

Anthony Harper

26 February 2014

Legal Services Agency

BY EMAIL: robin.lees@justice.govt.nz

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Dear Robin

MR DAVID MCCARTHY - 13443117 - GRANT THROUGH TO TRIAL

1. We write to seek a further grant from the Legal Services Agency ("LSA") for representation of Mr McCarthy through to and including trial (currently set down for five days starting on 26 May 2014).
2. The time sought by counsel is particularised in the **attached** Schedule and amendment to grant. We consider that our figures accurately reflect the volume of work required to adequately conduct Mr McCarthy's defence.
3. Below we discuss Mr McCarthy's case to date and his prospects moving forward.

Merits of case

4. We are still of the opinion that Mr McCarthy has a sound defence to the various causes of action brought against him. A problem facing the plaintiffs' various causes of action is the issue of loss. To date, we have seen no evidence that any loss has been suffered. Furthermore, regarding his particular defences, we note:
 - (a) *Breach of contract* – we are confident that Mr McCarthy can successfully raise a defence on the grounds that any action that he has taken cannot be interpreted as being in breach of the contract he signed. The contract prohibits the "teaching" of the plaintiffs' techniques/information. However, rather than "teaching", Mr McCarthy has instead been criticising the teachings of the plaintiffs (as being, *inter alia*, dangerous). Furthermore, as an alternative defence, we believe it is arguable that the contract is void/unenforceable on grounds of coercion or duress.
 - (b) *Inducement of breach of contract* – it is clear to us that the plaintiffs will struggle to satisfy the necessary tests for this tort. First, there is unlikely to be any evidence to prove that Mr McCarthy had knowledge of the contract he is said to have induced a breach of (this being a later contract to the one he signed himself). Secondly, there is no evidence to suggest he ever intended to induce such a breach.
 - (c) *Breach of confidence* – the defence to this cause of action will be similar to the defence for breach of contract. Mr McCarthy will say that he did not "teach" any allegedly confidential information. Furthermore, in the alternative, we are of the opinion that there may be a further defence on the grounds that there can be no expectation of confidence where an inequity exists. Mr McCarthy will say that the nature and circumstances of his signing the contract would constitute such an inequity.
 - (d) *Breach of the Copyright Act 1994* – It is likely that, in posting the plaintiffs' videos to the internet, there has been a prima facie breach of copyright by Mr McCarthy. However, we are of the view that Mr McCarthy will be able to argue that any breach is justified under the "fair dealing" provisions of the Copyright Act (see s 43) that permit sufficiently

acknowledged criticism. That said, it is this cause of action that potentially carries the most risk for Mr McCarthy.

5. We appreciate that the Legal Services Agency ("LSA") will need to carry out its own review of the merits of this case. In order to assist with this process, we **enclose** a bundle of the pleadings to date (including a request for further particulars and Mr McCarthy's answers to such request).
6. Grant Illingworth QC has kindly offered his thoughts on this case and is more than happy to discuss merits with the LSA assessor.

Prospects of Settlement

7. In our opinion, given the apparent intention of the plaintiffs to "gag" Mr McCarthy, settlement is an unlikely outcome.
8. In previous correspondence, you have emphasised the need to focus on settlement options. With this in mind, we have suggested to Mr McCarthy that he consider making a settlement offer to the plaintiffs on the following grounds:
 - (a) He agrees (permanently) not to post any video material online that is the property of the plaintiffs;
 - (b) The plaintiffs discontinue their claim with no issue as to costs;
 - (c) Mr McCarthy would be free to continue making criticisms about the plaintiffs, albeit without breaching any copyright in the process.
9. The above proposal might serve to undermine the plaintiffs' strongest claim, being copyright infringement, and the remedy sought, being injunctive relief. This would leave the plaintiffs with the difficult task of proving economic loss. However, Mr McCarthy has indicated that this type of self-imposed restraint would be unacceptable to him as it would effectively allow the plaintiffs to achieve their original purpose of permanently silencing him.

Security for costs

10. On our insistence, the plaintiffs have deposited security for costs, to the value of \$36,527, in Simpson Grierson's trust account. If the plaintiffs lose this case, it is agreed that the security fund will be applied to any costs award in favour of Mr McCarthy.

Trial

11. The plaintiffs are running what we would describe as a "Rolls Royce" campaign against Mr McCarthy. This is not only clear from the heavy involvement of two Simpson Grierson partners and a senior associate, but also the inflexible stance taken in regard to procedural matters. It is clear that the plaintiffs are attempting to utilise their significant resources in order to "burn off" Mr McCarthy.
12. We expect that there will be two, possibly three, counsel at trial on behalf of the plaintiffs. With this in mind, we request that approval be granted for two counsel to appear at trial on Mr McCarthy's behalf. This will greatly help to reduce the workload of the lead provider and to allow for crucial in-hearing support as the matter progresses. Counsel that would attend the trial would be Richard Smedley, as lead provider and senior counsel, and Chris Baldock, as supervised provider and junior counsel.
13. We expect that you will require further information from us and, of course, we are happy to provide it. Please do not hesitate to contact us in this regard.

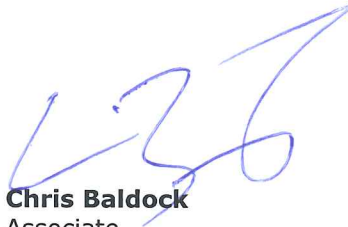
14. We look forward to hearing from you.

Yours faithfully
Anthony Harper



Richard Smedley
Partner

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Chris Baldock
Associate

Ph: (09) 920 6466 | chris.baldock@ah.co.nz

SCHEDULE – ESTIMATED TIME REQUIRED BY COUNSEL THROUGH TO TRIAL**MR DAVID MCCARTHY – 13443117**

Activity	Hours required	
	Lead Provider	Supervisor Provider
Preparation of amended statement of defence (as recently directed by the Court)	1 hour	2 hours
Incidentals (e.g. including, telephone calls, meetings with client, correspondence with Court and plaintiffs, review of ongoing discovery material, discussions with third parties)	5 hours	10 hours
Preparation of briefs of evidence	10 hours	30 hours
Preparation for trial, including preparation of opening submissions, direct examination, cross examination and closing	50 hours	70 hours
Time occupied by trial (two counsel)	40 hours	40 hours
Follow up advice following trial	2 hours	3 hours
	108 hours	155 hours
TOTAL	263 hours	

07/13 form 19

Legal aid file No.

13443117

Civil Legal Aid

Lead provider's matter/file No.

140048-1

Amendment to Grant

Use this form to request an amendment to a grant for any civil matter other than Family, Waitangi and ACC fixed fee proceedings.

Name of aided person David Edward McCarthy

Name of lead provider Richard Smedley

Name of law firm Anthony Harper

Forum category ☐ 1 ☐ 2 ☒ 3 ☐ 4

Funding sought

Type of proceedings this amendment covers: Civil

Please note: you must fill in the 'Status of case' and 'Reasons' sections over the page if you require hours in addition to the steps or prior approval disbursements.

Provider name or number

Level of experience

Provider rate (excl. GST)

Lead Provider

Richard Smedley

1 2 3 A B
☐ ☐ ☒ ☐ ☐

\$ 149

Listed Provider B

Chris Baldock

1 2 3 SUP A B
☐ ☐ ☐ ☐ ☐ ☐

\$ 92

Step No.	Activities	Hours	Total Fee	Hours	Total Fee
	Preparation of amended statement of defence (as directed by Court)	1	149	2	184
	Incidentals (including, telephone calls, meetings with	5	745	10	920
	Preparation of briefs of evidence	10	1,490	30	2,760
	Preparation for trial, including preparation of opening submissions, direct examination and cross examination	50	7,450	70	6,440
	Time occupied by trial (two counsel)	40	5,960	40	3,680
	Follow up advice following trial	2	298	3	276

Other (specify)

Further disbursement for outsourcing discovery (see final invoice attached).				

Total fees (excl. GST)* **\$30,352.00**

Total disbursements (excl. GST)*

Total GST* **\$4,552.80**

*If you are not registered for GST, you will be paid the GST excl. amount

Total amount (incl. GST)* **\$34,904.80**

CPB-140048-1-206-V1

LA office use only

☐ Approve ☐ Further information ☐ Refuse

Name

Signature

Date

day month year

Comments

Prior-approval Disbursements (specify using GST excl. amount)

Status of case

This section only applies to grants approved on or after 1 March 2007

Have any of the matters for which aid is sought been disposed of by a court, tribunal or any other means?

☒ No

☐ Yes

Date of final disposition

Please outline reasons for delay in submitting this amendment (refer to section 28 of the Legal Services Act 2011)

continue on a separate sheet if necessary

Reasons

Briefly describe what work is to be completed (refer to the proceedings steps and activities) or justify request for prior approval disbursements and provide a summary of the issues.

This Grant seeks approval for time through to and including trial.

Please see our letter **enclosed** with this amendment to grant.

continue on a separate sheet if necessary

Grounds

Please comment and note reasons on the aided person's grounds for continuing these proceedings.

Please see our letter **enclosed** with this amendment to grant.

continue on a separate sheet if necessary

Lead provider

I confirm that:

- I have informed the aided person of this amendment to the grant and explained why it is necessary.
- I have explained to the aided person that this amendment may increase their repayments (if any).
- I have informed Legal Aid of any changes to the address, or any increase in the income or disposable capital of the aided person.

Signature of lead provider



Date

26/02/2014

day month year