHC 596.
2 At [35]-[36].
3 At [37].
4 At [37](a)-(b).

Costs applications

[7] Both APN and Mr Prentice seek costs under s 8 of the Costs in Criminal Cases Act 1967 (the Act). Relevantly, it provides as follows:

> (1) Where any appeal is made pursuant to any provision of Part 6 of the Criminal Procedure Act 2011 the court which determines the appeal may, subject to any regulations made under this Act, make such order as to costs as it thinks fit.
>
> …
>
> (5) If the court which determines an appeal is of opinion that the appeal includes any frivolous or vexatious matter, it may, if it thinks fit, irrespective of the result of the appeal, order that the whole or any part of the costs of any party to the proceedings in disputing the frivolous or vexatious matter shall be paid by the party who raised the frivolous or vexatious matter.

[8] Section 13(2)(a) of the Act provides for scale costs to be prescribed by regulations. The Costs in Criminal Cases Regulations 1987 (the Regulations) have been enacted pursuant to that section. The scale costs prescribed by the Regulations in respect of Mr Nottingham's application for leave to appeal are $226. The provisions relating to scale costs are, however, subject to the jurisdiction conferred by s 8(5), which permits the Court to order that the whole or any part of the costs of any party to proceedings be paid in circumstances where the unsuccessful party has raised frivolous or vexatious matters.

[9] Both APN and Mr Prentice submit that s 8(5) is engaged in the present case.

[10] APN says that its actual costs were $29,855. It acknowledges that this includes the costs of junior counsel who appeared at the hearing, and that some of the costs incurred reflect the fact that counsel who dealt with the appeal was not involved with the earlier trial, and had to become familiar with the proceedings. Accordingly, it seeks costs of $25,000, being part of its actual costs.

[11] Mr Prentice notes that costs fixed in accordance with the civil scale prescribed by the High Court Rules, calculated on a 2B basis, would be $10,704. He argues that the work done in opposing Mr Nottingham's applications was on a par with the work

required for a similar civil application for leave to appeal, and that the civil time allocations and scale give an appropriate framework for determining costs. Mr Prentice seeks costs of $10,704.

Analysis

[12] I am satisfied that Mr Nottingham's applications for an extension and for leave to appeal were both frivolous and vexatious.

[13] Mr Nottingham had brought a private prosecution against APN and Mr Prentice alleging that they had breached confidentiality orders in contravention of the Criminal Procedure Act 2011.

[14] Judge Collins dismissed the case against APN because Mr Nottingham did not have the right defendant. At the appeal hearing, Mr Nottingham conceded that APN was not the publisher of the relevant publication. In effect, he thereby conceded that APN should not have been prosecuted in the first place. If that was the case, any application to appeal could not possibly have succeeded.

[15] This was, or should have been, apparent to Mr Nottingham at the conclusion of the trial. Indeed, I note that he attempted to amend the charges in front of Judge Collins. That application was declined. In the circumstances, the applications before me seeking to obtain leave to appeal were vexatious.

[16] Judge Collins also held that Mr Nottingham's evidence at trial fell well short of proving that Mr Prentice was the author or guiding hand behind the website alleged to have made the offending publication. He ruled that Mr Prentice had no case to answer.

[17] Before me, Mr Nottingham did not attempt to explain how, on any appeal, he could remedy this evidential lacuna. Rather, he sought to argue:

(a) that he, as prosecutor, should not have been required to bring the best available evidence to the Court;

(b) he should not have been required to prove every element of the charges; and

(c) that counsel for the defendants had an obligation to advise him if there was an error in his charging documents.

[18] These assertions demonstrate Mr Nottingham's fundamental misunderstanding of the criminal justice system. They are untenable propositions, and it was frivolous and vexatious to attempt to advance them.

[19] The application for leave to appeal was a year and a half out of time. Mr Nottingham did not explain the delay and did not even attempt to address the legal threshold applicable to his applications. It should have been clear to him that he was going to struggle to meet the required threshold from the outset.

[20] I accept the submissions made on behalf of Mr Prentice that the applications were doomed to fail, and that both APN and Mr Prentice should not have been put to the costs of opposing them.

[21] There were other abuses of process.

[22] Mr Nottingham filed a very late affidavit at 4.45pm the day before the hearing. That affidavit was lengthy and it contained a large number of exhibits. It was not served on the respondents until after the close of business hours, and understandably both opposed its receipt.

[23] There was no proper explanation offered for the delay in filing the affidavit. Mr Nottingham simply said that he had a number of other things to attend to.

[24] Importantly, for present purposes, the affidavit was in any event inadmissible. As I noted in my judgment, it was replete with irrelevant material, opinion evidence and pontification by a Mr McKinney, who appeared as Mr Nottingham's McKenzie friend, as to what he – Mr McKinney – thought the law is, or perhaps more precisely,

should be.[5] The affidavit contained a number of pejorative comments about Judge Collins and how he ran the trial.[6] It also contained pejorative comments about other persons, in particular, a Mr Presland, who was not a party to the trial, but rather was Mr Prentice's solicitor.[7]

[25] The submissions filed by Mr Nottingham in support of the applications did not address the proposed appeal points set out in the application for leave to appeal. Rather, they addressed a differently worded set of points. I have no doubt that it was frustrating, time consuming and expensive for both APN and Mr Prentice to try and address the shifting sands of Mr Nottingham's case.

Conclusion

[26] The respondents were put to unnecessary expense, by Mr Nottingham's multiple procedural failings, and by his obduracy in persisting with this matter, when it was or should have been clear from the outset that the proposed appeal was devoid of any substantive merit.

[27] As to the quantum of costs, s 8(5) of the Act can in appropriate circumstances allow costs which, in effect, compensate parties on an indemnity basis.

[28] In this regard, I note APN has not detailed the basis on which its actual costs of $29,855 were incurred. I do not know what rates have been charged, or how long was spent dealing with the matter. Nor does APN explain whether or not its costs include GST. I can make no assessment of whether the costs claimed are reasonable and as a result, I am not prepared to award APN costs in the amount sought.

[29] Costs calculated by reference to the High Court Rules for civil applications for leave to appeal give a feel for an appropriate costs award under the Act. I bear in mind, however, that an award of increased or even indemnity costs may well have been appropriate had the matter been in the civil jurisdiction.

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5 At [17].
6 At [17].
7 At [17].

[30] I award costs of $15,000 each in favour of both APN and Mr Prentice, and against Mr Nottingham. APN and Mr Prentice are also entitled to their reasonable disbursements. In the event that there is any dispute as to the disbursements, the dispute is to be referred to the Registrar.

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Wylie J