IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2007-485-001510

BETWEEN	ROBERT EDWARD JONES Plaintiff
AND	CHRISTOPHER JOHN LEE Defendant

Hearing: On the papers

Judgment: 3 September 2010

JUDGMENT AS TO COSTS OF CLIFFORD J

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[1] The plaintiff, Robert Edward Jones ("Sir Robert") sued the defendant Christopher John Lee ("Mr Lee") in defamation.

[2] Sir Robert said that an article written by Mr Lee, and published on Mr Lee's own website and in various Wellington local newspapers, defamed him. The article in question related to Sir Robert, a management company owned by Sir Robert and the publicly listed company Robt Jones Investments Limited. Sir Robert alleged 26 separate defamatory meanings, some 13 of which were based on innuendo. Eighteen particulars were pleaded in support of the innuendo meanings. Sir Robert claimed $804,000 damages for the alleged defamation.

[3] Mr Lee filed a statement of defence which, amongst other things, pleaded the defences of honest opinion and qualified privilege. In turn, Sir Robert gave notice under ss 39 and 41 of the Defamation Act.

[4] Mr Lee's position was that he had intended no criticism of Sir Robert, but rather had sought to comment on what he regarded as various undesirable aspects –

from the point of view of investors – of management contracts in general, and, in particular, the one entered into between Robert Jones Investments Ltd and Sir Robert's company. That was an honest opinion. His business as an investment advisor meant he made those remarks on an occasion of qualified privilege.

[5] During the course of the trial, the claimed defamatory meanings were substantially simplified and reduced in number by Sir Robert, and the pleaded innuendo meanings were not pursued.

[6] As noted in the plaintiff's first memorandum (at 19), the case taken by Sir Robert against Mr Lee, and Mr Lee's defence of that case, gave rise to difficult issues relating to the availability of the defence of honest opinion. On the first day of the trial I dismissed an application made on behalf of Sir Robert that that defence was not available to Mr Lee. That application essentially relied on the assertion that what Mr Lee was alleging were statements of opinion were statements of fact, and that as statements of fact they were not correct. I subsequently ruled that the defence of honest opinion was not available, but on a different ground – namely that the opinion Mr Lee sought to advance was not one which responded to the sting of the alleged defamation.

[7] The jury found that Mr Lee had defamed Sir Robert by reference to two of the eight allegedly defamatory meanings put to the jury at the end of the trial. The jury awarded Sir Robert damages of $104,000 and also found that in writing, publishing and allowing the impugned article to be published, Mr Lee was predominantly motivated by ill-will towards Sir Robert or otherwise took improper advantage of the occasion of publication, so that the defence of qualified privilege was not available to him.

[8] Sir Robert now applies for indemnity or increased costs against Mr Lee. In doing so, he argues that Mr Lee acted vexatiously, frivolously, improperly or unnecessarily in defending the proceeding, and continuing to defend it. Mr Lee should have settled prior to trial, knowing that settlement would have been available to him. Furthermore, when I held that the defence of honest opinion was not

available to Mr Lee, that ruling being made on the fourth day of the five day trial, Mr Lee should have discontinued his defence at that point.

[9] I deal first with the plaintiff's application for indemnity or increased costs. I then address the question of categorisation and other costs issues.

Claim for indemnity or increased costs

[10] The principles that determine whether the High Court should make an award of indemnity costs are well established. As referenced in the plaintiff's first memorandum, the commentators in *McGechan on Procedure* state that awards of indemnity costs are rare, and require "exceptionally" or "distinctly" bad behaviour.[1] They also state that the term "unnecessary" takes its meaning and flavour from the preceding adverbs "vexatiously, frivolously, improperly", citing *Saunders v Winton Stock Feed Ltd*.[2]

[11] In *Bradbury v Westpac Banking Corp*,[3] Justice Harrison concluded overall that for it to be appropriate for a Judge to award indemnity costs he or she must be satisfied that the party against whom such an award is being made knew or ought to have known at the relevant time that their case had no prospect of success, and that they acted unreasonably by "pursuing a wholly unmeritorious and hopeless claim".

[12] As regards the various matters relied on by Sir Robert in making application for indemnity costs, I comment as follows.

[13] The fact that Mr Lee may – from earlier experience – have been aware that a settlement was possible is not, in my judgment, a factor pointing to his behaviour in defending this proceedings being such that it should be responded to with an award of indemnity costs. Rather, the issue – as I think the plaintiff's submissions acknowledge – is whether in defending Mr Lee knew, and ought to have known, that he was embarking on a claim that was bordering on the hopeless.

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1 Andrew Beck Anders *McGechan on Procedure* (looseleaf ed) at [HR14.6.03(1)(a)].
2 *Saunders v Winton Stock Feed Ltd* (2009) 19 PRNZ 342 at [30].
3 *Bradbury v Westpac Banking Corp* [2009] 3 NZLR 400.

[14] As the plaintiff's first memorandum itself acknowledges, in seeking categorisation of the proceedings as Category 3, "defamation proceedings are arcane and complex, particularly in relation to defamatory meanings of words, whether innuendo expands ordinary meanings, pleadings-requirements and the availability of special defences".

[15] More generally, I note that fundamental legal issues in defamation proceedings continue to cause courts considerable difficulties. I refer, for example, to the New Zealand Court of Appeal decision *Broadcasting Corporation of New Zealand v Crush*,[4] and the more recent decision *Television New Zealand v Haines*.[5] The comment by the Court of Appeal at [87] of *Crush*, that the experienced counsel in that case appeared to have been "talking past" each other in their submissions, perhaps highlights the difficulties in this area.

[16] In my view, an assessment of whether the conduct by Mr Lee of his defence is properly to be regarded as vexatious, frivolous, improper or unnecessary is to be undertaken in that context, and bearing in mind the inherent complexities of defamation proceedings. As I have already noted, and as I think is fairly submitted in the defendant's memorandum, my finding that the defence of honest opinion was not available was made after consideration of what I regarded to be difficult legal issues, and after I had originally rejected the plaintiff's application made at the commencement of the trial for such a finding. As my memoranda show, my ruling that the defence was unavailable followed my raising additional issues with counsel, and did not reflect the basis upon which the plaintiff had sought such a ruling at the start of trial.

[17] Therefore, and although the defence of honest opinion was at the heart of Mr Lee's defence, and was ruled not to be available to him, I do not consider that his conduct in defending these proceedings was such that an award of indemnity costs would be appropriate.

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4 *Broadcasting Corporation of New Zealand v Crush* [1986] 2 NZLR 234.
5 *Television New Zealand v Haines* [2006] 2 NZLR 433.

[18] In reaching that conclusion, I note that I am not persuaded that various matters referred to on behalf of Sir Robert, for example the jury's finding that Mr Lee was predominantly motivated by ill-will or otherwise took improper advantage of the occasion of publication, nor the matters advanced relating to what Sir Robert contended – but I do not accept – was an "unambiguous" offer of settlement, nor the text of corrections published by the defendant, alter that conclusion. The jury's finding relevant to the availability of qualified privilege goes to the nature of the defamation, not the manner in which Mr Lee conducted his defence. As I have indicated, I do not accept there was an "unambiguous offer of settlement". The offer of settlement was addressed directly to the publisher of the newspaper, not Mr Lee. As for the text of corrections published by Mr Lee, if Sir Robert had asserted they constituted an additional defamation, then such could have been pleaded.

[19] For similar reasons, neither do I consider that this is an appropriate occasion for the award of increased costs. Taken overall, and although I do not claim particular expertise in this area as jury trials for defamation are rare, by reference to the issues I was required to consider during the trial and the various authorities I relied on in determining those issues, my assessment is that in terms of the conduct of the plaintiff (and the defendant) and the issues raised both before and at trial, this was a defamation case that was not atypical of cases of this sort.

Categorisation

[20] Rule 14.3(1) provides that proceedings which, because of their complexity or significance, require counsel to have special skill and experience in the High Court, are to be classified as Category 3 proceedings. Sir Robert submits that is the case here. Mr Lee, through his counsel, argues that it is not.

[21] As will be apparent, I consider that these proceedings did raise complex legal issues. The process of a jury trial for defamation also raises issues – in terms of the relative role of the Judge and jury and the way the issues for the jury are to be determined and the jury is to be instructed – that are quite different from those in a normal criminal trial before a jury.

[22] I am satisfied that the circumstances of this trial call for a categorisation of 3B, and I so order, noting that Sir Robert did not claim costs for the adjourned original hearing, set down for 2 November 2009.

[23] I also comment that I do not understand those costs to include the travel disbursements referred to at paragraph 29 of Sir Robert's costs application. Disbursements will generally be a matter for the Registrar. However, I decline to certify the so-called out of town air fares, taxi and accommodation costs for Mr Reed. In doing so, I note that the correspondence to the Court refers to Mr Reed maintaining chambers in Wellington. In those circumstances, I do not consider that such costs should properly be certified.

Reduced costs

[24] Mr Lee argued that what otherwise might be an award of scale costs in favour of Sir Robert should be reduced by reference to Sir Robert having failed to comply with the rules as regards the adjournment and having taken or pursued unnecessary steps or arguments that lacked merit.

[25] On the first point, and as Justice Miller anticipated in his minute of 8 September 2009, Mr Lee is entitled to costs as regards the adjournment of the original hearing set down for 2 November 2009. Mr Lee did not particularise those costs. I trust that is a matter that will be able to be settled between the parties.

[26] Mr Lee also sought a reduction of costs by reference to the plaintiff having taken or pursued unnecessary steps or arguments that lacked merit. For reasons very similar to those for which I declined an award of indemnity or increased costs as regards Mr Lee's conduct in defending these proceedings, so I also decline an order reducing costs by reference to this aspect of the defendant's application. In particular, whilst I note that the plaintiff had filed briefs of evidence for witnesses who were not called at trial, I do not consider that in the overall scheme of this trial that would have involved extensive wasted time or expenditure by the defendant in terms of preparation for cross-examination. Those briefs were always very subsidiary to the principal issues that were well outlined in the brief filed by

Sir Robert. Given that costs are being awarded based on the scale, no separate item arises as regards the preparation of any particular witness's brief.

[27] On the basis that Mr Lee agrees (see 5 of his memorandum) with the calculation of scale costs set out in Table 1 of the first memorandum filed on behalf of Sir Robert, I order that Mr Lee pay Sir Robert costs of $82,713.00, reduced by the appropriate amount for an award of 3B costs to Mr Lee as regards the interlocutory matters dealt with by Justice Miller in his minute of 8 September 2009. Subject to [23], disbursements are to be fixed by the Registrar.

"Clifford J"

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