IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2000-485-854

BETWEEN	P E C DOONE First Plaintiff
AND	R J DOONE (FORMERLY KNOWN AS R J JOHNSTONE) Second Plaintiff
AND	FAIRFAX NEW ZEALAND LIMITED Defendant

Judgment: 6 July 2005

JUDGMENT ON COSTS OF MILLER J

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[1] The plaintiffs discontinued this defamation proceeding on the eve of trial. The defendant moves for costs.

[2] There was no dispute that, the plaintiffs having discontinued, the defendant is prima facie entitled to costs under Rule 476C, subject to the Court's discretion in respect of costs under Rule 46. The relevant principles were summarised in *Oggi Advertising Limited v MacKenzie* [1998] 12 PRNZ 535:

> The normal principles as to costs are as stated in North Shore CC v Local Government Commission (1995) 9 PRNZ 182, namely:
>
> > (1) In terms of r 476 there is a presumption that a discontinuing plaintiff will be liable for costs;
> >
> > (2) Where, as is the usual case, the Court is unable to determine what would have been the outcome of the trial that never took place, it will not strive to speculate as to the answer as determining costs;
> >
> > (3) The presumption is, nonetheless, rebuttable in the exceptional case where the merits are clear but subject always to the overriding provision of r 46 that:

> "all matters relating to the costs of or incidental to any proceeding or any step therein shall be in the discretion of the Court."

[3] There consensus ended. Both parties appealed to the Court's discretion, in the defendant's case to award indemnity costs and in the plaintiffs' to order that costs lie where they fall. In support of their positions, both parties filed very lengthy memoranda referring to briefs of the evidence that was to have been led at trial. The defendant argued that I should award indemnity costs of $226,028.90, relying on an open offer of an apology and $10,000 towards costs, the proposition that it would have succeeded at trial, and the plaintiffs' conduct of the litigation. The plaintiffs claim that discontinuance was justified by the late disclosure that the defendant had used the Prime Minister to verify its story before publication. They say that they were misled as to her role in the matter. Somewhat inconsistently, they do not accept that the defendant's recourse to Ms Clark to verify its story affected the strength of their case against the defendant.

The merits

[4] In *Oggi Advertising*, Baragwanath J held that in fixing costs on a discontinuance the Court will not speculate as to the outcome where, as is usual, it cannot decide what would have been the outcome of the trial. In *North Shore City Council v Local Government Commission* [1995] 9 PRNZ 182, Tompkins J held that there is an exception to the rule where the merits are "so obvious" that they should influence the Court's decision on costs.

[5] The present application illustrates the wisdom of that approach. The proceeding concerned articles published in the Sunday Star Times on 16 and 23 January 2000. The offending article imputed to Mr Doone misuse of his office as Commissioner of Police to dissuade a constable from breath testing Ms Johnstone. It suggested he said "that won't be necessary". The defendant later admitted that he did not say that, but it alleged his conduct in leaving the car Ms Johnstone was driving and approaching the constable amounted to much the same thing. For present purposes it is a reasonable assumption that the publication was defamatory, a point which is significant because it invites hesitation before concluding that the

plaintiffs were not justified in taking action. The defence focused on truth and qualified privilege.

[6] With respect to the first of these defences, the plaintiffs say the evidence would show both Mr Doone and Ms Johnstone were well under the breath alcohol limit and that Mr Doone said and did nothing to dissuade the constable from administering a breath test. He did not know of any road safety reason why the car would be stopped, which explains why he got out to ask what the problem was. The constable, who was to have given evidence for the plaintiffs, would say he had a breath screening device with him in case he needed it but had no intention of using it and did not mention breath testing to Mr Doone. Mr Doone would say he did not see the device.

[7] This cursory sketch suffices to show that I am in no position to say, on the proposed evidence in chief, that the defendant obviously would have established the truth of its allegation that the Commissioner had misused his office. Contrary to the defendant's submission, the question for trial would be whether his conduct was calculated to cause the constable to desist, and not merely whether it had that effect. It is an intensely factual question that could be resolved only after hearing the evidence, including cross-examination.

[8] With respect to the defence of qualified privilege, all that need be said is that it involved an extension of the defence recognised in *Lange v Atkinson* [1998] 3 NZLR 424. That defence applies to national politicians and those with immediate aspirations to that status. The defendant would have asked the Court to extend it to other public officials. It cannot be said that the defence would obviously succeed having regard to the competing values that must be weighed when considering whether extension is justified.

[9] The defendant pointed to the discontinuance in support of its argument that it would have succeeded at trial. It is true that discontinuance suggests lack of confidence in the plaintiffs' case, and the explanations advanced on their behalf are unconvincing. It is not clear why disclosure that the defendant relied on the Prime Minister to verify the story before it was printed in the Sunday Star Times should

cause them to discontinue. The plaintiffs do not concede that it affected the strength of their case. They say disclosure of her involvement led them to recognise that they had a cause of action against her, but that does not explain the failure to pursue the newspaper. The other reasons persisted with concerned costs of the six day hearing and the inconvenience to the 20 witnesses who were to be called. Neither is plausible in circumstances where the plaintiffs maintain they intend to launch a new proceeding against Ms Clark.

[10] It does not follow, however, that I should conclude the plaintiffs were sure to fail. Perhaps they did decide that Ms Clark was a more deserving target. Her involvement would seem to be relevant to the question of privilege, where the plaintiffs' case was plainly arguable. Or it may simply be, as the defendant's counsel submitted, that the plaintiffs were in disarray. In fairness to the plaintiffs, it must be said that I am left with an impression that they have been ill-served by their advisors, who seem to have left trial preparation to the last moment. In those circumstances, the discontinuance is ambiguous. Having regard to my observations above, I am not prepared to treat it as confirmation that the plaintiffs would have failed on the merits.

The settlement offer

[11] The defendant relied on an open offer of settlement made by letter of 17 April 2000, some three months after the initial publication. It offered to meet the plaintiffs' reasonable costs up to $10,000 and to publish a correction withdrawing the statement that Mr Doone had said "that won't be necessary". It duly published a correction to that effect after the plaintiffs declined to settle. Their explanation was that the correction did not address the inference in the original article that Mr Doone deliberately obstructed the constable after the latter had conveyed an intention to breath test Ms Johnstone. The defendant declined to amend the apology in the matter suggested. There were further settlement discussions in April 2005, shortly before trial. The plaintiffs offered to accept $100,000 and costs together with an apology. Negotiations again broke down over the question whether the apology should extend to the inference that Mr Doone misused his position.

[12] An open settlement offer may be relied upon to justify an award of indemnity costs in a defamation action, relying on Rule 48C(3)(b)(v), which allows the Court to order a party to pay increased costs if it failed without reasonable justification to accept an offer to settle and, by analogy, on s.43(3) of the Defamation Act: *Parris v Television New Zealand* [1999] 13 PRNZ 327.

[13] However, the apology failed to deal with the sting of the alleged defamation, namely that Mr Doone had misused his office. In the circumstances, it is unsurprising that the matter did not settle. To find that the plaintiffs ought to have accepted the offer is to accept the defendant's argument that its defence of truth must have succeeded.

Conduct of the litigation

[14] The defendant suggested that the plaintiffs must take responsibility for the five years that the case took to reach trial, and argued that the delay led to increased costs. The latter proposition is unexceptional. However, correspondence produced by the plaintiffs' solicitor suggests that the delay was by no means one-sided. I am in no position to conclude that the plaintiffs rather than the defendant are accountable for it.

Conclusion

[15] The defendant has over-reached itself by applying for indemnity costs in circumstances where it had no realistic prospect of showing, in the context of a costs application, that it must have succeeded at trial. However, I am not prepared to direct that costs lie where they fall. I do not find plausible the justifications for late discontinuance advanced by the plaintiffs, still less that they warrant departure from the usual rule. Costs will follow the discontinuance and be fixed according to scale.

Calculation of scale costs

[16] The defendant sought costs of $83,875.25, inclusive of disbursements at $6,260.25 and GST. The plaintiffs contended that the appropriate award ought to be $48,730. The plaintiffs acknowledge that certain steps, such as preparation of the defence and evidence, justified awarding costs on a category 3C basis, recognising the special skill and experience necessary for the conduct of defamation proceedings.

[17] The table below sets out the work in respect of which the defendant seeks costs together with the days I have allowed and the appropriate scale. GST must also be paid. I note that the defendant's actual costs in relation to individual items may be less than the scale costs in a very few instances, but the amount awarded is substantially less than actual costs overall, and is reasonable in my view.

No	Schedule 3 Ref	Description	Days Allowed	Scale Allowed	Total Cost Allowed
1.	2	Commencement of defence by defendant (receiving instructions, researching facts and law, and preparing, filing and serving statement of defence …)	6	3C	12,900
2.	3.6	Pleading in response to other party's amended pleading (payable regardless of outcome, except where formal or consented to) - amended defence to fourth amended statement of claim	2	3C	4,300
3.	4.5	List of documents on discovery (includes formal discovery and subsequent informal discovery)	6	2B	8,700
4.	4.6	Production of documents for inspection	3	2B	4,350
5.	4.7	Inspection of documents (of the plaintiffs' and of the non-party LTSA)	6	2B	8,700

No	Schedule 3 Ref	Description	Days Allowed	Scale Allowed	Total Cost Allowed
6.	4.10	Filing and serving memoranda in anticipation of judicial conference or mentions hearing joint memoranda and memoranda dated 12 May 2000, 15 September 2000, 7 December 2000, 6 May 2002, 10 June 2002, 10 May 2004, 28 January 2005, 9 March 2005, 19 April 2005, 20 April 2005 and 25 April 2005	9 x 0.4	2B	7,740
7.	4.17	Appearances at mentions hearings or call over conference 16 May 2000, 1 August 2000, 21 February 2001, 9 May 2001, 5 June 2001, 13 April 2005 and 26 April 2005	7 x 0.2	2B	2,030
8.	4.14	Preparation for hearing of defended interlocutory application (excluding summary judgment application) - opposition to application for an adjournment	0.5	3C	1,075
9.	4.15	Appearance at hearing of defended interlocutory application (excluding judgment summary application (for sole or principal counsel))	0.5	3C	1,075
10.	7.3	Defendant's preparation of written statements of evidence to be used at hearing	4	3C	8,600
11.	7.4	Defendant's preparation of list of issues and authorities, selecting documents for common bundle of documents, and all other preparation	4	3C	8,600
				TOTAL	**$68,070.00**

12.		**Disbursements comprising:** Court filing fees (statement of defence $65; three amended defences @ $90 each, $270.00)			335
		• Morley Security & Investigation Group: (fees locating and serving subpoena on Constable Haldane) • Roger N Taylor invoice 20 June 2005 re review lost income claim (to be invoiced to defendant this month as a disbursement			5,091.75 833.50
				TOTAL	**$6,260.25**

Briefs of evidence

[18] The defendant filed copies of the intended briefs of evidence in support of its application and asked that they not be available for searching as part of the Court file. The plaintiffs resisted. I accept that some of the material is sensitive and not all of it appears to be in the public domain. None of it has been tested. There will be a direction that the volume entitled 'Bundle, Part III' be returned to the defendant's solicitors.

F Miller J

Solicitors:
Phillips Fox, Wellington for Plaintiffs
Izard Weston, Wellington for Defendant