

**IN THE HIGH COURT OF NEW ZEALAND
GREYMOUTH REGISTRY**

**CIV-2009-418-125
[2012] NZHC 1553**

BETWEEN FRANCIS THOMAS DOOLEY
 Plaintiff

AND RAYMOND BRUCE SMITH
 First Defendant

AND MOHAMMED SHAHADAT
 Second Defendant

Hearing: 2 July 2012
 (Heard at CHRISTCHURCH)

Counsel: R K P Stewart for plaintiff
 R B Smith in person
 M Shahadat in person

Judgment: 2 July 2012

(ORAL) JUDGMENT OF LANG J
[on costs]

[1] On 26 March 2012, I delivered a judgment in which I upheld claims in defamation by Mr Dooley against the two defendants, Mr Smith and Mr Shahadat.¹ I reserved the issue of costs, but reserved leave to all parties to seek a determination in respect of that issue should they not be able to reach agreement. That has proved to be the case and, accordingly, I am now required to determine the issue of costs.

[2] Costs in this case are not to be determined in accordance with the usual principles contained in the High Court Rules. Instead, they are governed by s 24(2) of the Defamation Act 1992 (“the Act”), which provides:

24 Declarations

...

(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.

[3] Counsel for Mr Dooley contends I should make an award of costs in his client’s favour on a solicitor-client basis as the section clearly allows. Mr Shahadat and Mr Smith advance, as a primary argument, a submission that my earlier factual findings mean that costs should lie where they fall. Alternatively, they submit they should not be required to pay costs on a solicitor-client basis.

[4] Mr Smith and Mr Shahadat point out that I have already determined that Mr Dooley contributed significantly to the circumstances giving rise to the defamatory statements. They say I should take this factor into account when fixing costs, and that Mr Dooley should be required to meet 75 per cent of the legal costs and disbursements he has incurred.

[5] Counsel for Mr Dooley contends that costs should be awarded on a joint and several basis. Mr Smith and Mr Shahadat contend that, if I make an award of costs, it should be on a several basis to reflect the fact that they each faced separate claims.

¹ *Dooley v Smith & Anor* HC Greymouth CIV-2009-418-125, 26 March 2012.

They agree that Mr Shahadat should be required to meet 80 per cent of any award of costs, and that Mr Smith should pay the balance.

Relevant principles

[6] There does not appear to be any authority regarding the manner in which the Court is to exercise its jurisdiction as to costs under s 24(2). I accept Mr Stewart's submission, however, that as a general rule Parliament must have intended a successful applicant for a declaration under s 24(1) of the Act to receive an award of costs on a solicitor-client basis.

[7] If the Court is to depart from that position, it should only do so on a principled basis.

Decision

To what extent, if at all, should the Court reduce the award of costs to reflect Mr Dooley's actions?

[8] Mr Dooley successfully established that each of the defendants made defamatory statements about him. He also rebutted affirmative defences based on truth, honest opinion and qualified privilege. That being the case, he is clearly entitled to an award of costs. I therefore do not accept the submission by Mr Smith and Mr Shahadat that costs should lie where they fall.

[9] I do not propose to repeat here the reasons underpinning my earlier conclusions regarding the responsibility to be attributed to Mr Dooley for creating the situation that occurred. The reader of this judgment is taken to be familiar with the views I expressed in the substantive judgment.²

[10] I am satisfied that some allowance needs to be made for the fact that Mr Dooley was responsible to a significant extent for producing the circumstances in which both defendants made their defamatory statements. He could have avoided

² Ibid, at [52] to [70].

that by taking the steps referred to in my judgment.³ The fact that he did not do so gave rise to all that followed. I accept, also, that others who are not party to this proceeding contributed to what occurred.⁴ I do not consider, however, that Mr Dooley should be penalised for the fact that those persons should have taken greater care during the period leading up to the making of the defamatory statements.

[11] I consider that Mr Shahadat and Mr Smith should be responsible for 70 per cent of the legal costs Mr Dooley has incurred in bringing this proceeding. An award at that level adequately recognises, in my view, my finding that Mr Dooley contributed significantly to the events that occurred. At the same time, it does not elevate Mr Dooley's actions to the point where they excessively erode his right to be indemnified in respect of legal costs. It also reflects the fact that the defendants elected to defend the claim, and in doing so put Mr Dooley to the expense of establishing the defamatory statements and rebutting the affirmative defences they advanced.

Joint or several liability?

[12] I do not view Mr Dooley's claim against the defendants as being analogous to a claim against joint tortfeasors. Although the two claims arise out of broadly the same sequence of events, nevertheless, each was a separate claim based on different allegations. Mr Dooley was required to establish each claim separately, and to rebut each affirmative defence separately. It would be wrong in principle, in my view, for Mr Smith to be required to contribute to costs properly attributable to Mr Dooley's claim against Mr Shahadat and vice versa. For that reason I am satisfied that liability for costs should be several.

[13] As will already be apparent, Mr Shahadat accepts he was primarily responsible for the situation that arose. He prepared the press release that gave rise to Mr Dooley's claim against him. Mr Smith is less culpable than Mr Shahadat, because he was merely asked to comment on Mr Shahadat's press release. In saying that, I do not ignore the fact that Mr Smith also re-published his earlier statements on

³ Ibid, at [57], [60] and [68].

⁴ Ibid, at [71] to [83].

a subsequent occasion. However, as indicated in my judgment⁵, I consider that his motivation for doing so was largely affected by Mr Dooley's actions in the period leading up to the second publication.

[14] I therefore accept there should be a distinction between the quantum of costs that each defendant should be required to pay. I consider the apportionment agreed by Mr Smith and Mr Shahadat to be broadly appropriate, but I do not agree with it entirely. I consider Mr Shahadat should be required to pay 70 per cent of Mr Dooley's costs, and Mr Smith should be required to pay 30 per cent.

How is quantum to be determined?

[15] I do not propose to enter judgment at this stage for any particular sum. Counsel for Mr Dooley has tendered a schedule setting out the costs Mr Dooley currently claims. This shows that, as at today's date, Mr Dooley has incurred legal costs totalling \$274,530.79. In addition, he claims out of pocket expenses totalling \$18,931.08. From those sums Mr Dooley acknowledges there must be deducted the sum of \$45,820.95, being settlement funds he received from another defendant who was originally joined to this proceeding.

[16] I am conscious that Mr Shahadat and Mr Smith have only just received copies of the latest accounts rendered by Mr Dooley's solicitors. For that reason they have not had an opportunity to peruse them or, indeed, to question the appropriateness of the sums claimed in earlier accounts. I prefer to decide the issue of costs according to principle, and to leave the parties to quantify the award.

[17] Sub-part 2 of Part 14 of the High Court Rules provide for the taxation of costs between parties. Rule 14.18 permits any party entitled to costs subject to taxation to obtain from the Registrar an appointment for the taxation of costs. In order to engage this rule I direct that the costs payable to Mr Dooley are costs that are subject to taxation.

⁵ Ibid, at [209] to [218].

[18] The defendants are to advise Mr Dooley's counsel within 21 days whether, and to what extent, they challenge any or all of the costs he has claimed. If no objection is received by 5 pm on 23 July 2012, counsel for Mr Dooley may seal an order for costs based on the apportionment set out above. If, however, either defendant challenges any of those costs, counsel for Mr Dooley shall seek an appointment for taxation of those costs from the Registrar in accordance with Sub-part 2 of Part 14. The provisions of r 14.18 to 14.23 of the High Court Rules will then apply.

[19] For the assistance of the parties and the Registrar, I record that Mr Dooley is entitled to recover his reasonable solicitor-client costs. I do not see that entitlement as extending to disbursements Mr Dooley has incurred personally, except where they relate directly to legal costs and/or Court costs he has incurred. For this reason, I would view his claim to be reimbursed in respect of Court hearing fees to be valid. I doubt, however, whether the remaining out of pocket expenses are properly claimable. They appear to relate to expenses incurred personally by Mr Dooley and not to solicitor-client costs. It may be that some of the claimed disbursements relate to the cost of meals and accommodation supplied to his counsel during the hearing in Greymouth. To that extent the claims would be valid. The same would not apply, however, to expenses Mr Dooley has incurred in relation to his own accommodation and meals.

[20] I note that the Court has the power under r 14.23 to refer a matter back to the Registrar with any necessary directions on the application of a party dissatisfied with the Registrar's decision. Although I am not to be seen as encouraging further resort to the Court, this gives the parties the ability to refer disputed items back to me in the event they are dissatisfied with any aspect of the Registrar's decision.

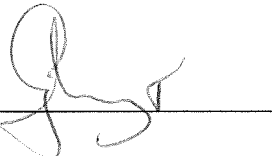
Orders

[21] The orders of the Court are therefore as follows:

- (a) Mr Dooley is entitled to be reimbursed in respect of 70 per cent of his costs calculated on a solicitor-client basis.

- (b) The orders for costs are to be severally against Mr Shahadat and Mr Smith.
- (c) Mr Shahadat is to be responsible for 70 per cent of the award of costs and Mr Smith is to be severally liable in respect of 30 per cent.
- (d) I make directions in terms of [18] above regarding the taxation of the award of costs.
- (e) I reserve leave to the parties generally to seek further directions in the event they are unable to reach agreement regarding the quantum of costs.

Lang J



Solicitors:
Izard Weston, Wellington
Copy to:
R B Smith
N Shahadat