IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2011-404-008076
[2012] NZHC 3460

BETWEEN	DARYL YOUNG Plaintiff
AND	TELEVISION NEW ZEALAND LIMITED First Defendant
AND	RED SKY FILM & TELEVISION LIMITED Second Defendant
AND	BRYAN BRUCE Third Defendant

Hearing: On the papers

Judgment: 17 December 2012

COSTS JUDGMENT OF GILBERT J

This judgment was delivered by me on 17 December 2012 a 4.30 pm pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar
Date:

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[1] Mr Young claims he was defamed in a documentary relating to David Bain's retrial in 2009 which was made by Red Sky Film & Television Ltd, presented by Bryan Bruce, and televised by TVNZ. The accuracy of Mr Young's evidence at the retrial was questioned in the documentary and in various related publications. Mr Young claims that the natural and ordinary meaning of the words used in these publications meant, and was understood to mean, that he is a liar, is dishonest, cannot be trusted, committed perjury when he gave evidence at the retrial and is a man who commits perjury.

[2] The defendants deny that the publications are capable of bearing these defamatory meanings and have pleaded qualified privilege. Mr Young seeks to defeat the qualified privilege defences on the basis that the defendants were predominantly motivated by ill will towards him or otherwise took improper advantage of the occasion of publication.

[3] In a judgment dated 19 October 2012,[1] I dealt with six interlocutory applications:

(a) An application by TVNZ for an order that none of the pleaded publications is capable of bearing the defamatory meanings alleged;

(b) An application by TVNZ striking out the particulars of ill will pleaded against it;

(c) An application by TVNZ for review of a decision of an Associate Judge directing that discovery and inspection be completed before the above applications are heard;

(d) An application by Red Sky and Mr Bruce for an order striking out the claims against them;

[1] *Young v Television New Zealand* [2012] NZHC 2738.

(e) An application by Red Sky and Mr Bruce striking out the particulars of ill will pleaded against them; and

(f) A similar application by Red Sky and Mr Bruce for review of the Associate Judge's decision.

[4] I granted the defendants' applications for review. The other applications were partly successful. I found that three out of the five publications relied on in the statement of claim were not capable of bearing the meanings pleaded by Mr Young. I struck out all but one of the 26 particulars of ill will pleaded against TVNZ and 15 of the 21 particulars of ill will pleaded against Red Sky and Mr Bruce.

[5] TVNZ seeks costs on each of these applications on a 3C basis with a 25 per cent uplift. Red Sky and Mr Bruce seek 3C costs. Mr Young submits that costs should be reserved pending determination of his appeal from the judgment and the defendants' cross-appeal. Alternatively, he submits that costs should be fixed on a 2B basis but that liability for payment should be reserved until the outcome of the trial. Mr Young also challenges a number of aspects of the defendants' costs claims.

Costs category

[6] The proceeding has not yet been categorised for costs purposes. The defendants submit that Category 3 is appropriate; Mr Young suggests Category 2.

[7] TVNZ submits that defamation proceedings are inherently complex and require precise pleadings, particularly as defendants may not plead alternative meanings in support of their defences. TVNZ argues that the proceeding requires familiarity with and experience in the law of defamation including "complex" issues such as the distinction between the roles of judge and jury in determining the availability of pleaded meanings; the extent to which the pleaded meanings of any one publication may be coloured by surrounding publications; and the limits of the concepts of ill will and improper advantage for the purposes of s 19 of the Defamation Act 1992.

[8] Counsel for Red Sky and Mr Bruce says that the most recent defamation proceeding in which he and counsel for TVNZ were involved was assessed as a Category 3 proceeding and that this is accordingly the appropriate category for this proceeding.

[9] Mr Young submits that it does not follow from the fact that this is a defamation proceeding that it ought to be assessed as falling within Category 3. He submits that the proceeding is not of such significance or complexity that it requires counsel with special skill and experience. He argues that the distinction between the roles of Judge and jury is uncomplicated, the limits on the concepts of ill will and improper advantage have been clarified by the Supreme Court, and that assessing the meaning of words is routine work for lawyers. He submits that the appropriate categorisation is Category 2.

[10] I agree with Mr Young that not all defamation proceedings should be classified as Category 3. It will depend on the complexity of the proceedings and their significance. However, on balance, I am persuaded that Category 3 is appropriate for this proceeding which involves seven causes of action and raises matters of considerable significance, not only to the parties, but more generally. The claims, defences and replies to defences will all require detailed pleading and careful presentation at trial. I consider that the proceeding requires counsel with specialist skill and experience in the High Court. The parties appear to have made the same assessment as evidenced by their decision to retain leading defamation lawyers to represent them.

[11] Accordingly, I classify the proceeding as falling within Category 3.

Should costs be reserved pending the outcome of the appeal and cross-appeals?

[12] Mr Young argues that the Court will not be able to make any proper assessment of the relative success of the parties in respect of these interlocutory applications until his appeal and the cross-appeals have been disposed of. He submits that this is a special reason in terms of r 14.8 of the High Court Rules for departing from the normal requirement that costs on an interlocutory application

must be fixed and become payable when the application is determined. I do not accept this. Nor do I accept Mr Young's alternative submission that the incidence of costs should be reserved until the outcome of the trial. The appropriate course is to fix costs on the applications now and require that they be paid at this stage, subject to any application for stay.

Steps for which costs should be determined

[13] The defendants have sought costs for steps taken in the proceeding prior to the interlocutory applications dealt with in my judgment. The costs of these earlier steps should be left for later determination. I therefore make no order for costs in respect of steps taken up to and including 24 February 2012, the date of the Associate Judge's orders which were the subject of the review applications.

[14] The defendants also seek costs for filing memoranda and for appearances at a mentions hearing on 21 March 2012 and a case management conference on 1 June 2012. These steps were only required because of the interlocutory applications I dealt with. I reject Mr Young's submission that the defendants should not receive costs for these steps.

[15] The defendants have also sought costs for filing memoranda seeking costs. Schedule 3 of the High Court Rules does not contain any item for the filing of memoranda seeking costs on an interlocutory application and, in any event, I am not prepared to award costs for this step.

Time allocation

[16] I consider that preparation of the interlocutory applications and the bundle for the hearing would have involved a normal amount of time and that Band B is appropriate for these steps.

[17] There is no disagreement about the time allocation for the hearing which occupied a full day.

[18] The only remaining issue concerns preparation for the hearing. I take into account that each defendant made three interlocutory applications and numerous issues had to be addressed. Balanced against this, there was considerable overlap and community of interest between the defendants on these applications. Although it was appropriate for TVNZ to be separately represented from Red Sky and Mr Bruce because their interests are not the same, the defendants were able to present a common position on most of the issues. I note that the defendants' written submissions were not lengthy, and did not need to be. Taking these matters into account, I conclude that Band B is appropriate for this step as well.

Second counsel

[19] All parties were represented by two counsel at the hearing. I consider that this was appropriate having regard to the importance of the issues addressed at the hearing. In these circumstances I certify for second counsel.

Should there be an uplift on scale costs?

[20] TVNZ argues that an uplift of 25 per cent on scale costs should be awarded because Mr Young opposed the early determination of the pleadings issues and thereby impeded the efficient progress of the proceeding.

[21] Mr Young counters that he did not oppose the preliminary determination but accepted the Associate Judge's view that interlocutory proceedings should be dealt with together after discovery and inspection had been completed. He also argues that the community of interest between the defendants should be taken into account in negating the uplift application.

[22] I do not consider that there should be an uplift. Although I have not upheld the procedure Mr Young sought to follow, I do not consider that he has acted unreasonably or contributed unnecessarily to the time or expense of the proceeding. Mr Young's preferred approach was supported by the Associate Judge.

Disbursements

[23] There is no issue concerning the disbursements that have been claimed. These are allowed in the sums claimed.

Result

[24] The plaintiff is to pay the defendants' costs for the steps identified in this judgment relating to the interlocutory applications.[2] Costs are to be calculated on a 3B basis, including an allowance for second counsel. The defendants are also entitled to disbursements as claimed.

M A Gilbert J

[2] First defendant's memorandum dated 8 November 2012 – Steps 4.12, 4.17, 4.10, 4.11, 24, 25, 26, 27. Second and third defendants' memorandum dated 8 November 2012 – Steps 4.12, 4.10, 4.11, 24, 26.