

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

**CIV-2011-404-008215
[2013] NZHC 2278**

BETWEEN TIAN MIN (MAGGIE) MA
Plaintiff

AND TONY MENG HIANG TAY & ORS
Defendant

CIV-2012-404-003751

BETWEEN TONY MENG HIANG TAY & ORS
Plaintiff

AND TIAN MIN (MAGGIE) MA
Defendant

Hearing: [On the papers]

Appearances: P Dale for Ms Ma
A Swan for Mr Tay & Ors

Judgment: 3 September 2013

**JUDGMENT OF WOOLFORD
[as to costs]**

*This judgment was delivered by me on Tuesday, 3 September 2013 at 12.00 pm
pursuant to r 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Counsel: A M Swan, Auckland.
P J Dale, Chancery Street Chambers, Auckland.

[1] On 25 March 2013, I declined Mr Tony Tay's application in CIV-2011-404-008215 for an order that Ms Maggie Ma provide security for costs in respect of a three day hearing in May 2013. In the same judgment, I granted Ms Ma's application to strike out the statement of claim in CIV-2012-404-003751, on the basis that the claim should have been raised in CIV-2011-404-008215.¹

[2] Costs are sought by Ms Ma. She seeks indemnity costs, or increased costs, or costs on a 2C basis. Indemnity costs total \$29,198 while 2C costs total \$33,830. Mr Tay acknowledges that costs on a 2B basis in respect of his unsuccessful application for security for costs are appropriate. He submits that a 2B basis is also appropriate for Ms Ma's successful application to strike out his statement of claim. He calculates costs on a 2B basis to be \$11,641.50.

[3] I bear in mind the commentary in *McGechan on Procedure*² that while it is intended that the r 14.3 categorisation for each proceeding be made in its early stages, the same does not apply to time banding. The appropriate time band for each interlocutory step in the proceeding is fixed by the Judge or Associate Judge who deals with that step, and the banding for the trial Judge is by the trial Judge. The bands may differ at each step. Awarding 2B costs for all steps in a case is unobjectionable, because it reflects an average case requiring a normal amount of time for every step. But otherwise, a blanket assessment for banding is not desirable, nor even possible under the rules. I accept the r 14.3 categorisation of both proceedings as category 2 proceedings, being proceedings of average complexity requiring counsel of skill and experience considered average in the High Court. However, I am of the view that the appropriate time band for Mr Tay's application for security for costs in CIV 2011-404-008215 is band A, as I consider that a comparatively small amount of time was reasonable.

[4] I am also of the view that this is not a case for increased or indemnity costs on Ms Ma's application to strike out the statement of claim in CIV-2012-404-003751. Ms Ma submits that increased or indemnity costs should be awarded because Mr Tay commenced the proceedings for an ulterior motive and in doing so

¹ Ma v Tay [2013] NZHC 573.

² Andrew Beck and Others *McGechan on Procedure* (online looseleaf ed, Brookers) at [HR Pt 14.5.01].

wilfully disregarded known facts, which were clearly established. She also submits that Mr Tay made allegations which should never have been made or unduly prolonged the case by groundless contentions.

[5] Although I did strike out the statement of claim, I am not of the view that the proceedings were commenced for an ulterior motive nor was it a hopeless case. In fact, in dismissing the summary judgment application, I found that Ms Ma did not have a complete defence to the claim and accordingly accepted that Mr Tay had an arguable claim.

[6] I am of the view that the appropriate time band in CIV 2012-404-003751 is band B although I will make an allowance for the preparation of affidavits by Ms Ma by analogy with the time allowed for the filing of a notice of opposition and supporting affidavits in the case of originating applications (Schedule 3 Time Allocations – no 38).

[7] In all the circumstances, I award the following costs to Ms Ma:

		Time band	Days	Cost
Mr Tay's application for security for costs (appearances at case management or mentions hearings and at the hearing of the defended application covered in costs relating to Ms Ma's application to strike out).				
23	Filing opposition to application for security for costs	A	0.3	\$597.00
24	Preparation of written submissions on application for security for costs	A	0.5	\$995.00

Ms Ma's application to strike out costs				
2	Commencement of defence by defendant to claim	B	2.0	\$3,980.00
11	Filing memorandum dated 30 August 2012 for case management conference on 31 August 2012	B	0.4	\$796.00
13	Appearance at case management conference on 31 August 2012	B	0.3	\$597.00
22	Filing interlocutory application to strike out	B	0.6	\$1,194.00
12	Appearance at mentions hearing on 7 November 2012	B	0.2	\$398.00
-	Preparation of affidavits for application to strike out	B	1.4	\$2,786.00
24	Preparation of written submissions on application to strike out	B	1.5	\$2,985.00
26	Appearance at hearing of defended application to strike out	B	1.0	\$1,990.00
Total costs				\$16,318.00

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Woolford J