IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2013-485-939
[2015] NZHC 2415

UNDER	the Defamation Act 1992 and the Fair Trading Act 1986
BETWEEN	CPA AUSTRALIA LIMITED Plaintiff
AND	THE NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS Defendant

On papers

Judgment: 2 October 2015

JUDGMENT OF DOBSON J
(Costs)

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[1] In my substantive judgment in this proceeding issued on 6 August 2015, I found that the plaintiff (CPAA) had made out defamatory utterances by an officer of the defendant (NZICA). However, as a corporate plaintiff the cause of action could not succeed unless pecuniary loss was made out. CPAA was unable to establish loss. Numerous affirmative defences were pleaded to the defamation cause of action and, in some cases by narrow margins, I found that those defences would not have availed NZICA. Similar considerations prevented CPAA succeeding in a second cause of action for breaches of the Fair Trading Act 1986.

[2] My judgment concluded with the following observation:

> [226] I identify with the view expressed by Ms Brownrigg as a subpoenaed witness who is a member of both parties that it is a matter of real regret that the dispute between them could not be resolved short of litigation. On the other hand, CPAA's complaints were understandable, and my provisional view is that the scope for criticism of the standard of NZICA's conduct is likely to reduce the justifiable quantum of costs awarded in favour of NZICA.

[3] Agreement on costs has not been reached and instead I have received memoranda that reveal an extreme divergence in the parties' contentions as to an appropriate determination on costs. NZICA sought some $247,000 including $62,566.02 for disbursements. This included an uplift on 3C costs for steps in the proceeding that followed CPAA's rejection of an offer by NZICA to settle.

[4] In contrast, CPAA submitted that its position was sufficiently vindicated in my reasoning to treat the outcome as a technical victory for CPAA, or at least as a draw between the parties so that no award of costs was justified. Alternatively, that any award of costs ought to be reduced from an otherwise appropriate scale entitlement on account of the manner in which the defence was run. If its other arguments were rejected, CPAA sought to limit any adverse costs award to some $117,800 (including the sum of $62,566.02 for disbursements which were not in dispute).

Scale costs

[5] The proceedings were not classified for cost purposes prior to trial. It is appropriate to determine a costs classification first to identify what would be the presumptive entitlement of the successful party, before considering any factors that might justify varying that outcome.

[6] As to the costs category, predictably NZICA contended for category 3, and CPAA for category 2. Defamation proceedings do tend to be complex, involve greater significance in technical pleading issues than often arise in other civil litigation. There was complexity here on whether the usual requirement for a corporate plaintiff to make out pecuniary damages pertained when CPAA sought only a declaration. The proceedings have had a relatively protracted procedural history. Considering the competing contentions, I consider that category 3 costs are appropriate.

[7] As to banding, NZICA claimed that the majority of steps required relatively large time allocations. On this aspect, I prefer CPAA's assessment that, although numerous distinct steps can be identified, they did not uniformly require particularly

complicated or protracted attention. I accordingly direct that band B is the appropriate banding for costs purposes.

[8] As to the items claimed for, CPAA has questioned the justification for items either being claimed at all, or as to the extent of the claim. I uphold the following objections it made to NZICA's claim:

- Item 13: There was no conference held in May 2013.

- Item 20: NZICA's claim for two supplementary lists of discovery documents is not justified. Half the time claimed for the second supplementary list is appropriate.

- Item 30: CPAA disputes that NZICA should be entitled to five days for preparing briefs of evidence when a substantial volume of the evidence was to support a denial of Ms Patterson making the statements that, once a transcript was available, had inevitably to be conceded. This item should be confined to 1.5 days.

- Item 32: NZICA claimed four days for preparing lists of issues, authorities and the common bundle. The majority of the work on the bundle was undertaken by CPAA and I have reduced that to 1.5 days.

- Items 34 and 35: NZICA claimed for seven days in Court, but CPAA is correct that on two days the Court adjourned before lunch. I agree with CPAA that only six and three days should be allowed.

- Item 35: CPAA's objection appears to be in error. It is appropriate to allow for second counsel which is not disputed.

[9] The quantification on a 3B basis would result in a costs order for $81,990.[1]

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[1] The steps have been calculated after 1 July 2015 according to the new rates in the rules. Each party did this inconsistently, so the relevant sums may differ from their calculations.

Rejection of settlement offer

[10] The proceeding was commenced in May 2013. On 26 May 2015, NZICA made an offer to settle the proceeding, the terms of which were open until 15 June 2015. CPAA complained that the period for consideration of the offer was inadequate, and that its terms did not acknowledge the defamatory statements made. NZICA's proposed statement did not acknowledge that there had been defamatory statements or any conduct in breach of the Fair Trading Act, but expressed regret for alleged actions that may have had adverse consequences for CPAA or its members. The proposed statement included an assertion that NZICA:

> … did not intend, whether through its own actions or otherwise, to disparage CPA Australia …

Publication of any such joint statement was to be for a limited time and only on the respective organisations' websites, whereas components of the defamatory material complained about comprised large advertisements in the New Zealand Herald and the National Business Review.

[11] CPAA argued that it had achieved a better vindication of its position in the judgment following trial, and so was therefore not vulnerable to an increased adverse costs award because it had not failed to accept an offer of settlement without reasonable justification.[2] I consider CPAA's rejection of the offer was reasonable. It established at trial that aspects of the utterances on behalf of NZICA were defamatory. I am also satisfied that NZICA had intended to disparage CPAA, inconsistently with terms proposed by NZICA for the joint statement.

Should there be reduced costs to reflect NZICA's conduct

[12] Rule 14.7 of the High Court Rules recognises the prospect of refusing or reducing costs otherwise payable to a successful party. This includes in circumstances where, although the party has succeeded overall, it has failed in relation to a component of the proceeding, the inclusion of which significantly increased costs. Further, where a party claiming costs has contributed unnecessarily to the time or expense incurred by failing to admit facts subsequently established.

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2 High Court Rules, r 14.6(3)(b)(v).

[13] Here, CPAA argues that NZICA unreasonably refused to admit the terms of Ms Patterson's speeches, requiring preparation of evidence that became unnecessary when a transcript of the Christchurch address was discovered shortly before trial. CPAA also argues that the scope of the proceeding was expanded by the affirmative defences pleaded unsuccessfully by NZICA.

[14] I consider there is a basis for reducing NZICA's costs entitlement on both these grounds. In addition, assessing the conduct of the parties more generally, NZICA's stance in opposing all aspects of the causes of action perpetuated the tone and content of Ms Patterson's disparaging remarks, which NZICA sought to justify.

[15] I am mindful of the principle that costs outcomes ought to be predictable, but am satisfied that a material reduction in what might otherwise be awarded is appropriate here. I order that NZICA is entitled to 75 per cent of the scale 3B costs as I have quantified them, namely **$**61,492.50**,** together with the disbursements of $62,566.02 as agreed between the parties.

Dobson J

Solicitors:
Chen Palmer, Wellington for plaintiff
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