IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2015-485-484
[2016] NZHC 1078

UNDER	the Defamation Act 1992
BETWEEN	KAREN FRANCES ARNOLD Plaintiff
AND	FAIRFAX NEW ZEALAND LIMITED First Defendant
	TIMOTHY RICHARD SHADBOLT Second Defendant

On the papers

Counsel:	P A McKnight and A J Romanos for Plaintiff R K P Stewart and R G Cahn for First Defendant F E Geiringer for Second Defendant
Judgment:	23 May 2016
Reissued:	22 June 2016

JUDGMENT OF CLIFFORD J (COSTS)

Introduction

[1] The plaintiff, Ms Karen Arnold, is suing Fairfax and Mr Shadbolt in defamation. Mr Shadbolt has recently filed a notice of discontinuance of the counterclaim in defamation he brought as defendant against Ms Arnold. Ms Arnold now applies for costs on that discontinuance.

Background

[2] In order to put this application for costs in context, it is necessary to summarise the procedural history of this matter to date:

(a) Ms Arnold filed her statement of claim on 23 June 2015.

(b) Mr Shadbolt filed his statement of defence and counterclaim on 31 July 2015. In his defence Mr Shadbolt pleaded, amongst other things, honest opinion and qualified privilege.

(c) Ms Arnold filed her reply to Mr Shadbolt's statement of defence and counterclaim on 14 August 2015. She did not respond to Mr Shadbolt's counterclaim. That same day, Ms Arnold gave notice to Mr Shadbolt pursuant to ss 39 and 41 of the Defamation Act 1992 asking Mr Shadbolt which of the pleaded imputations were alleged to be honest opinion, and to provide particulars of ill will and improper advantage.

(d) On 9 October 2015 Ms Arnold applied to strike out Mr Shadbolt's honest opinion defence, or alternatively to require him to identify the imputations said to constitute honest opinion. She also applied to strike out all but one of the defamatory imputations pleaded in his counterclaim.

[3] I heard those applications on 2 February 2016. In a judgment of 23 February 2016 I declined each of those applications, save that I ruled that one of the defamatory meanings pleaded by Mr Shadbolt was not, as a matter of law, a meaning capable of being borne by the words in question.[1]

[4] In the final paragraph of my substantive judgment on Ms Arnold's applications I made the following comments:

> [32] I make some final comments. These are proceedings between local body politicians. By my assessment, much of the material complained of reflects the regular rough and tumble of local body politics. In that context, freedom of speech issues arise. The one complained of comment that may go further than that is Mr Shadbolt's reference to "outright lies that are being hurled in his [Mr Sycamore's] and council's direction", impliedly by "the combined forces of the blatantly ambitious Councillor Pottinger, the award-winning former Southland Times journalist Councillor Arnold, the Southland Times and the remnants of the Invercargill Ratepayers Association". But

[1] *Arnold v Fairfax* [2016] NZHC 207.

> again, in context, I think it is fair to ask "Where is the harm?". I invite counsel to reflect on these matters.

[5] On 8 March 2016 I made an order of costs in favour of Fairfax and Mr Shadbolt.[2] That award of costs recognised Ms Arnold's limited success in having one of the pleaded counterclaim imputations struck out.

[6] On 24 March Mr Shadbolt filed a notice of discontinuance with respect to his counterclaim.

Submissions

[7] In applying for costs, Ms Arnold recognises that she has not taken – in relation to Mr Shadbolt's discontinued counterclaim – any steps in the proceeding recognised in Schedule 3 to the High Court Rules.

[8] She argues, nevertheless, that the general principle found in r 15.23 applies, namely:

> Unless the defendant otherwise agrees or the court otherwise orders, a plaintiff who discontinues a proceeding against a defendant must pay costs to the defendant of and incidental to the proceeding up to and including the discontinuance.

[9] Ms Arnold points to the presumptive implication of discontinuance, referred to in *McGechan* at [HR15.23.01(a)], that:

> The r 15.23 presumption obviates any requirement for the defendant to demonstrate that the plaintiff acted unreasonably in commencing and then discontinuing a proceeding. The defendant has the advantage of the presumption even where there has not been such unreasonableness.

[10] She argues that her actual costs are the appropriate measure of payment to her. She specifies those as being $3842.50 plus GST. She asks for an award of costs in that amount.

[11] In doing so, she emphasises that, from her perspective, Mr Shadbolt's counterclaim was always a mere tactic, and had no substantive merit. She refers to

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2 *Arnold v Fairfax* [2016] NZHC 379.

comments made by Mr Shadbolt as long ago now as 2006 indicating that, as a public official, he should take a robust view of criticisms in the media by reference to the importance of free speech in a democracy.

[12] Mr Shadbolt opposes any award of costs. He points out, first, that – as Ms Arnold accepts – she has not taken any steps recognised in sch 3. Further, the merits of Mr Shadbolt's claim were stronger than Ms Arnold argues, and in any event, cannot be assessed at this point in the proceedings. Finally, and given the comments I made as referred to at [4] above, it would be contrary to policy for Mr Shadbolt, having discontinued, to pay costs. Although not put in these terms, he essentially argues that the presumption that costs follow a discontinuance should be displaced, because in these circumstances to do otherwise would not be just or equitable.

Analysis

[13] Two things are clear.

[14] First, the fact that no identifiable sch 3 step can be identified does not preclude an order for costs being made nor indicate that one is not appropriate. Rule 14.5(1) provides:

> For the purposes of r 14.2(c), a reasonable time for a step is—
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> (a) the time specified for it in Schedule 3; or
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> (b) the time determined by analogy with that schedule, if Schedule 3 does not apply; or
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> (c) the time assessed as likely to be required for the particular step, if no analogy can usefully be made.

The question becomes, therefore, what in fact has Ms Arnold done in response to Mr Shadbolt's counterclaim, and what is the appropriate time recognition.

[15] Secondly, the fact that no recognised step has been taken – making calculation difficult – and the presumption of unreasonableness arising from discontinuance, do not of themselves provide a basis for an award of full costs, as sought here.

[16] Central to Ms Arnold's application was the following submission:

> Accordingly, in terms of r 14.6 of the High Court Rules, we suggest that Mr Shadbolt's counterclaim can be characterised as supporting not only a claim for increased costs "taking or pursuing an unnecessary step or an argument that lacks merit": (14.6(3)(d)(ii)), but also a claim for indemnity costs (the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding: (14.6(4)(a)).

[17] Ms Arnold identifies the work that was "clearly done" was "in anticipation of filing a statement of defence" (a draft statement was prepared but not filed) and the wasted costs incurred in respect of the interlocutory application as it related to Mr Shadbolt's pleaded meanings.

[18] In my view, and by reference to r 14.5(1), by analogy the work I consider would, in principle, be recognised in terms of costs to be paid to Ms Arnold on discontinuance are akin to the commencement of her defence (item 2 sch 3). Whilst no statement of defence to the counterclaim was actually filed, it is apparent both from the issues raised at the hearing of Ms Arnold's interlocutory applications, and the material provided on her behalf in support of her application for costs, that the counterclaim has given rise to her incurring costs. Given the absence of the formal step, a one and a half day allowance is appropriate.

[19] I am not satisfied, however, that increased or indemnity costs are called for. There is, as far as I am aware, no implication from the presumption of unreasonableness following a discontinuance that an award of increased or indemnity costs follows.

[20] The final two relevant considerations are the implications:

(a) of the fact that Mr Shadbolt discontinued shortly after opposing Ms Arnold's interlocutory application to strike out a large part of his counterclaim; and

(b) of the inference that Mr Shadbolt asks me to draw, that – at least in part – he discontinued his counterclaim in response to the remarks I made referred to at [4] above.

[21] Ms Arnold's application as regards the counterclaim was the smaller part of the matters subject to her (largely unsuccessful) interlocutory applications. That application would still have been declined even if Mr Shadbolt had withdrawn his counterclaim at an earlier stage. The fact of my observations add little, in my view, to the presumption of unreasonableness that discontinuance reflects. Mr Shadbolt could have addressed the question of costs in advance of discontinuance if he had wished to do so. In my view, therefore, those considerations do not affect the conclusion I have reached.

[22] I therefore consider that Mr Shadbolt should pay Ms Arnold costs of $3,345, being one and a half days at the category 2 rate of $2,230 per day. There is an order accordingly.

[23] I have read the joint memorandum in respect of case management dated 12 May 2016. The approach outlined is one I consider to be sensible.

[24] Counsel may proceed accordingly.

Clifford J

Solicitors:
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