IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CIV 2004-419-001366

	BETWEEN	MARGARET TENNANT Appellant
	AND	DOUGLAS GILVERT SHAW SIMES Respondent

Hearing: 16 May 2005

Appearances: J Goodall for Appellant
C Simes for Respondent

Judgment: 20 May 2005

JUDGMENT OF SIMON FRANCE J

This judgment was delivered by Justice Simon France on 20 May 2005 at 12:00 p.m. pursuant to r540(4) of the High Court Rules 1985.

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Counsel:
Cheryl Simes, Barrister, P O Box 4265, Hamilton

[1] This appeal concerns the decision of Wolff DCJ to direct that costs lie where they fell in relation to defamation proceedings. Two of the original three parties to the proceedings appeal and cross-appeal that decision.

Background

[2] The respondent is a senior lecturer in the History Department at Waikato University. The University had appointed two outside academics to review the research and teaching programmes of the History Department with a view to providing guidance on how the Department might better position itself in a "research funding related environment".

[3] The appellant is one of the two appointed reviewers. She is a Professor of History at Massey University.

[4] The reviewers report was e-mailed by the acting Dean of Arts to members of the History Department on 21 November 2003. The e-mail:

- requested notification of any errors of fact in the report;
- invited formal responses that would be appended to the report; and
- invited informal responses which would not be part of the appendices.

[5] Dr Simes was concerned over two parts of the report that related to him. Dr Simes approached Dr Simpson who was Acting Dean of the Arts Faculty. It is clear there was some discussion between them. As a result, on 1 December Profession Simpson again e-mailed the History Department, this time stating that the report was confidential and inquiring if it had been passed on to anyone else.

[6] On the same day, Dr Simes responded to this e-mail by e-mailing Professor Simpson at 6:33 pm. Dr Simes thanked Professor Simpson for his response and said, inter alia:

> … As I pointed out however I am intending to seek a Court order to ensure legal accountability, since the review document has already been disseminated and may well be further FURTHER (sic) disseminated before the issues are resolved. I will be doing so tomorrow. I would prefer that this be done with consent, …, but if necessary will proceed alone … Speed is of the essence in the circumstances, so please let me know, as promised, whether I am moving with or without University acquiescence …"

[7] Profession Simpson replied at 8:45 am the next morning:

> This is to confirm our discussion yesterday that you should proceed with your promised action which we will not be contesting.

[8] Seemingly on this basis, the next day Dr Simes obtained ex parte orders injuncting the two defendants from publishing or disseminating "any report" that contained the two passages or statements to like effect. It is not necessary for this judgment that I provide the detail. Since the parties have agreed to excisions, I do not set the passages out.

[9] I note that at this point Professor Tennant was seemingly totally unaware of any of these events. She was served with the interim order on 12 December 2003.

[10] There then was various negotiations between the University and Dr Simes. There is no record of Professor Tennant's involvement in these or otherwise. Events reached a stand-off in February 2004 with each party writing to the other with final positions and inviting a response. Neither letter referred to the other's, nor were any responses forthcoming.

[11] Two months later, on 29 April 2004, the University filed an application for recission of the injunction. A flurry of activity followed and on 6 May Wolff DCJ recorded that an agreement had been reached whereby a second version of the report would be circulated with agreed deletions. All defences were reserved.

[12] On 12 May statements of defence were filed by both defendants. Professor Tennant also filed an affidavit that saw the breach of confidence claim discontinued on 19 May.

[13] On 21 May undertakings concerning non-publication of earlier drafts, and destruction of the same, were filed. On 11 June 2004 a Notice of Discontinuance was filed. It reads:

> The Plaintiff hereby discontinues this proceeding. This discontinuance is without prejudice as to the issue of costs, which are sought by all three parties.

Costs

[14] The plaintiff filed a memorandum dated 11 June 2004, the same date as the discontinuance. It sought above scale costs.

[15] Both defendants filed memoranda on 15 June 2004. Each sought above scale costs. The second defendant, in particular, placed great store on the presumption in District Court Rule 408C that a respondent will be entitled to costs on discontinued proceedings. Both referred to the absence of any reference to the Rule by the plaintiff.

[16] The plaintiff filed a response addressing the Rule 408C arguments. It was accompanied by a request for leave to file the response. The leave application said that Rule 408C had not been referred to because it:

> did not appear to be in point given the way this proceeding was brought to a conclusion, and which was known to the Court.

[17] The defendants filed a joint reply opposing the plaintiff having leave to file the further submission. They submitted there was nothing in the way the proceedings were discontinued that suggested Rule 408C ought not to apply.

[18] Judge Wolff issued his costs ruling on 23 August 2004. In that he gave leave to file the extra submissions. He then addressed the Rule 408C argument:

> [5] I note the submissions concerning the effect of Rule 408C. In the present case – at least as I understand it from hearing counsel at the telephone conference – costs were to remain a live issue.

[19] Having ruled Rule 408C inapplicable, His Honour then declined to enter the merits of the case or to determine if the words in the report were defamatory. He

concluded finality was the best approach. He considered any award of costs he made would be arbitrary given the state of the material at the time proceedings were discontinued. He accordingly determined that costs should lie where they fall.

Appeals

[20] It is appropriate to deal first with the cross-appeal. It was advanced by Mrs Simes on the basis that:

- the learned Judge could and should have found the words were defamatory;

- if he had, it is clear that costs would then have been awarded to Dr Simes. This is because the Costs ruling is silent as to the suggested defences, and by implication this silence means that His Honour had rejected the defences as lacking merit;

- in other words, Dr Simes would plainly have succeeded and accordingly should get costs.

[21] I reject the middle step of this submission. There is absolutely nothing in the costs decision that would allow an inference of that kind to be drawn. At the point in time which proceedings were discontinued, the words of the report were the only concrete item before His Honour. There were affidavits advancing viewpoints, but these were untested and his Honour could not possibly have determined the merits of the matter. The Judge noted that the plaintiff had obtained the injunctive relief sought, but that he could not venture into the merits of the defamation proceedings to an extent that would support an award of costs to the plaintiff.

[22] I also record Mrs Simes' submission that I should infer that Professor Tennant was an obstacle to the resolution reached. This is because a suggested alternative wording of the Report was not agreed to. I am advised the ultimate compromise was that the passage was removed altogether. I am not prepared on the material before me to draw that inference sought.

[23] It is not necessary for me to determine the issue of whether the words were defamatory. I do note that some of the glosses advanced by Mr Goodall seemed totally implausible to me. There was merit in Mrs Simes' submissions concerning the obvious meaning of the words.

[24] I agree the Judge was correct not to speculate. The cross-appeal is dismissed.

[25] The appeal is more difficult. It turns initially on the applicability of Rule 408C. Obviously, if that rule is applicable, the appellant has the advantage of a strong presumption.

[26] It is plain the parties had a different view as to what the effect was of the statement in the Notice of Discontinuance, that discontinuance was "without prejudice as to costs". Mrs Simes, who was not counsel at the time, submits it means that costs are at large, and that the fact of discontinuance is not to be held against the plaintiff. This is consistent, she submitted, with the fact that discontinuance occurred only because the excisions sought by the plaintiff were made. One purpose of the proceedings was fulfilled. The appellant on the other hand submits the expression simply means that costs were not agreed, and were to be determined by the Court according to the normal rules, including Rule 408C.

[27] I have earlier set out para [5] of the decision under appeal. My reading of that is that Wolff DCJ was of the view that "without prejudice" was intended by the parties to mean that costs would be determined under a broad discretionary approach. I also read para [5] as saying that this interpretation reflected His Honour's understanding from the discussions he had had with counsel at the time.

[28] I take the view that "discontinuance without prejudice as to costs" must mean that costs are not to be determined against the normal presumption that penalises a person for discontinuing. Without prejudice means more, I consider, than just saying costs are still to be settled. Accordingly, I would have agreed with the District Court's assessment on the basis of the words of the Notice. I also note, however, the advantage His Honour had in terms of familiarity with the file, and in terms of

discussions with then counsel. I note neither counsel appearing before me were the counsel then involved.

[29] Notwithstanding the absence of the presumption, there still remains a need to consider the appeal. The inclusion by the plaintiff of Professor Tennant in the proceedings is somewhat questionable. The primary purpose of the proceedings was to get the document changed. I agree with Mr Goodall's proposition that Professor Tennant could simply have been asked for an undertaking in relation to distribution of the report. There was no apparent need to obtain ex parte orders against her. On the other hand the whole interim relief episode does not seem to have particularly involved Professor Tennant or affected her.

[30] The more substantive issue is the appellant's submission that defamation proceedings against Professor Tennant were bound to fail. A defence of honest opinion was plainly open to Professor Tennant to argue, and Mr Goodall relied also on qualified privilege. From a distance, one could imagine a likelihood of success, but experience teaches that assumptions are dangerous until the evidence is heard and tested. I am satisfied that the relevant factual issues were sufficiently unclear to make it open to an experienced Judge to conclude an award of costs on this basis would be arbitrary.

[31] Accordingly, the appeal is also dismissed. Neither party is entitled to an award of costs on this appeal.

Addendum

[32] I was surprised to discover in the course of preparing these reasons that a relevant appeal by Dr Simes to the Court of Appeal was still extant. In brief, Potter J granted Professor Tennant leave to bring this appeal. Dr Simes appealed that ruling to the Court of Appeal against that extension of time. Profession Tennant then sought to strike the appeal out on the basis that it was without jurisdiction. On 28 April (CA 257/04) the Court of Appeal dismissed the strikeout, holding that there was jurisdiction to appeal. That means that the appeal by Dr Simes is still in existence. If successful, this appeal could not take place. Dr Simes wishes to know

the outcome of my decision before deciding whether to appeal the decision of Potter J.

[33] I was not aware during the hearing of the existence of the appeal. I requested memoranda about this. It appears counsel believed from the past history of the file that I would have known. Counsel wish me to issue judgment. Approaches may differ, but I admit I would have been reluctant to proceed with the hearing if given an opportunity to address the point, but in the circumstances I am issuing my ruling as requested.

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Simon France J