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

**CIV-2007-404-3606**
**[2012] NZHC 2214**

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| BETWEEN | DIANE ROSINA TOWAI DIVETT<br>First Plaintiff |
| AND | REFOCUSSING TRUST<br>Second Plaintiff |
| AND | PAULINE SKEATES<br>First Defendant |
| AND | INSIGHT SERVICES LTD<br>Second Defendant |

Hearing: (On the papers)

Counsel: CL Elliott for Plaintiffs
AE McDonald for Defendants

Judgment: 30 August 2012

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**JUDGMENT OF BREWER J**
**(Costs)**

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*This judgment was delivered by me on 30 August 2012 at 2:30 pm pursuant to Rule 11.5 High Court Rules.*

*Registrar/Deputy Registrar*

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SOLICITORS
Ellis Terry (Wellington) for Plaintiffs
Hoffman Law (Auckland) for Defendants

COUNSEL
CL Elliott; AE McDonald

## Introduction

[1] On 19 July 2011, I delivered my judgment on an application by the plaintiffs to enforce the terms of a settlement agreement.[1]

[2] I found in favour of the plaintiffs in some limited respects. I declined to make any of the declarations or orders for injunctive relief sought by the plaintiffs. I did, as sought, reserve leave for the plaintiffs to apply for an award of damages – although I made it clear that I did not encourage them to do so. No claim for damages has been made.

[3] I reserved leave to the parties to file memoranda as to costs. I indicated, however, that my inclination was to let costs lie where they fall. By memorandum dated 21 December 2011, the plaintiffs apply for costs on a 2B basis. The defendants, by memorandum dated 21 February 2012, oppose the application. Their submission is that costs should lie where they fall. The plaintiffs filed a further memorandum on 15 March 2012 rebutting some of the points made by the defendants.

## Background

[4] The background to the settlement agreement was a copyright dispute that arose between Dr Divett, as the developer of the teaching theory and practice known as "Refocussing", and Ms Skeates, who was for a time a trusted associate and who then set up her own business in the same field.

[5] Proceedings issued by Dr Divett in 2007 against Ms Skeates were settled by agreement in 2008:[2]

> In very general terms, the settlement agreement contained an acknowledgement by Ms Skeates that Dr Divett owned copyright in the Refocussing theory and the various works describing it. Ms Skeates accepted that she was not entitled to use Dr Divett's material and she undertook that she would not do so in the future. Instead, she was free to develop her own theory and materials and could teach with reference to

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1 *Divett & Anor v Skeates & Anor* HC Auckland CIV-2007-404-3606, 19 July 2011.
2 Ibid, at [8].

those. In addition, she would use her best endeavours to prevent or restrain others within her professional orbit to whom she had provided Refocussing training or materials from using Refocussing.

**The case before me**

[6] In the application I had to decide, the plaintiffs contended that Ms Skeates breached the settlement agreement in every important respect. It was alleged that Ms Skeates continued to breach Dr Divett's copyright, denigrated Dr Divett to her followers, and did all she could to frustrate the intent of the settlement agreement.

[7] The plaintiffs' case was detailed and by reference to the clauses in the settlement agreement. It is not necessary for me to go over my findings in detail here. Instead, I reproduce my summary:[3]

> [148] A summary of my findings on each of the applicants' claims is as follows:
>
> (a) Clause 1(a) of the agreement is an acknowledgement clause and does not impose obligations on the defendants;
>
> (b) The same applies for clause 1(b);
>
> (c) In respect of the defendants' alleged continued use of the word Refocussing in breach of clause 2:
>
> (i) There is no fiduciary relationship (of agency, partnership or otherwise) between Ms Skeates and the members of the European network, and Ms Skeates is not liable for their actions;
>
> (ii) There is no evidence that Ms Skeates has continued to promote, teach, sell or disseminate materials containing the word Refocussing (except to the limited extent admitted at [23] above);
>
> (iii) Insight Focused Therapy or IFT is not confusingly similar to Refocussing therapy and RFT respectively;
>
> (d) The defendants failed to comply with clause 3(a) in respect of www.refocussing.dk, but subsequently it was transferred to the plaintiffs in February 2010. The defendants do not have ownership or control over the other domain names sought by the plaintiffs to be transferred to them;

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[3] Ibid, at [148]-[149].

(e) Ms Skeates did not use her best endeavours to procure the transfer of domain names and other uses of Refocussing from third parties in accordance with clause 3(b);

(f) The defendants have not breached clause 5, which requires destruction of materials described in clause 2, as there is no evidence that Ms Skeates has those materials within her power, possession or control;

(g) Clause 6 is permissory; it allows Ms Skeates to produce her own written materials but it does not impose obligations on the defendants;

(h) In respect of the defendants' alleged continued use or reproduction of a substantial part of Dr Divett's works:

(i) The materials described at [78] and [80] above are substantially derived from or based on Refocussing and therefore breach clause 7(a). However, that breach was admitted in the defendants' memorandum of 8 October 2010 and Ms Skeates undertook to remove those exercises from her materials;

(ii) The plaintiffs have not proven on the balance of probabilities that Ms Skeates has continued to use or reproduce any other materials substantially derived from or based on the plaintiffs' works;

(i) I am not satisfied on the balance of probabilities that Ms Skeates has continued to use in the context of Refocussing therapy terminology coined or created by Dr Divett in breach of clause 7(a);

(j) The plaintiffs have proven dissemination in breach of clause 7(b) only in respect of the materials described at [78] and [80] above;

(k) The defendants failed immediately to destroy, in accordance with clause 8, the materials described at [78] and [80] above;

(l) The agreement did not impose an obligation on either party to release the public statement in clause 10; it is a permissory clause;

(m) Ms Skeates made negative or derogatory statements in respect of Dr Divett in breach of clause 11;

(n) There is no evidence that Ms Skeates breached clause 12 by failing to refer persons interested in Refocussing to the plaintiffs. Crediting trainees from Refocussing to Insight Focussed Therapy is not a breach of clause 12.

[149] I am satisfied that there have been breaches (at least to some degree) by the defendants of clauses 2, 3(a), 3(b), 7(a), 7(b), 8 and 11 of the settlement agreement.

[8] I held that it was not necessary for me to make declarations in respect of the findings of breach; nor did I find it appropriate to give injunctive relief in respect of the two findings of breach which might possibly go to continuing conduct.

**Discussion**

[9] Rule 14.2(a) of the High Court Rules makes it a general rule that a losing party should pay costs to a successful party. However, the approach when a party has been only partially successful (as here) is set out by the Court of Appeal in *Packing In v Chilcott*:[4]

> In a case such as the present, where in broad terms each party has had similar success, we do not consider it helpful to focus too closely on the question which party has failed and which has succeeded. Costs in a case such as this should rather be based on the premise that approximately equal success and failure attended the efforts of both sides. To that starting point should be added issues such as how much time was spent on each transaction or group of transactions in issue, and any other matters which can reasonably be said to bear on the Court's ultimate discretion on the subject of costs. In the end, as in all costs matters, the Court must endeavour to do justice to both sides, bearing in mind all material features of the case.

[10] Measuring success in this case is more difficult than in many others because it is not quantifiable. The plaintiffs here sought vindication of legal rights and were partly successful. The Court of Appeal in *Waihi Mines Ltd v Auag Resources Ltd* said:[5]

> A plaintiff who receives or is entitled to nominal damages will not necessarily be regarded as a successful plaintiff. Nevertheless, vindication of a legal right without damages may carry an award of costs. Whether one or other of these approaches is adopted, or the middle ground of leaving costs to lie where they fall, is ultimately a matter for the discretion of the Judge, upon an assessment of all relevant circumstances.

[11] I note that the defendants have also pointed to the judgment of Tipping J in *Walsh v Kerr*,[6] cited with approval in *Waihi Mines*. In that decision, his Honour

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4 *Packing In Ltd (In Liq) formerly known as Bond Cargo Ltd v Chilcott* (2003) 16 PRNZ 869 (CA) at [5].

5 *Waihi Mines Ltd v Auag Resources Ltd* (1999) 13 PRNZ 372 at [6].

6 *Walsh v Kerr* [1987] 2 NZLR 166.

points to a line of authority[7] which doubted whether a plaintiff who simply recovered nominal damages could be regarded as successful in the ordinary sense of the word.

[12] The defendants submit that because the plaintiffs' relief was simply vindication of a right they should not be afforded costs. However, as the Court of Appeal in *Waihi Mines* makes clear, the matter remains open and is for the Judge to determine having regard to all of the circumstances of the case.

[13] In this case, the most substantial success that the plaintiffs had was in regard to the breach of clause 3(b), which addressed a failure to use best endeavours, and the breach of clause 11, which addressed the negative/derogatory remarks made by Ms Skeates about Dr Divett. However, as to the first breach, the defendants accepted that they failed to use their best endeavours.

[14] This success needs to be measured against what the plaintiffs did not establish. The plaintiffs failed on the following allegations:

(a) Establishing breaches of clauses 1(a), 1(b), 6 and 10. These were all permissory, not mandatory, parts of the settlement agreement and did not give rise to enforceable rights;

(b) In respect of clause 2 there was insufficient evidence:

(i) That a fiduciary relationship existed between Ms Skeates and her European network;

(ii) That Ms Skeates (with a minor exception) had continued to exploit the word "Refocussing";

(iii) That Insight Focused Therapy or IFT is confusingly similar to Refocussing therapy and RFT respectively;

(c) Breach of clause 5. There was insufficient evidence to establish that Refocussing materials were not destroyed;

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[7] *Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Industries Ltd* [1951] 1 All ER 873; *Alltrans Express Ltd v CVA Holdings Ltd* [1984] 1 All ER 685.

(d) Breach of clause 12. There was insufficient evidence that the defendants had failed to refer persons interested in Refocussing to the plaintiffs.

[15] The main conclusions relevant to my determination of costs as I find them to be are:

(a) The plaintiffs have had limited success;

(b) The success has not resulted in legal remedies;

(c) The success goes to partly moral vindication and partly legal vindication; and

(d) Such vindication has not gone to damages and would in any event give rise to only nominal damages.

[16] The proceeding was made more lengthy and difficult than it needed to be by the plaintiffs pursuing claims they simply could never prove. For example, there was never sufficient evidence that Ms Skeates was in a fiduciary relationship with her European network.

[17] On the other hand, although the defendants acknowledged breaches of the settlement agreement where these were apparent, the oral component of the case was drawn out by Ms Skeates's evasive responses to cross-examination.

**Decision**

[18] In my view, the competing factors for costs are nearly balanced. However, I find that Ms Skeates's undermining of the settlement agreement was ultimately the cause of Dr Divett bringing the proceeding to enforce the agreement. As nominal damages would have been able to be awarded, in the exercise of my discretion I consider that Dr Divett as first plaintiff is entitled to nominal costs.

[19] I calculate these as $1,990, being one day at the current category 2 rate.

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Brewer J