

**NOTE: ORDER OF THE HIGH COURT PROHIBITING PUBLICATION OF  
NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF  
THIRD PARTY REMAINS IN FORCE.**

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA669/2013  
[2015] NZCA 542**

BETWEEN                      NEW ZEALAND ASSOCIATION OF  
   COUNSELLORS INCORPORATED  
   Appellant

AND                              PETER GERARD STOCKMAN  
   Respondent

Court:                          Randerson, French and Winkelmann JJ

Counsel:                      C Heaton for Appellant  
   Respondent in person

Judgment:                    12 November 2015 at 2.30 pm  
(On the papers)

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**JUDGMENT OF THE COURT**

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**A The respondent's applications for indemnity costs and to adduce further evidence are declined.**

**B The respondent is awarded costs of \$4,460.00.**

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**REASONS OF THE COURT**

(Given by Winkelmann J)

[1] The New Zealand Association of Counsellors Incorporated (the Association) had appealed a decision of Peters J referring a complaint by the respondent, Mr Stockman, back to the Association for further consideration on the grounds that

the Association had acted in a procedurally unfair manner by excluding email evidence.<sup>1</sup> The Association abandoned its appeal on 21 May 2015. Mr Stockman now seeks an order for indemnity costs against the Association and leave to adduce further evidence in support of that claim. In the alternative he seeks an award of costs for a standard appeal.

## **Background**

### *High Court proceedings*

[2] The Association had appealed Peters J's ruling that the Association had erred in excluding certain evidence from its consideration of a complaint made by Mr Stockman against a counsellor, Ms Galvin. Ms Galvin had been counselling both Mr Stockman and a third party. In two initial meetings she was engaged to undertake joint counselling, and in a third to act as a mediator.

[3] After the third meeting Mr Stockman accessed the third party's private email account, obtaining emails between Ms Galvin and the third party, and it was these emails which formed the basis of his complaint. In the course of the disciplinary process Ms Galvin objected to the production of the emails as evidence against her. She contended that they were confidential communications in that neither sender nor recipient consented to their use. She also objected on the basis that Mr Stockman had procured the emails "unlawfully ... in breach of confidence", and that in any event the emails were irrelevant to the complaint because they were sent after the counselling had concluded. Finally, even if relevant, allowing evidence of the content of the emails would constitute a breach of Ms Galvin's right to natural justice because she was unable to respond to them by disclosing all relevant information.

[4] Peters J ruled that there was no proper basis for the exclusion of the evidence in this case, remitting the complaint back to the Regional Ethics Team of the Association for reconsideration, including by reference to the emails.<sup>2</sup>

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<sup>1</sup> *Stockman v New Zealand Association of Counsellors Incorporated* [2013] NZHC 2267.

<sup>2</sup> At [27] and [31].

Notwithstanding his success, she declined to award costs to Mr Stockman because he was at the time self represented.

*The Association's Appeal*

[5] The Association's notice of appeal contained the following grounds of appeal:

- (a) The Judge erred in finding there was no confidentiality in the communication between Ms Galvin and the third party until the third party asserted that confidentiality;
- (b) Having found there was no confidentiality in the communication between Ms Galvin and the third party, the Judge erred in failing to consider any breach of the third party's privacy that could have provided the basis for the Association to exclude the emails;
- (c) The Judge erred in failing to hold it was reasonable for the Association, when applying the principles of natural justice in its complaints process, to apply the principles contained in s 30 of the Evidence Act 2006 to exclude information that was improperly obtained (information taken without the owner's permission);
- (d) The Judge failed to take her reasoning further and consider whether it was reasonable for the Association to use the procedure contained in s 69 of the Evidence Act to exclude the emails on the basis that doing so prevented harm to the client/counsellor relationship between Ms Galvin and the third party, and that this consideration outweighed the public interest in the emails forming part of Mr Stockman's complaint against Ms Galvin; and
- (e) Having found that the Association acted in a procedurally unfair way in excluding the emails, the Judge failed to consider whether substantial prejudice had been caused to Mr Stockman and erred in

referring the matter back to the Association to consider the complaint in its entirety.

[6] On 10 February 2014 Mr Stockman filed an application for an extension of time to file a notice under r 33 of the Court of Appeal (Civil) Rules 2005 supporting the judgment appealed from on different grounds and/or additional grounds. That application was not opposed by the Association.

[7] On 18 December 2014 the appeal was allocated a hearing date of 6 August 2015. No steps were required to be taken in terms of the timetable by Mr Stockman until 23 July 2015. The Association filed and served a notice of abandonment of appeal dated 20 May 2015.

### **Mr Stockman's applications**

[8] Mr Stockman says that the Association's appeal should never have been commenced, and seeks an award of indemnity costs under the provisions of r 53E(3)(a), (b) and (f) of the Court of Appeal (Civil) Rules. Rule 53E(3) provides:

- (3) The Court may order a party to pay indemnity costs if—
  - (a) the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending an appeal or a step in an appeal; or
  - (b) the party has ignored or disobeyed an order or direction of the Court or breached an undertaking given to the Court or another party; or
  - (c) costs are payable from a fund, the party claiming costs is a necessary party to the appeal affecting the fund, and the party claiming costs has acted reasonably in the appeal; or
  - (d) the person in whose favour the order of costs is made was not a party to the appeal and has acted reasonably in relation to it; or
  - (e) the party claiming costs is entitled to indemnity costs under a contract or deed; or
  - (f) some other reason exists which justifies the Court making an order for indemnity costs despite the principle that the determination of costs should be predictable and expeditious.

[9] In support of his application Mr Stockman says first that the appeal was meritless and should never have been brought. Mr Stockman outlines the deficiencies in the Association's processes which he says are serious. He says that the breaches of natural justice in the procedure followed by the Association in considering his complaint entailed flagrant misconduct and breaches of the New Zealand Bill of Rights Act 1990. While he concedes that he obtained the emails improperly, there was no basis for the exclusion of the emails.

[10] In support of his application he also relies upon the Association's conduct prior to the commencement of the appeal, which he characterises as improper. He says that in bringing the appeal the Association failed to follow judicial directions and/or breached an undertaking given to Peters J to address aspects of their process which he had argued in the High Court were in breach of natural justice. Mr Stockman narrates comments he claims Peters J made to counsel for the Association that she should convey to her client that the Association were going to have to "sort this out" or "remedy this" or "fix this up". He says that counsel for the Association agreed to convey that to her client. Mr Stockman submits that by commencing this appeal, rather than addressing the breaches of natural justice the Judge had highlighted, the Association has breached that undertaking.

[11] Mr Stockman also complains that the Association successfully applied for an order that his appeal on an issue of costs arising out of the High Court hearing and this appeal be heard together. Mr Stockman opposed such an order on the grounds that the appeals had nothing to do with each other. He then unsuccessfully sought leave to appeal that direction to the Supreme Court.<sup>3</sup> Ultimately, Mr Stockman's appeal was deemed abandoned.<sup>4</sup> He argues that had the Association accepted his word that his appeal had nothing to do with them (because it was concerned with a point of principle relating to self-represented litigants being able to recover costs), and not engaged in machinations to limit their risk of paying costs, the cost and time taken by their appeal would have been considerably less.

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<sup>3</sup> *Stockman v New Zealand Association of Counsellors Incorporated* [2014] NZSC 53.

<sup>4</sup> *Stockman v New Zealand Association of Counsellors Incorporated* [2014] NZCA 531.

[12] He also complains of humiliation and stress he has suffered by virtue of the conduct of Ms Galvin. He says that she made false accusations against him, yet the Association has taken every possible step to ensure that he would not get an opportunity to clear his name.

[13] Finally, Mr Stockman makes an application to adduce further evidence to support his arguments.

*Application for indemnity costs*

[14] It is a well-established principle that self-represented litigants are not entitled to costs.<sup>5</sup> However in the present case Mr Stockman was legally represented in this appeal before the appeal was abandoned by the Association.

[15] Mr Stockman's submission that the appeal was without merit is made in support of the proposition that the Association proceeded "vexatiously, improperly or unnecessarily in commencing or continuing" the appeal for the purposes of s 53E(3)(a). We do not accept that is so. The Association's notice of appeal invoked s 69 of the Evidence Act. That section grants discretion to a judge to prevent disclosure in a proceeding of a confidential communication, even in circumstances where the person whose confidential information would be disclosed by the production of the evidence does not take the point. Many non-court bodies have routinely adopted the Evidence Act to guide them in determining issues as to the admissibility of evidence.<sup>6</sup> Mr Stockman concedes that he unlawfully obtained the evidence he sought to adduce. It is common ground that it was a private communication. It is also common ground that the communication was between a third party and their former counsellor. The appeal raised issues of significance to the Association and its members. These issues were not so obviously without merit that the Association is to be regarded as having acted vexatiously, improperly or unnecessarily in commencing and continuing with the appeal.

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<sup>5</sup> *Re Collier (A Bankrupt)* [1996] 2 NZLR 438 (CA) at 440; *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2010] NZCA 400, (2010) 24 NZTC 24-500 at [162]; and *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 311, (2013) 26 NZTC 21-024 at [7].

<sup>6</sup> R Mahoney and others *The Evidence Act 2006: Act and Analysis* (3rd ed, Brookers, Wellington, 2014) at [EV4.09.01].

[16] Mr Stockman also seeks to rely upon evidence of the exchange between Peters J and counsel for the Association as evidence that the Association ignored a judicial direction or breached an undertaking to the Court. Even if the exchange was as Mr Stockman recounts, it did not (and of course could not) amount to a direction that the Association must accept the Judge's findings, thus precluding an appeal. Nor did it amount to an undertaking to similar effect. This does not assist Mr Stockman.

[17] Mr Stockman says that the Association caused cost and delay in obtaining orders that his appeal against the refusal of Peters J to award him costs (later deemed abandoned), be heard together with this appeal. He argues that justifies an award of indemnity costs. It cannot do so. The appeals were obviously related and it was appropriate that they be heard together as this Court held.<sup>7</sup>

[18] On Mr Stockman's own account, his distress and humiliation was caused by the counsellor's conduct, and not the bringing of this appeal. It is therefore irrelevant to the issue of indemnity costs.

[19] For these reasons we are satisfied that Mr Stockman's application for indemnity costs should be declined.

*Application to adduce additional evidence*

[20] Mr Stockman seeks leave to adduce an affidavit in which he sets out his recollection of exchanges between Peters J and counsel for the Association to substantiate the claims outlined about this exchange, and explains the stress and humiliation he has suffered by virtue of the conduct of the counsellor. He also attaches:

- (a) Evidence in connection with the Association's processes;

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<sup>7</sup> Mr Stockman argued that this Court failed to understand that he did not seek costs for himself but rather sought to establish a principle that unrepresented litigants should be able to obtain costs orders for themselves. However, establishing or rejecting that principle would have the inevitable effect of deciding the parties' rights and obligations in respect of costs in this case.

- (b) Evidence of his correspondence with the Association following the High Court judgment in connection with his original complaint, and additional complaints he made against those involved for the Association in the disciplinary processes and the Association's processes to date;
- (c) A letter from a psychotherapist summarising 10 sessions Mr Stockman attended with him in which the psychotherapist narrates various statements made by Mr Stockman, outlines his assessment of Mr Stockman's character and confirms that he found him an earnest and credible person;
- (d) Correspondence between legal representatives for Mr Stockman and the Association in connection with deficiencies identified by Mr Stockman in the Association's processes;
- (e) Extracts from academic writing involving the use of feminist theory to analyse patterns of psychological abuse;
- (f) Correspondence from Mr Stockman to the Association following an attempted mediation proposing grounds upon which the issues between the Association, various individuals in respect of whom Mr Stockman had complained, and Mr Stockman, could be resolved. In the course of the correspondence he says that if the Association does not take the steps he requests he will take every legal action possible to get justice for himself and other present and future clients of the Association's members, including recovering indemnity costs. He also attaches the Association's response; and
- (g) Copies of fee notes issued to Mr Stockman by counsel representing him.

[21] The application is governed by the provisions of r 45 of the Court of Appeal (Civil) Rules. One of the requirements for the admission of further evidence under



r 45 is that the evidence be cogent.<sup>8</sup> None of this evidence is relevant to an issue before the Court, because, even if accepted, the evidence does not make out a r 53E(3) ground.

[22] We are satisfied that the application to adduce the additional evidence should be declined.

### **Costs in accordance with r 53A**

[23] Initially Mr Stockman's application and submissions related only to the issue of indemnity costs. However we invited him to respond to the Association's submissions in relation to an order for costs in accordance with the general principles applying to costs awards under the Rules. Mr Stockman has now filed those submissions. He seeks costs as follows:

- (a) Briefing counsel — 1.5 days. Mr Stockman notes that as he had represented himself in the High Court, his counsel for the Association's appeal had to spend time to brief herself in connection with the appeal.
- (b) Responding to the Association's case on appeal — 0.2 of a day.
- (c) Responding to the Association's application to have the two appeals heard together — 0.2 of a day.
- (d) Submitting a notice that he intended to support the judgment appealed against on other grounds under r 33 — 0.2 of a day.
- (e) Preparation for the hearing of the appeal — 1 day. He says that counsel had done some preparatory work.

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<sup>8</sup> *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR (CA) at 192; *Aotearoa International Ltd v Paper Reclaim Ltd* [2006] NZSC 59, [2007] 2 NZLR 1 at [6], n 1; and *Erceg v Balenia Ltd* [2008] NZCA 535 at [15].

- (f) Preparation of a memorandum in relation to unlinking of appeals —  
0.2 of a day.

[24] This is a total of 3.3 days.

[25] The Association submits that Mr Stockman is not entitled to costs because he wasted time and cost with his meritless pursuit of his view that the two appeals should not be heard together. If we are minded to award him costs, the Association submits they should be minimal and reached by analogy with the steps relating to appeals as of right.

[26] Although costs are at the discretion of the Court, r 53A sets out a number of principles the Court should normally be guided by when determining costs. These include principles that the party who fails with respect to an appeal should pay costs to the party who succeeds, that costs should be assessed by applying the appropriate daily recovery rate to the time considered reasonable in relation to the appeal, and that so far as possible, the determination of costs should be predictable and expeditious. Rule 53D provides that a reasonable time for a step in an appeal is the time set out in Schedule 2 of the Rules.

[27] We consider that Mr Stockman should be entitled to costs incurred in opposing the appeal to date and that costs should be fixed by analogy to the Schedule 2 steps for an appeal as of right. This approach is consistent with the principles applying to the determination of costs specified in r 53A we have set out above.

[28] Taking this approach we are satisfied that he should be entitled, on a band A basis, to a time allocation of 1.5 days for responding to the commencement of the appeal (a time allocation which allows briefing of counsel and the preparation of the notice supporting the appeal on other grounds) and a time allocation of 0.5 of a day for responding to the Case on Appeal. This is a lesser time allocation than for preparation of the Case on Appeal, but the burden of a party commenting upon additions to or suggested redactions from a case on appeal is considerably less than that of the party preparing it.

[29] Mr Stockman is not entitled to costs in connection with the preparation of the hearing, as the appeal was discontinued well before the timetable required the filing of submissions. Counsel's general preparatory work is allowed for in the time allocation for the commencement of the appeal.

[30] Mr Stockman is also not entitled to costs in respect of his opposition to the Association's application that the two appeals be heard together (see [23](c) above). His opposition was unsuccessful. He persisted with it ([23](f)), again unsuccessfully, which would have caused wasted costs for the Association.

[31] Accordingly, Mr Stockman is entitled to an award of costs calculated on the basis of 2.0 days, at the standard daily rate for recovery of \$2,230.00: an award of \$4,460.00.

### **Name suppression**

[32] Mr Stockman also seeks suppression of the name "Stockman". In the High Court Peters J declined Mr Stockman's application for name suppression and it was published in the High Court judgment.<sup>9</sup> There is no basis for making an order to suppress publication of Mr Stockman's name at this point.

[33] We note that the order made in the High Court suppressing the publication of the identity of the third party remains in force.

### **Result**

[34] The respondent's applications for indemnity costs and to adduce further evidence are declined.

[35] The respondent is awarded costs of \$4,460.00. The Registrar is directed to pay that sum to the respondent out of security for costs paid by the appellant. The balance is to be released to the appellant.

Solicitors:  
Morrison Kent, Wellington for Appellant

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<sup>9</sup> *Stockman v New Zealand Association of Counsellors Incorporated*, above n 1, at [32].