IN THE COURT OF APPEAL OF NEW ZEALAND

CA251/06
[2007] NZCA 516

BETWEEN	BRIAN MONTGOMERY SALMON Appellant
AND	LYNETTE ANNE MCKINNON Respondent

Hearing: 16 October 2007

Court: William Young P, Glazebrook and Robertson JJ

Counsel: J G Miles QC and D H McLellan for Appellant
M E J Macfarlane for Respondent

Judgment: 20 November 2007 at 11 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B Mr Salmon is to pay Ms McKinnon costs of $12,500 and usual disbursements.

REASONS OF THE COURT

(Given by William Young P)

The appeal

[1] Brian Salmon maintains that an email written by Lynette McKinnon ostensibly about a company he controls was defamatory of him. He sued her in the High Court seeking a declaration under s 24 of the Defamation Act 1992 and

solicitor and own client costs. In a judgment delivered on 26 October 2006, Allan J dismissed the claim and ordered Mr Salmon to pay Ms McKinnon costs on a 2B basis. Mr Salmon now appeals.

[2] The appeal raises four issues:

(a) Was the email published of and concerning Mr Salmon?

(b) Was the email defamatory of Mr Salmon?

(c) Would relief be appropriate if defamation were established?

(d) What orders as to costs should be made?

[3] We will discuss the appeal by reference to these questions but, before we do so, it is necessary to say something more about the background.

Background

[4] Mr Salmon runs The $2 Shop Ltd, a company which owns the $2 Shop brand and franchise. There are $2 Shop retail stores throughout New Zealand operated by 34 franchisees. Ms McKinnon was the principal behind Two Bob Ltd, the franchisee for the Hastings area.

[5] Under the franchise agreement, which all the franchisees had entered into, the franchisees were required to pay to The $2 Shop Ltd an advertising levy (calculated by reference to gross sales). The $2 Shop Ltd in turn was required to:

> use such funds solely for the purpose of advertising as determined by the Franchisor.

There were mutual obligations between The $2 Shop Ltd and the franchisees to consult regularly on advertising but The $2 Shop Ltd had:

> the final approval as to what advertising will be done by the Franchisor on behalf of the Franchisee.

[6] In May 2003 The $2 Shop Ltd (using its own money and not the advertising fund) bought a 2002 Lamborghini motor vehicle. Mr Salmon announced this purchase to the franchisees in letters which were expressed in this way:

> **Re: Promotions**
>
> This letter is to advise that The $2 Dollar Shop Limited has purchased a Lamborghini 2-seater motor car.
>
> Coloured gold, it will go well with our corporate blue and yellow and we have secured the personalised plate:
>
> THE
> 2DOLAR
> SHOP
>
> The photographs below show the unusual, eye-catching design of the vehicle. [Photographs of the car were on the letter]
>
> This vehicle will be available for some promotional purposes and should be a real crowd puller.
>
> The car will be used at the Franchising Exposition which is going to be held at Epsom Show Grounds on Friday15th, Saturday 16th, Sunday 17th August 2003.
>
> Please contact Jo-Anne to co-ordinate your ideas.

A letter in these terms and dated 1 July 2003 was sent to Ms McKinnon. It left her with the conclusion that the car had been purchased from the advertising fund. At least one other franchisee (Mr Robert Ferrari) thought this might be the case and wrote to Mr Salmon inquiring whether this was so. Although Mr Ferrari's letter implies that he would have not approved of such expenditure of advertising fund money, his focus was very much on operational expenses associated with the car. Mr Salmon was irritated by the inquiry and wrote back to Mr Ferrari confirming, in rather cool terms, that advertising fund money had not been used to buy the car. But despite the inquiry from Mr Ferrari showing that there was a potential for the franchisees to misunderstand the letter from The $2 Shop Ltd, Mr Salmon did not write to the franchisees generally to clarify the position as to how the Lamborghini had been purchased.

[7] Until insurance difficulties arose, the car was used for some promotional activities associated with the franchise network. Any other use of the car must have been for the purposes of The $2 Shop Ltd given that Mr Salmon was adamant that he had never used the car for private purposes.

[8] In August 2005, there were discussions within the franchise network about promotional activity and, in particular, about a promotion associated with the Good Morning Show. This provided the context for an email of 24 August 2005 from Ms McKinnon to 15 other franchisees:

> Subject: Re: Re Good Morning Show
>
> Hi everyone
>
> Before anything else is done I believe we should sell the Lamborgini [sic] that was purchased from the Advertising Fund. That product has done nothing to enhance the sales of any of our businesses and put the funds from it back into the Advertising Fund.
>
> I look forward to the opportunity to discuss on a group basis some of the issues with regard to turnover etc but I don't think any of it should diminish what Steve has done since he has been on board with the sourcing of great stock over recent months that has sold well in just everyone's shop and the promotion of some fantastic lines like the $2 wool that you couldn't buy anywhere else for less than $2.95, disposable cameras and the soup to name but a few and the good feedback we got from customers about the "guy doing the promotions on the Good Morning Show".
>
> Cheers Lyn

[9] Mr Salmon's solicitors wrote to Ms McKinnon on 25 August 2005 alleging defamation. Mr Salmon's concern was that franchisees who read the email would think that he had misapplied money from the advertising fund to acquire an expensive motor vehicle. The letter required an immediate retraction and threatened defamation proceedings.

[10] Ms McKinnon's solicitors responded on 26 August 2005. They referred to the letter of 1 July 2003. After referring to the use of the car for promotional purposes, the letter continued:

> 7 In these circumstances we are struggling to see how it is that Mr Salmon as an individual could possibly be defamed by the statement contained in Lyn McKinnon's email.

> 8 We have discussed the matter carefully with our client who tells us that if she is in error and you are able to demonstrate this then of course she will provide an immediate correction and apology.
>
> 9 In light however of the letter of 1 July 2003 we wonder if it is really necessary for her to do so.

[11] This produced an immediate response from Mr Salmon's solicitors. This letter confirmed that the car had been purchased otherwise than from the advertising fund. The letter noted that Mr Salmon's solicitors were considering whether there had been a breach of the franchise agreement on the part of Two Bob Ltd. Although we accept that the franchise agreement was soon to expire, the reference to the agreement added to the letter's generally threatening tone.

[12] This letter produced a further response from Ms McKinnon's solicitors of 29 August 2005 in which they said:

> 2 Until your letter was received our client had honestly believed that the car purchase was funded by the advertising levy and bank account.
>
> 3 Accepting what is now reported, that there was no connection between the advertising bank account at TSB and the $2 Shop Limited's account with Westpac, our client does retract the statement the car was purchased from the Advertising Fund. She sincerely apologises for the inaccuracies in the statement she made.
>
> 4 Please advise if you wish our client to copy this letter to the franchisees.

[13] The apology and the offer to circulate it to the franchisees were not acceptable to Mr Salmon. So his solicitors wrote back requiring an apology in more grovelling terms including an acknowledgement that Ms McKinnon had defamed Mr Salmon (in the form of an admission that the statement had "cast a dispersion [sic] upon Brian Salmon"). As well, Mr Salmon required Ms McKinnon to pay his solicitors' costs and disbursements.

[14] Through her solicitors, Ms McKinnon indicated a general willingness to meet Mr Salmon's reasonable costs and she wrote by email to all the recipients of the earlier email. This email set out the terms of the earlier email and then went on:

> 2 The solicitors for the franchisor, the $2 Shop Limited, and for Mr Brian Salmon have since complained that this statement was wrong, in that the Lamborgini [sic] was not paid for from the Advertising Fund, but from another of the Franchisor's bank accounts. In consequence I have retracted that statement and apologised to the Franchisor for the error.
>
> 3 The correct position is that the Lamborgini [sic] was purchased by the Franchisor company, see it's [sic] letter of 1 July 2003 headed "Re Promotions" to Franchisees stating amongst other things – "This vehicle will be available for some promotional purposes and should be a real crowd puller."
>
> 4 The Franchisor and Mr Salmon have also claimed that the statement was defamatory. That is not accepted, nor was it intended by me as I had honestly believed that the car was purchased from the advertising fund for promotional purposes.

[15] After further disagreeable correspondence from Mr Salmon's solicitors, defamation proceedings were issued.

[16] These proceedings came on for trial before Allan J in June last year. Amongst the witnesses were Mr Ferrari who, gave evidence for Mr Salmon as to his response to the email, and Ms Komarowski (the Hutt Valley franchisee) who said that she had not read the email as conveying a meaning which was defamatory of Mr Salmon.

[17] Broadly what was in issue before Allan J is also in issue before us. So it is convenient to refer to his findings as we address the issues raised by the case.

Was the email published of and concerning Mr Salmon?

[18] The Judge found in favour of Mr Salmon on this issue. He reviewed the evidence as to how the operations of The $2 Shop Ltd were conducted and the number and roles of staff. He also discussed the awareness of the franchisees as to Mr Salmon's control of The $2 Shop Ltd. He then concluded:

> [46] … [O]verall there could be little doubt that the purchase of this vehicle, and the way it was subsequently to be used, arose from decisions which only Mr Salmon could make. If the car had been purchased from the advertising fund, then that could only have resulted from a decision taken by Mr Salmon. There is nothing to suggest that anyone else within the small group of staff at The $2 Shop would have had that authority. All of this must

> have been within the knowledge of franchisees who received Ms McKinnon's e-mail.
>
> [47] I therefore accept Mr Miles' submission that:
>
> > … the defendant's words in her e-mail, 'Before anything else is done I believe we should sell the Lamborghini that was purchased from the Advertising Fund', was, to ordinary readers, with the knowledge of the franchisees, a reference to Mr Salmon as he was the only person who could conceivably be responsible for the purchase of the car using advertising levies in the first place.
>
> [48] I find that reasonable franchisees who received the e-mail could, and would, identify Mr Salmon as the person to whom the impugned words were referring.

[19] At the conclusion of the submissions for Mr Salmon before us we indicated to Mr Macfarlane, counsel for Ms McKinnon, that we did not need to hear him in relation to the second issue - an indication which carried the necessary collorary that the appeal would be dismissed. We also indicated to him that we did not particularly want to hear him on the first issue, essentially because we were of the view that the Judge was right. Mr Macfarlane, given that indication and some other, encouraging, suggestions as to costs, understandably did not pursue this aspect of the case.

[20] We think that he was right to take this course. His written submissions did not get to the heart of the issue. Mr Salmon would necessarily have been involved in a decision to use the advertising fund to purchase a car. The possibility that others might also have had a role to play does not diminish the reality that franchisees reading the email and concluding that the car had been purchased from the advertising fund would also conclude that Mr Salmon had at least substantial responsibility for the relevant decisions. So by innuendo, the email was published of and concerning Mr Salmon.

Was the email defamatory of Mr Salmon?

The defamatory meanings alleged

[21] On this aspect of the case, Mr Salmon also relies on an innuendo. The facts underlying the innuendo are primarily that those who read the email would

necessarily be aware of the structure of the franchise system operated by The $2 Shop Ltd and the purpose of the advertising fund.

[22] The statement of claim alleged defamatory meanings as follows:

> The plaintiff had caused The $2 Shop Limited to purchase a Lamborghini motor car using money in the Advertising Fund when the purchase involved:
>
> (1) a dishonest use of franchisees' funds;
>
> (2) a misuse of franchisees' funds in that the purchase was:
>
> (a) for the plaintiff's own purposes; and/or
>
> (b) against the interests of franchisees; and/or
>
> (c) imprudent and extravagant.

The reasoning of the Judge

[23] The Judge held that the email did not bear any of the meanings alleged.

[24] In reaching this conclusion he referred to the two franchisees who gave evidence as to their reactions to the email:

> [53] Two independent franchisees were called to give evidence which included their reaction to Ms McKinnon's e-mail, and so was directed at the claimed innuendoes. Such evidence is not inadmissible, but it is not determinative because the question for the Court is as to whether **some** of the franchisees, acting reasonably, might construe Ms McKinnon's e-mail in the manner for which Mr Salmon contends: *Hough v London Express Newspapers Limited* [[1940] 2 KB 507 (CA)] at 515-516.
>
> [54] Mr Ferrari professed to have been shocked by Ms McKinnon's e-mail, but I suspect that that was because the suggestion that the Lamborghini might have been purchased out of the advertising fund was inconsistent with the assurance which he had been given two years earlier by Mr Salmon. On the other hand, Ms Komarkowski, a Hutt Valley franchisee, was unconcerned at the suggestion that the Lamborghini might have been paid for out of the advertising fund, provided that it was being used as a promotional tool. She said that control of the advertising fund rested with The $2 Shop, and decisions about the spending of money from the advertising fund were for The $2 Shop and not for franchisees. Indeed, her approach to the advertising fund bordered on the fatalistic. She had formed the view that suggestions and proposals made in the past by franchisees had fallen on deaf ears, and there was little that franchisees could do to influence the advertising spend. Nor did she see the point in taking any great interest in the matter, given that advertising decisions rested solely with The $2 Shop.

> She did however say that she would not have regarded it as appropriate for the car to have been purchased from the advertising fund, if it was intended solely for Mr Salmon's personal use. Her evidence tends to reinforce Mr Salmon's evidence that franchisees, whilst concerned about marketing generally, made no inquiry about management of the fund itself.

[25] The Judge then set about putting himself in the position of the franchisees who received the letter:

> [57] The whole thrust of Mr Salmon's letter was that the Lamborghini would be a unique and effective marketing tool. That being so, it is likely that reasonable franchisees would assume that the vehicle was purchased from the advertising fund. The cost of the car was not revealed to franchisees. At trial Mr Salmon said that the purchase price was $360,000. That figure is more than 50% of the total of the advertising fund for the 2004-5 year, and so would have represented a very significant item of expenditure if the car had been purchased from the fund.
>
> [58] Not all franchisees would necessarily have been aware of the precise cost of such a vehicle. Ms Komarkowski certainly was not. Even if they did know the price, reasonable franchisees would have been likely to accept that the decision was ultimately for the franchisor to make, even though those franchisees might not have made the same decision themselves, and might even have disagreed with it. That conclusion is supported by the apparent disinterest of franchisees as a group in the detail of advertising expenditure.
> …
>
> [59] For some months after the purchase of the car it was regularly used for marketing purposes. There is evidence of a number of trips throughout the North Island. Early in 2004 insurance difficulties precluded anyone but Mr Salmon from driving the car but there is no evidence that he thereafter used it for private purposes, and indeed Mr Salmon himself denied doing so.

[26] The Judge noted that not a single franchisee had reacted to the email by challenging Mr Salmon or questioning the assumed purchase of the Lamborghini. He then went on:

> [61] The absence of debate or expressions of concern by franchisees in August 2005, is a matter which it is proper to take into account in assessing the sense in which recipients read Ms McKinnon's e-mail. In many (if not most) cases, evidence of the reaction of individual readers would be of limited assistance for the reasons explained in *Hough*: the fact that one or two witnesses thought the words complained of did not carry the meanings for which a plaintiff contends, does not justify a conclusion that all readers would be of the same view.
>
> [62] Here, however, the position is different. Recipients were few in number and they were all of the same class, in the sense that all were franchisees, all had broadly the same relationship with Mr Salmon, all were parties to the same form of franchise agreement, and all had participated in a prior correspondence which dealt with marketing and advertising issues.

[27] The Judge expressed his conclusions in the following way:

> [63] The absence of franchisee reaction is, in my view, unsurprising. Final decisions about utilisation of the advertising fund were for The $2 Shop alone, and not for franchisees. The franchisee group had opportunities to offer their ideas and initiatives to the franchisor, with respect to marketing and advertising, but both contractually and in fact, the franchisees accepted that the final decision rested with the franchisor.
>
> [64] In my view, reasonable informed recipients of Ms McKinnon's e-mail would take it to mean simply that, whatever the justification for purchase of the vehicle from the advertising fund in 2003, it had not lived up to marketing expectations since, and a sensible decision would be to sell it and to deploy the proceeds of sale in more productive activities. A reasonable informed reader would not, in my view, take the e-mail to mean or imply that the decision to purchase the car (as assumed by Ms McKinnon, from the advertising fund) reflected adversely on Mr Salmon in any of the respects pleaded by him at paragraph 7 of his statement of claim.
>
> [65] That is not to say that some franchisees might not have disagreed with a decision to purchase the Lamborghini from the advertising fund. There may well have been strongly held views on any such purchase, but in all the circumstances I am unable to conclude that a reasonable franchisee recipient of Ms McKinnon's e-mail would take her publication to carry any of the innuendoes pleaded.

The arguments advanced on behalf of Mr Salmon

[28] Mr Miles QC for Mr Salmon suggested that the conclusion of the Judge was, on the face of it, surprising. He contended that the Judge, in company with Ms McKinnon and Ms Komarkowski, was saying that Mr Salmon:

> … could do as pleased with the advertising fund. If he chose to buy an expensive sports car from funds which were to be used solely for the purpose advertising the $2 Shop franchise, he was within his rights and no adverse inference could be taken about the propriety of doing so.

[29] *Hough v London Express Newspapers Ltd* [1940] 2 KB 507 (CA) supports the proposition that in legal innuendo cases, the innuendo witnesses, having proved their special knowledge, can be asked what they made of the alleged defamatory statement. Mr Miles accepted that that this was the effect of *Hough*. But he maintained that this is contrary to principle and that in any event the evidence was of limited materiality and had the potential of confusing the judicial function. On a slightly different tack, he complained that Mr Ferrari's evidence had been discounted by the Judge because of the events of 2003 but made the point that Mr Ferrari's

reaction in 2003 indicated concern at the possibility that the advertising fund had been used to buy the car.

[30] He also argued that the evidence of Ms McKinnon and Ms Komarkowski as to promotional use of the car ought not to have been brought into account without evidence to the effect that all franchisees were aware of such use.

[31] Mr Miles maintained in his written submissions that the lack of contemporary complaint by individual franchisees:

> does not inform the Court of anything relevant and … is subject to such uncertainty that it should have been disregarded. For example the Court had no idea why franchisees might not have complained. There was no evidence on this. There, was, however, evidence that the appellant's solicitors wrote to the respondent the day after the email. Other franchisees might have heard of this, but the Court simply did not have a foundation for relying on this factor.

This point was developed in his oral submissions.

[32] We will endeavour to deal separately with the primary threads of the arguments advanced by Mr Miles.

Was the Judge's conclusion surprising?

[33] On the evidence, Mr Salmon did not use the car for private purposes. There is no evidence to suggest that the franchisees thought that he did so. So the email cannot fairly be construed as suggesting that Mr Salmon had used the advertising fund either dishonestly or for personal purposes. Further, although the wisdom of purchasing such a vehicle for promotional purposes would have been open to question, it is by no means easy to extract from the email the meaning that this would have amounted to a "misuse of franchisees' funds". Indeed given that the control of the fund was vested in the franchisor, it is far from clear that franchisees regarded the advertising fund as "franchisees' funds".

[34] Also material is the climate of belief induced by the 1 July 2003 letter. Given its heading ("re Promotions") and its contents, it is understandable that Mr Ferrari

thought that the car may have been purchased using the advertising fund and that Ms McKinnon concluded that it had been. It is likely enough that other franchisees thought along similar lines. But with exception of the slightly equivocal letter from Mr Ferrari to Mr Salmon, no one else raised any question about the possible use of advertising fund money for the purchase of the car. We will revert shortly to the legitimacy of reasoning backwards from absence of complaint. But, in any event, the assertion made by Ms McKinnon did not add much to what franchisees already may have thought.

[35] All in all, the conclusion of the Judge does not seem surprising to us.

Evidence of meaning

[36] Although Mr Miles suggested, perhaps rather faintly, that we should not follow *Hough*, he did not flesh the argument out. Nor did he cite any authority which casts doubt on the approach approved in *Hough*.

[37] In an innuendo case, it may be sensible to ask the innuendo witness what he or she made of the alleged defamatory statement as a way of testing the materiality of the special circumstances alleged. Depending of course on what is said, the answer may suggest the need for further inquiry as to whether there are other circumstances which have not been pleaded but which might be relevant to the meaning alleged. In this case, for instance, Mr Ferrari's "professed" reaction to the email could be attributed to the fact that Mr Salmon had previously told him that the car had not been purchased from the advertising fund. Ms Komarkoski's reaction was associated with a fatalistic approach to the use of the advertising fund, but it was also perhaps material to whether franchisees regarded the advertising fund as being "franchisees' funds". As well, there was evidence from Mr Salmon, referred to by the Judge, that franchisees had not made inquiry about the management of the advertising fund. Obviously material to what franchisees made of the email was what they made of (or could remember about) the 1 July 2003 letter. The franchisees could not be expected to remember the detail of the letter but perhaps would be likely to remember that a Lamborghini had been purchased and that this was associated with promotional activities. Given that letter (and sensible inferences as

to what franchisees presumably knew about the use of the car), we see no reason why the meaning of the email should not be assessed on the basis that franchisees would have known or believed that it had been used for promotional purposes.

[38] In any event, it is clear that the Judge did not allow his decision to be controlled by the direct evidence of the franchisees.

[39] As noted, Mr Miles (in something of a deviation from his argument that evidence as to meaning was irrelevant) invoked the reaction of Mr Ferrari in 2003 as indicating that the 2005 email was defamatory. But the Judge was plainly aware of Mr Ferrari's 2003 letter. Although that letter could fairly be regarded as expressing concerns about the purchase, those (focussing as they did on operational costs) did not really line up with the pleaded meanings. In particular, while Mr Ferrari in his letter might be thought to have questioned the wisdom of the purchase (assuming it had come from the advertising fund) the letter does not suggest that there had been a "misuse of franchisees' funds".

Absence of evidence of adverse reaction

[40] There was no evidence of any of the recipients of Ms McKinnon's email reacting to it in a way which was adverse to Mr Salmon. On the other hand, on our reading of the transcript, the evidence was not explicit as to the absence of adverse reaction. Given the documents which were produced and the course of the evidence as a whole, it seems reasonable to infer that there was no adverse reaction to the email and that certainly is the approach that the Judge took. His conclusion on this point (ie that there was no adverse reaction) was not the subject of specific challenge by Mr Miles and we propose therefore to approach the case on the same basis.

[41] Evidence of adverse reaction is customarily led in defamation cases to support a damages claim. Usually such evidence would be irrelevant as to interpretation, as is any evidence of attributed meaning. It might be thought to follow logically that absence of adverse reaction should not be admissible as to meaning. This was very much the argument of Mr Miles.

[42] What must be remembered is that this is a true innuendo case. This meant that evidence of attributed meaning was able to be led in accordance with *Hough*. Further, Mr Miles sought to rely on Mr Ferrari's 2003 letter as being in substance the equivalent of an adverse reaction to the 2005 email. In this very particular context, it is far from obvious why an absence of adverse reaction to the actual 2005 email should not likewise be admissible. Although challenged by us on this point, Mr Miles was unable to cite any authority which supported his position.

[43] Mr Miles challenged the logic of the Judge's approach. He noted, accurately, that there might be a number of reasons why recipients would not complain. But the Judge recognised - and allowed for - this in his judgment. With all fair allowances, it might be thought a bit odd that if the email can fairly be taken to have accused Mr Salmon of being a thief (which is what he claimed), none of the recipients went back to Mr Salmon about its subject matter.

[44] In short we see no reason why this line of reasoning was not available to the Judge. For the avoidance of doubt, however, we record that we regard his conclusion as being well supportable even in the absence of this reasoning.

Our conclusion

[45] We are satisfied that the Judge's approach was right and, in any event, well open to him in a case which required him to form some view of the factual matrix in which the $2 Shop franchise operated.

Would relief be appropriate if defamation were established

[46] Mr Salmon did not seek damages against Ms McKinnon. Rather he invoked s 24 of the Defamation Act which provides:

> **24 Declarations**
>
> (1) In any proceedings for defamation, the plaintiff may seek a declaration that the defendant is liable to the plaintiff in defamation.
>
> (2) Where, in any proceedings for defamation,—

(a) The plaintiff seeks only a declaration and costs; and

(b) The Court makes the declaration sought,—

the plaintiff shall be awarded solicitor and client costs against the defendant in the proceedings, unless the Court orders otherwise.

[47] Section 24 does not give a successful plaintiff an entitlement to a declaration. Such relief is discretionary. All recipients of Ms McKinnon's email were promptly told by her that the car had not been purchased from the advertising fund. Ms McKinnon had, as well, indicated a general willingness to meet Mr Salmon's reasonable costs. In that context, it is far from clear what additional benefit Mr Salmon would have derived from a declaration that she was liable to him in defamation.

[48] If a declaration had been made under s 24(l) it would only be in the terms that Ms McKinnon had defamed Mr Salmon. To a very limited extent such a declaration would have gone further than Ms McKinnon was prepared to go because she had not been prepared to acknowledge that she had defamed Mr Salmon and she only apologised to The $2 Shop Ltd and not to Mr Salmon personally. But given that Mr Salmon's whole case was that there was a complete identity between him and The $2 Shop Ltd – so much so, that comments apparently referable to The $2 Shop Ltd must be taken as extending to him – this seems a very fine point.

[49] All of this raises the question why these proceedings were brought. The most obvious inference is that this was to "fine" Ms McKinnon the amount of the solicitor and own client costs to be incurred. In other words, the proceedings were not motivated by a desire for vindication but rather with the intention of punishing Ms McKinnon. Such inference is supported by Mr Salmon's over-blown reaction to what at worst was no more than a very minor and quickly abated storm in a teacup and the bullying tone of the correspondence which emanated from his solicitors.

[50] We have already indicated that we agree with the Judge's view that the email was not defamatory to Mr Salmon. This conclusion makes it slightly awkward for us to express a concluded view as to what if any relief Mr Salmon might have been granted if we had differed from the Judge as to his interpretation of the email. Given

our conclusion that the email did not defame Mr Salmon, we are, of course, sympathetic to Ms McKinnon's refusal to acknowledge that she had defamed him. The reality, however, is that our considerable dissatisfaction with the way in which these proceedings were threatened, commenced and prosecuted does not depend upon Mrs McKinnon's defence having been made out. These proceedings would have been oppressive if Mr Salmon's contention as to the meaning of the email had been upheld.

What orders as to costs should be made?

[51] At the conclusion of his argument, we indicated to Mr Miles that we had it in mind to reflect our concerns about the proceedings by an order (or perhaps orders) as to costs – that is costs in both the High Court proceedings and this Court. We heard from counsel briefly as to costs and gave them leave to file written submissions.

[52] In the High Court the Judge fixed costs in favour of Ms McKinnon on a 2B basis. This order was then implemented between the parties by agreement in a way which left Ms McKinnon some $11,000 out of pocket. Contrary to the arguments of Mr Miles, we do not regard the agreed quantification of the costs order as an overall compromise of Ms McKinnon's entitlement to costs so as to exclude the right to appellate review. (Indeed, Mr Salmon, who himself challenged the award of costs in his appeal, plainly did not see the "compromise" in that light). The "compromise" as to costs was never going to be any better than the order of Allan J that costs be fixed in favour of Ms McKinnon on a 2B basis. As well, it is understandable that in the High Court, Ms McKinnon kept a low profile as to costs, especially as the primary purpose of the proceedings against her was to require her to meet in full Mr Salmon's solicitor and own client costs. So her stance as to costs might perhaps be regarded as a function of the oppressiveness of the proceedings against her. On the other hand, it is inescapable that her approach was also the result of a tactical decision by her counsel. Further, until we raised the issue at the end of the case for the appellant, Ms McKinnon had given no indication of a challenge to the award of costs in the High Court. In those circumstances we do not propose to interfere with the award of costs in the High Court.

[53] The question of costs in this court is more generally at large.

[54] Mr Miles in his written submissions complained that our approach involved a breach of his client's right to natural justice (as we waited until the end of the submissions made by Mr Miles before raising the costs issue), maintained that if he had been on notice of any suggestion that there was a mismatch in wealth between Mr Salmon and Ms McKinnon, he could have adduced evidence to show that she was "a person of significant means" and also asserted that an award of solicitor and own client costs would have a chilling effect on the willingness of plaintiffs to resort to s 24 of the Defamation Act.

[55] We disagree with these submissions:

(a) The reality is that if we had raised our concerns about the proceedings (and possible costs ramifications of those concerns) at an earlier stage in the argument, there could (and probably would) have been other complaints. From the point of view of Mr Salmon, there was never going to be a right time for our concerns to be raised. Nor would the costs implications necessarily have been materially different if, faced with knowledge of our concerns, Mr Miles had abandoned the appeal in the course of argument.

(b) Our view of the case is not dependent on the view that Ms McKinnon has no – or very little – money. Indeed we know that Ms McKinnon is not legally aided. As well, the course adopted by Mr Salmon only made sense if Ms McKinnon would be able to meet a substantial order for costs.

(c) Nor do we see our disapproval of this claim as likely to have any tangible effect on the willingness of plaintiffs to utilise the s 24 procedure in appropriate cases. The problem with this case is that the best vindication of his name that Mr Salmon could receive by dint of a s 24 declaration would not have been appreciably better than the vindication already provided by Ms McKinnon.

Disposition

[56] The appeal is dismissed. Mr Salmon is to pay Ms McKinnon's costs on a solicitor and own client basis which we quantify (on the basis of the material we have received from Mr Macfarlane) at $12,500 and usual disbursements.

Solicitors:
Stewart Germann Law Office, Auckland, for Appellant
Sainsbury Logan & Williams, Napier, for the Respondent