IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-404-003461

UNDER	the Judicature Amendment Act 1972
BETWEEN	R I G Plaintiff
AND	THE CHIEF EXECUTIVE OF THE MINISTRY OF SOCIAL DEVELOPMENT First Defendant
AND	BARNARDOS NEW ZEALAND Second Defendant
AND	LOUISE SMITH Third Defendant
AND	THE ATTORNEY-GENERAL Fourth Defendant
AND	PRAMILA FERNANDEZ Fifth Defendant

Hearing: On the Papers

Counsel: E Orlov for Plaintiff
H Janes for Third Defendant
H Waalkens QC for Fifth Defendant

Judgment: 25 November 2009

JUDGMENT (No.2) OF COOPER J ON COSTS

This judgment was delivered by Justice Cooper on
25 November 2009 at 11.30 a.m., pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors:
Equity Law, PO Box 8333, Symonds Street, Auckland
Crown Law Office, PO Box 2858, Wellington 6140
Knight Coldicutt, PO Box 24133, Wellington 6011
Keegan Alexander, PO Box 999, Auckland 1140
Copy to:
A J Cooke, PO Box 105495, Auckland 1001
H Waalkens QC, PO Box 106215, Auckland 11443

[1] In a judgment dated 27 July 2009 ("the substantive judgment") I struck out the plaintiff's statement of claim. I directed that if costs could not be agreed I would receive submissions.

[2] The third and fifth defendants have now sought costs, by memoranda dated 17 and 14 August respectively. In his memorandum of 26 August, Mr Orlov opposes any award of costs on behalf of RIG.

[3] Both the third and fifth defendants seek an award of increased or indemnity costs. Ms Janes, for the third defendant, also submits that the Court should consider awarding costs against counsel for the plaintiff personally.

[4] In each case, costs in accordance with Category 2 Band B have been calculated at $8,480, exclusive of GST and disbursements. Actual costs incurred by the third defendant have amounted to $21,630 (exclusive of GST and disbursements). The fifth defendant's costs are $8,760.

[5] In the substantive judgment I upheld the defendants' submissions that the claim should be struck out because the plaintiff had not filed an amended statement of claim as had been required by Harrison J. Harrison J had made two orders to that end. The first required the filing of an amended statement of claim by 30 July 2008. The second extended the time for filing the amended statement of claim to 22 August 2008 and provided that unless the plaintiff took that step by 4.00 p.m. on that day the proceeding was to be struck out.

[6] I reviewed the unusual procedural path that the proceeding had taken and noted (at [44]) that, notwithstanding the terms of Harrison J's order, I considered that I would need myself to be satisfied that there were proper grounds for striking out the claim. Having discussed the circumstances in which Harrison J had made the orders, and the deficiencies in the statement of claim that lay behind them, I was satisfied (see the judgment at [73]) that there were grounds for requiring the amended pleading to be filed. I held further that the plaintiff had not advanced any proper justification for failing to comply with it. It followed that the claim should be struck out in accordance with Harrison J's order.

[7] In addition to relying on non-compliance with Harrison J's order, the defendants had advanced arguments based on witness immunity and *res judicata*. The conclusion that I had already reached at [73] meant that I did not need to resolve the defendants' further arguments. However, with particular relevance to the position of the third and fifth defendants, I said that it was very difficult to see how a claim could be maintained against them having regard to s 188 of the Children, Young Persons, and Their Families Act 1989, as well as common law rules providing for the immunity of witnesses.

[8] At [76] I said:

> It is unnecessary for me to reach any concluded view on the plaintiff's proposed causes of action, given the conclusion I have already expressed on the consequences of the failure to comply with the "unless" order. However, I do observe that, given the background that I have earlier set out, the claims appear to be particularly weak, and are not such as would cause the Court to give any greater indulgence than was in fact given in relation to the time for filing an amended statement of claim. I add that throughout, counsel for the plaintiff have persisted in claiming there was nothing inadequate in the claim as pleaded. There was no suggestion that, given further time, an amended statement of claim would be filed, and indeed further time was not sought.

[9] Mr Orlov opposes the making of any award of costs against the plaintiff on the basis of "serious emotional harm" suffered by her as a consequence of the "wrongful removal of her child", "unchallenged evidence of misdiagnosis of the plaintiff", an allegation that the proceeding involves a Bill of Rights claim against the State, and the plaintiff's status as an invalid beneficiary. Mr Orlov maintains that an award of costs would constitute a restriction on the plaintiff's access to justice and be a breach of the International Covenant on Civil and Political Rights and the United Nations Convention on the Rights of the Child. He submitted that the circumstances of this case should induce the Court to adopt a merciful approach.

[10] I am in no doubt that an award of costs should be made in favour of both the third and fifth defendants. The plaintiff's claim has been struck out for deliberate failure to comply with an order requiring the filing of a proper pleading. It is worth repeating here what I said at [72] of the substantive judgment:

> I reject the implication of Mr Orlov's submission that because the claim engages the plaintiff's rights as a parent the claim does not have to be properly pleaded. The defendants against whom very serious allegations are

> sought to be advanced could not be expected to respond to the pleading in the form in which it was filed and remains.

[11] None of the matters relied on by Mr Orlov to oppose an award of costs could properly justify departure from the principle expressed in r 14.2(a) of the High Court Rules that the party who fails on an interlocutory application should pay costs to the party who succeeds. Given the stage at which the proceeding has been struck out, and the long history of related proceedings in the Family Court, this Court and the Court of Appeal, there is no basis on which the Court could possibly conclude that that principle should not be applied because of the kinds of consideration now relied on by Mr Orlov. I do not here repeat the background which was fully set out in the substantive judgment.

[12] I add that while the claim against the first and fourth defendants could be described as a claim "against the State", such a description is not apt in respect of the claim against the second, third and fifth defendants. The latter two parties were health professionals who had provided reports to the Family Court. There was no Bill of Rights claim against them. The plaintiff purported to claim against both for breach of fiduciary duty and breach of duty of care. The prayer for relief against the fifth defendant sought compensatory, aggravated and exemplary damages. It included a claimed declaration that she not practise as a psychiatrist and that she had engaged in conduct unbecoming of a psychiatrist. Although there was not a specific prayer for relief against the third defendant (having regard to the drafting of the statement of claim as a whole, this appears to have been an oversight), serious allegations were made against her. For example, she was accused of reckless indifference and producing a report in bad faith.

[13] Given the nature of the allegations and claims made against the third and fifth defendants, I reject Mr Orlov's contention that their costs application should be treated as if made in relation to claims advanced by a plaintiff under the New Zealand Bill of Rights Act 1990. I conclude that both the third and fifth defendants should have an award of costs in their favour.

[14] I turn then to the issue of whether there should be increased or indemnity costs. In the case of the fifth defendant, there is only a minor difference between the

costs calculated in accordance with Category 2 Band B and her actual costs. In the case of the third defendant there is a much more substantial gap. However, the costs actually incurred are not the starting point for discussion of whether there should be increased or indemnity costs. The proper question is whether there are circumstances which justify an uplift from the scale: *Holdfast NZ Ltd v Selleys Pty Ltd* (2005) 17 PRNZ 897.

[15] Ms Janes submitted that there are such circumstances in the present case. She referred to r 14.6(3)(b) of the High Court Rules which contemplates increased costs if the party opposing costs has contributed unnecessarily to the time or expense of the proceeding by failing to comply with the rules or with a direction of the Court, pursuing an argument that lacks merit and failing without reasonable justification to accept a legal argument. She pointed out that the plaintiff had failed to comply with the two orders made by Harrison J. Further, she argued that the cause of action against the third defendant was misconceived having regard to the statutory defence in s 188 of the CYPF Act. She noted that counsel for the third defendant had made it plain at an early stage that it was contended that the proceeding against her was misconceived, having regard not only to the statutory defence but also because of the doctrine of *res judicata* or issue estoppel.

[16] Ms Janes further argued that the same circumstances justified an award of indemnity costs on the basis that the proceeding was in all the circumstances frivolous, vexatious and unnecessary, as there was no prospect of success against the third defendant as a matter of both statutory and legal principle as it infringed the principle of witness immunity: see r 14.6(4)(a).

[17] As I have noted, the actual basis upon which I struck out the plaintiff's claim against the third and fifth defendants was that there had been non-compliance with Harrison J's orders requiring the filing of an amended pleading. I did not formally decide that there was no cause of action although I did state that it was "very difficult to see how a claim could be maintained" against either the third or fifth defendant, having regard to s 188 of the CYPF Act as well as the common law rule providing for witness immunity. Given my conclusion (at [76]) that the claims against all defendants were as I put it "particularly weak", I saw no reason to grant a greater

indulgence than in fact had already been given in respect of time for filing an amended statement of claim.

[18] Because the claim was struck out at an interlocutory stage, essentially for procedural reasons, I do not consider it would be appropriate now to award increased costs on the basis that its foundation was unmeritorious or indemnity costs on the basis that it was vexatiously, frivolously, or unnecessarily commenced. There were the allegations of bad faith and recklessness to which I have already referred, and however unlikely to succeed they may have appeared, there had been no factual inquiry when the claim was struck out.

[19] It will, however, be appropriate in my view to award increased costs on the basis of the failure to comply with the Court's direction that an amended statement of claim be filed. While it may well be the case that had an amended statement of claim been filed the defendants would still have pursued a strike out application on substantive grounds (and incurred the costs of doing so) the plaintiff's failure to comply with Harrison J's order increased the costs incurred by the defendants both in preparation and at the hearing to deal with the implications of that non-compliance and resulted in expenditure on their part that would otherwise not have been incurred.

[20] The cost of the hearing is already notionally included in the ordinary allowance under Item 4.15 of Schedule 3 of the High Court Rules. However, it was evident that the third defendant prepared for hearing on a more substantial basis than the other parties and indeed Ms Janes' submissions were largely adopted by other counsel. Preparation for the hearing legitimately covered the full range of issues raised by the strike out application, and would have been made more time consuming by the discursive nature of the statement of claim. In the circumstances, I consider it appropriate to allow the third defendant increased costs in the sum of $1,000 in respect of preparation for the hearing under Item 4.14.

[21] As mentioned earlier, Ms Janes requested the Court to consider if an order for costs should be made against counsel for the plaintiff himself. Mr Orlov simply noted in his submissions in reply that no formal application had been made so that he

would not respond. He also referred to the Privy Council decision in *Harley v McDonald* [2002] 1 NZLR 1 pointing out that in order for that step to be taken it would be necessary for there to be a further hearing. At such a hearing it would be necessary for Mr Orlov, should he so choose, to himself be represented by counsel.

[22] Once again I doubt it would be appropriate to go down that path given the fact that the proceeding was struck out essentially for procedural reasons. I note also that Ms Janes has not articulated the basis upon which an award against Mr Orlov would be justified having regard to the principles set out in *Harley*, so as to afford him an opportunity to respond. It would not be appropriate in the circumstances for there to be an order against Mr Orlov.

Result

[23] For the foregoing reasons I direct that the plaintiff is to pay the third defendant's costs in the sum of $9,480 and the fifth defendant's costs in the sum of $8,480 together, in each case, with any disbursements properly incurred. Any issue concerning the latter may be resolved by the Registrar.