

**IN THE DISTRICT COURT  
AT AUCKLAND**

**I TE KŌTI-Ā-ROHE  
KI TĀMAKI MAKĀURAU**

**CIV-2009-004-000678  
[2020] NZDC 1157**

BETWEEN

DEREK EDWIN CUTTING  
Plaintiff

AND

YICHUAN LIU  
STEVEN LAU  
DINAH QUI  
Defendants

Hearing: On the papers

Appearances: G Collicutt for the Plaintiff  
Mr Liu in person for the Defendants

Judgment: 27 January 2020

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**DECISION OF JUDGE L I HINTON  
[As to costs on recall applications]**

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[1] In this proceeding, I ordered judgment for the plaintiff, pursuant to my judgment dated 17 July 2017. I dismissed the defendants' counterclaim. I subsequently awarded costs in favour of the plaintiff pursuant to my judgment dated 9 April 2019.

[2] The defendants appealed my decision dated 17 July 2017 unsuccessfully to the High Court. The defendants were subsequently denied leave to further appeal by the High Court and the Court of Appeal.

[3] The defendants subsequently sought an order that my costs decision dated 9 April 2019 be recalled, and later sought the recall also of my original and substantive decision dated 17 July 2017.

[4] I dismissed the recall application in my decision dated 22 November 2019. That decision confirmed also my decision declining to make an order requiring Mr Collecutt to cease acting in the proceeding. I noted in the decision that the plaintiff was entitled to costs.

[5] I have subsequently received memoranda in relation to costs from the parties.

### **Plaintiff's application**

[6] The plaintiff sought an order of scale costs amounting to \$5,157, notwithstanding the plaintiff's view that there was potential to apply for increased or indemnity costs.

[7] The plaintiff noted its view that notwithstanding a very clear warning by the Court of Appeal, the defendants had chosen to proceed with a misconceived recall application.

### **Defendants' position**

[8] The defendants submitted that an award of costs against them would not be justified. In large part, the defendants' reasoning for that relied on assertions concerning the evidence of the plaintiff in the substantive proceeding dated 17 July 2017 which had not been accepted by me in my substantive decision and in my decision on the recall application dated 22 November 2019. The defendants submitted that they had acted in good faith, with sufficient evidence in support of the recall application and that "it is hard to say justice has been seen to be done in this case".

[9] The defendants maintain that Mr Keene as witness for the plaintiff had deliberately misled the Court, that Mr Collecutt as counsel did indulge Mr Keene's false oath and adduce his false evidence, such that: "Mr Keene's perjury evidence and Mr Collecutt's conduct in the litigation necessitated the filing of the recall application".

[10] So that, effectively now Mr Keene and Mr Collecutt in the defendants' view "have been awarded for their dishonesty and privilege".

### **Discussion**

[11] Costs are at the discretion of the Court. The ordinary rule is that costs follow the event, with the party who fails with respect to a proceeding paying costs to the successful parties.

[12] As stated in my decision dated 22 November 2019, the plaintiff is entitled to costs. The plaintiff succeeded in relation to the defendants' recall application which was dismissed.

[13] The plaintiff would also in my view be entitled to increased or indemnity costs, but these are not sought by the plaintiff.

[14] As I noted in my decision dated 22 November 2019, the recall application was misconceived and amounted to an exercise of a purported further right of appeal in relation to the substantive decision. My view was that the application simply re-ran arguments already raised in and rejected by the High Court and the Court of Appeal.

[15] The defendants have chosen in the face of explicit advice from the Court of Appeal on costs, and rejection of their arguments by both Higher Courts to attempt a re-run in the recall application. The defendants repeat again on this costs application assertions concerning Mr Keene and Mr Collecutt which are unjustified, wrong, have been rejected and are wholly unacceptable.

[16] There is no basis on which this Court could not order costs against the defendants on the recall application. The amount sought by the defendants is reasonable.

**Result**

[17] The plaintiff is entitled to an award of, and the defendants must pay to the plaintiff, costs of \$5,157.

L I Hinton  
District Court Judge