IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

AP NO 47/99

BETWEEN	**ROBERT McSKIMMING**	
	Appellant	
AND	**DAVID FERGUSON MITCHELL**	
	Respondent	

Date of Hearing: **14 March 2000**

Counsel: **Mr M Guest for the Appellant**
Mr Mitchell for the Respondent

NOT RECOMMENDED

ORAL JUDGMENT OF YOUNG J

INTRODUCTION

[1] This is an appeal and cross-appeal against a District Court judgment delivered by Judge MacAskill in a defamation claim by Mr David Mitchell against Mr Robert McSkimming.

[2] The judge, in a reserved judgment, found in favour of Mr Mitchell and awarded him general damages of $12,000. He declined to award Mr Mitchell exemplary damages. He fixed costs in the sum of $5,500 and directed that these costs together with disbursements, as fixed by the registrar, be paid by Mr McSkimming to Mr Mitchell.

[3] When he delivered his reserved judgment, the judge had overlooked something which had, in fact, been told to him: namely that Mr McSkimming was legally aided with a contribution of $50.00. So he was therefore required to revisit

the issue of costs given s 86 of the Legal Services Act. In a supplementary judgment the judge confirmed his costs decision after referring to the relevant statutory criteria.

[4] Mr McSkimming appeals against the award of costs and Mr Mitchell against the refusal to award exemplary damages.

THE COSTS ARGUMENTS

[5] I will deal first with the costs appeal.

[6] Section 86, Legal Services Act provides:-

> "(1) Subject to subsection (2) of this section, where any person receives civil legal aid in respect of any proceedings, that person's liability by virtue of an order for costs made against that person with respect to the proceedings shall not exceed the amount (if any) that is a reasonable one for that person to pay having regard to all the circumstances, including the means of all the parties and their conduct in connection with the dispute.
>
> (2) Notwithstanding anything in subsection (1) of this section, except in exceptional circumstances, the amount that a person to whom that subsection applies shall be liable to pay under any such order for costs shall not exceed the amount of the contribution which that person is required to make to the Board under section 37 of this Act.
>
> (3) Any order for costs made against a person to whom subsection (1) of this section applies may specify also the amount which that person would have been ordered to pay if this section had not affected that person's liability.
>
> (4) Where, because of this section, no order for costs is made against a person to whom subsection (1) of this section applies, an order may be made specifying what order for costs would have been made against that person with respect to the proceedings if this section had not excluded that person's liability."

[7] In the course of argument at the trial, counsel adverted to the grant of legal aid and the contribution of $50.00 and the implications under s 86 of the Legal Services Act on the ability of the court to make an award of costs. It is clear,

however, that the judge was not given the assistance of pointed and direct submissions as to an appropriate award of costs.

[8] After the judge delivered the decision the fact that he had overlooked s 86 was drawn to his attention. He was invited to revisit the issue of costs which he did in his supplementary judgment. The judge concluded that the award of costs originally made was reasonable. He accepted that the financial circumstances of Mr McSkimming were modest and that he had been described as a "superannuitant". He approached the case on the basis that Mr Mitchell was "a private individual evidently of ordinary means". He took the view that there were exceptional circumstances relating to in essence the absence of good faith on the part of Mr McSkimming which he referred to in his principal judgment and accordingly he confirmed his decision.

[9] Mr Guest, for Mr McSkimming, suggested that the course of events in relation to the award of costs was unfortunate. In particular he contended that the judge having made the initial award in circumstances where he overlooked the grant of legal aid had to some extent buttressed up that decision when he came to deliver his supplementary judgment. Mr Guest argued that there were, at least as a matter of nuance, more positively adverse views expressed against Mr McSkimming in the supplementary judgment than appear in the principal judgment.

[10] Mr Guest also noted that in the principal judgment the judge rejected a claim for exemplary damages for reasons which include the following:-

> "Considering the whole conduct of the defendant, from the time the defamation was published down to the date of this judgment, I conclude that the defendant did act in disregard of the plaintiff's rights but I find that his conduct was not so flagrant as to justify an award of punitive damages in addition to the compensatory damages award, especially having regard to the element of aggravated damages in that award. I consider that the award of general damages is adequate to punish the defendant for his conduct, to mark the Court's disapproval of such conduct and to deter him from repeating it."

[11] Mr Guest suggested there was a conundrum here because the judge had held that the conduct of Mr McSkimming was insufficiently flagrant to warrant

exemplary damages but bad enough to warrant a finding of exceptional circumstances.

[12] Mr Guest also told me that the way in which the matter was left with the judge at the trial did not leave him with the view that, at the time, he was exposed to the risk of an award of costs in the form in which it was delivered in the judge's reserved judgment some weeks later. It does seem pretty clear that counsel for Mr Mitchell did not articulate in any pointed way a claim for costs on the exceptional circumstances ground and the judge did not, in the end, receive particularly helpful submissions on the point as a whole. The issue seems to have been just left to him to resolve. This resulted in the position where Mr Mitchell's insistence on an award of costs based on exceptional circumstances has really been prompted by the finding of the judge in his favour, in essence by mistake, when he awarded costs in the original reserved judgment.

[13] These complaints are over-stated. The supplementary judgment does read very badly from the point of view of Mr McSkimming principally because the judge has collected together all the adverse findings against Mr McSkimming whereas the corresponding findings in the principal judgment are scattered through what was quite a long judgment. I do not see any finding in the supplementary judgment which goes beyond what was said in the principal judgment. As well - and I will come to this point again when I deal with the exemplary damages cross-appeal - I think what the judge was saying in relation to exemplary damages was not that an award of exemplary damages was not warranted but rather that, in the context of the case as a whole, there was no need for a further award of damages on top of the compensatory damages which were fixed. So I do not think that Mr McSkimming can really rely on the judge's refusal of an award of exemplary damages as being in the nature of a certificate as to his character or conduct in this case or as inconsistent with the finding of exceptional circumstances.

[14] However, I am a little troubled about the way the matter arose – where the judge came to make an award of costs without the matter having been properly argued and without recognising the jurisdictional problem involved, and then with that decision being confirmed again after comparatively little material was put to

him. I have, in fact, far more information about certain aspects of the case than the judge was favoured with. So for those reasons I have decided to consider afresh the issue whether an award of costs ought to be made on the basis of exceptional circumstances.

[15] Under s 86 there are two issues which the judge is required to consider before making an award of costs directly against the legally aided party.

[16] The first (under 86 (1)) is whether the award is a reasonable one for the legally aided party to pay having regard to all the circumstances, including the means of all the parties and their conduct in connection with the dispute.

[17] If the legal aid issue can be left out of it there can, I think, be no serious challenge to quantum of the award of costs and Mr Guest really accepted that.

[18] There is not much in the conduct issue as a separate consideration apart from the exceptional circumstances argument, to which I will refer shortly, except that I have to say that I agree with Mr Mitchell's submission to me that "conduct in connection with the dispute" includes all the legally aided party's conduct and not merely that party's compliance or otherwise with procedural directions.

[19] There was little real evidence before the judge as to the financial circumstances of either party. I was proffered some information from the bar as to the respective financial circumstances of Mr McSkimming and Mr Mitchell. Each counsel was courteous enough to accept that what the other said about his client was correct and they were, likewise, content for me to act on that basis.

[20] I was told by Mr Guest that Mr McSkimming is in modest circumstances. Before the case he and his wife had a house worth around $70,000 which was subject to a small mortgage. Since then the $12,000 awarded as damages has been paid, I understand by his daughter, and the Crown has taken a charge over the house for around $10,000 in relation to the legal aid payments to his counsel. I was told that Mr Mitchell's position is that he has net assets of around $27,000 largely in investments but has no house or motor car. He was refused legal aid because his

assets were in a comparatively liquid form; this even though his asset position was less favourable than that of Mr McSkimming.

[21] These considerations on the whole do not seem to me to be particularly significant in this case except the slightly ironic point that Mr McSkimming was able to obtain legal aid despite being rather better off than Mr Mitchell. The most important issue is whether there were, indeed, exceptional circumstances.

[22] The case, itself, was something a storm in a teacup, albeit a rather nasty one. It arose out a dispute within the Cromwell Country Music Club. Mr Mitchell, is or was, a member of the committee and Mr McSkimming had been president. The defamation was in the form a letter from Mr McSkimming to the committee which alleged - on the findings of the judge - that Mr Mitchell had acted improperly and, indeed, had misappropriated money belonging to the club. Mr Mitchell attended the meeting of the committee at which the letter considered. The committee did not believe the allegations and the upshot of its considerations was that Mr McSkimming was invited to resign from the club.

[23] In his principal judgment the judge took the view that Mr McSkimming was actuated by ill will and had acted throughout in an obdurate and unrepentant manner by asserting facts which he could not prove and in not accepting facts which were proved. Indeed, the judge rejected Mr McSkimming's bona fides; this for reasons which he gave in his judgment in some detail at pages 16 and 17. So there were strong findings of fact against Mr McSkimming.

[24] The expression "exceptional circumstances" has been considered in a number of cases including the recent decision of Hammond J in *Awa* v *Independent News Auckland Ltd* [1996] 2 NZLR 184, a judgment where the earlier relevant earlier decisions are reviewed.

[25] I think that the judge's finding that Mr McSkimming had not acted in good faith was, in itself, enough to put the case into the exceptional circumstances category see for instance, *Longstaff* v *Boyle* (1990) 6 NZFLR 473 and *Sullivan* v *Sullivan* [1999] NZFLR 260. The obduracy of Mr McSkimming in persisting with

his claims against Mr Mitchell is another supporting factor, see for instance *Awa*. Rejection of reasonable settlement offers may be relevant. Here there were without prejudice discussions which, in themselves, are not material to my consideration. What I think is relevant is that there was no offer made by Mr McSkimming in a reasonable attempt to bring the proceedings to an end. Indeed, he does not appear at any stage to have been prepared to apologise. The harshness of the allegations which he made and continued to assert at trial can hardly be ignored. So the case, as a whole, does appear to involve exceptional circumstances.

[26] The focus of the cases on s 86 has also been on the financial circumstances of the parties. The fact that Mr McSkimming does have a house and is thus in a position to meet an award of costs might also be thought put the case into the exceptional circumstances, see for instance *Dowd* v *Gubay* (1992) 6 PRNZ 158 (although there the house was very valuable). I note, however, that in *Awa*, the legally aided party was in financial circumstances which were not particularly dissimilar to those of Mr McSkimming. As well, and material to this point, it appears that Mr Mitchell is not as well off as Mr McSkimming and he was denied a grant of legal aid really because of what seems to be the somewhat arbitrary way that assets are brought into account when legal aid is granted – that is houses are ignored but cash or liquid assets can be a disqualifying factor.

[27] In all those circumstances, having considered the matter afresh, I am not prepared to interfere with the judge's decision on this issue.

THE EXEMPLARY DAMAGES ARGUMENT

[28] Mr Mitchell has cross-appealed against the refusal by the judge to award exemplary damages.

[29] I think that I have to set out most what the judge had to said as to this:-

> "I find the following matters of relevance:
>
> (a) The defendant made the defamatory statements without any proper reason or foundation.

(b) He made the statements for an improper purpose, to obtain the expulsion of the plaintiff from the club, and he was motivated by ill will.

(c) The statements were published directly to the members of the committee, but it was a natural and probable consequence that they would become known to members of the club and then to members of the local community and the country music community.

(d) In consequence of the publication of the publication and republication of the defamatory statements, the plaintiff did suffer serious damage to his reputation and suffered, in consequence, natural anxiety and distress.

(e) The defendant continued to the end of the hearing, obdurantly and unrepentantly, to assert the truth of facts which he could not prove and to deny the truth of facts which had been proved.

(f) The defendant not only maintained the truth of the defamatory comments up to and including the hearing but further alleged, wrongly, that the plaintiff had been guilty of dishonesty on another occasion, namely, the St Bathan's event.

(g) The defendant failed to apologise notwithstanding the patent weakness of his defences.

Some of these considerations are aggravating factors which justify a more liberal award of compensatory damages.

In considering what relief should be given to the plaintiff, I take into account that the plaintiff has not sought, pursuant to s 26 of the Defamation Act 1992, a recommendation that the defendant publish or cause to be published a correction of the matter that is the subject of the proceedings.

Taking into account all of the matters referred to above and giving appropriate weight to the aggravating factors, I consider that an appropriate award of general damages is $12,000.00.

Punitive Damages

The plaintiff also seeks punitive damages. Pursuant to s 28 of the Defamation Act 1992, punitive damages may be awarded against the defendant only where that defendant has acted in flagrant disregard of the rights of the plaintiff.

This is not a case where the defendant had any expectation that he would make any monetary gain in consequence of the defamation.

> As I have already found, the defendant was motivated by ill will and acted for an improper purpose. I exclude those matters from consideration under the head of exemplary damages because they have already been taken fully into account as aggravating factors.
>
> Considering the whole conduct of the defendant, from the time the defamation was published down to the date of this judgment, I conclude that the defendant did act in disregard of the plaintiff's rights but I find that his conduct was not so flagrant as to justify an award of punitive damages in addition to the compensatory damages awarded, especially having regard to the element of aggravated damages in that award. I consider that the award of general damages is adequate to punish the defendant for his conduct, to mark the Court's disapproval of such conduct and to deter him from repeating it."

[30] Mr Mitchell raised three arguments and I will deal with each in turn.

[31] He said that the learned judge had wrongly found that the appellant's conduct was not so flagrant as to justify an award of punitive damages.

[32] The judge here referred first to s 28 of the Defamation Act which provides:-

> "In any proceedings for defamation, punitive damages may be awarded against a defendant only where that defendant has acted in flagrant disregard of the rights of the plaintiff."

[33] It seems to me that when the judgment is read in context, the judge was not saying that he had no jurisdiction to make an award of exemplary damages. Indeed, given the findings made against Mr McSkimming, it is difficult to see how he could have held this. A person making allegations of disgraceful conduct against another which he does not believe to be true is plainly acting with flagrant disregard for that person's rights. Rather, as I have already indicated, I think that what he meant was that the behaviour was not so bad as to warrant punishment additional to that imposed by the award of general damages.

[34] The second complaint relates to the reference made by the judge to the fact that there was no financial gain which I think, in company with Mr Mitchell, is probably an indirect reference to *Rookes* v *Barnard* [1964] AC 1129.

[35] Mr Mitchell suggested that this meant the judge was inappropriately taking into account restrictive principles of English law applicable to the granting of exemplary damages which do not apply in New Zealand. He also suggested that, in any event, the judge had taken too narrow a view of the purposes of Mr McSkimming and he referred to the well-known speech of Lord Devlin in *Rookes* v *Barnard*.

[36] Where there has been a gain, financial or otherwise, from the commission of a tort, such gain can be stripped away from the tortfeasor by an award of exemplary damages. That, in essence, was what I think Lord Devlin was talking about. Here there plainly was no gain, whether financial or otherwise. So the point made by the judge was relevant although perhaps it did not need to be made as given, as I have said, that it was clear that Mr McSkimming had not made any gain, financial or otherwise. The reference does not imply that the judge dealt with the case on the basis of principles of English law as to the availability of exemplary damages. The judge specifically directed his attention to the New Zealand statutory provision which governed the case, that is s 28, Defamation Act.

[37] The third issue raised by Mr Mitchell was the contention that the judge was wrong to hold that the award of compensatory damages was sufficient to punish the appellant.

[38] The approach of the judge was to inquire whether some punishment was required which was additional to the punishment implicit in the award of general damages. This is entirely orthodox, *cf Taylor* v *Beer* [1982] 1 NZLR 89. Mr Mitchell said that the general damages award of $12,000 was a very modest award. That may be so and, indeed, I rather think that Mr Mitchell is right. But this submission was really a challenge to the award of compensatory damages which was not in itself challenged on appeal.

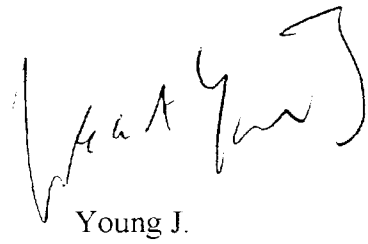
[39] Whether any additional element of punishment was required was quintessentially a matter for the trial judge. In this case, the award of $12,000 was accompanied by a requirement to pay costs of $5,500 and disbursements and witnesses expenses of approximately $2,700. As well Mr McSkimming has a

liability for his own legal costs of around $10,000. So this foolish letter has or will cost Mr McSkimming, who I gather is 70 and is, as I have said, a superannuitant, around $30,000. In those circumstances, the conclusion of the judge that he should not award exemplary damages was one which was fairly open to him.

CONCLUSION

[40] In those circumstances, I dismiss the appeal and cross-appeal.

[41] There will be no award of costs.



Young J.

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