IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2016-404-1312
[2018] NZHC 58

UNDER	the Defamation Act 1992
BETWEEN	JOHN DOUGLAS SELLMAN First Plaintiff
	BOYD ANTHONY SWINBURN Second Plaintiff
	SHANE KAWENATA FREDERICK BRADBROOK Third Plaintiff
AND	CAMERON JOHN SLATER First Defendant
	…cont'd

Hearing: On the papers

Appearances: E D Nilsson and J P Cundy for Plaintiffs
B P Henry and C S L Foster for First Defendant
C T Patterson and E J Grove for Second and Third Defendants
W Akel and J W S Baigent for Fourth and Fifth Defendants

Judgment: 7 February 2018

JUDGMENT NO 5 OF PALMER J

This judgment is delivered by me on 7 February 2018 1.00 pm
pursuant to r 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Counsel/Solicitors:
Lee Salmon Long, Auckland
B P Henry, Barrister, Auckland
Andrew Walter Graham & Co, Auckland
C T Patterson & E J Grove, Barrister, Auckland
Simpson Grierson, Auckland

Cont …

CARRICK DOUGLAS MONTROSE GRAHAM
Second Defendant

FACILITATE COMMUNICATIONS LIMITED
Third Defendant

KATHERINE RICH
Fourth Defendant

NEW ZEALAND FOOD AND GROCERY COUNCIL INC
Fifth Defendant

The substantive interlocutory judgment

[1] My interlocutory judgment of 2 October 2017 dealt with various applications by the defendants and plaintiffs.[1] The formal outcomes were:[2]

(a) the defendants' applications to strike out the claims as being time-barred were all declined;

(b) the defendants' applications to strike out the claims as an abuse of process were all declined but a minimum threshold of harm to reputation was applied to the meanings pleaded;

(c) 21 of the 159 pleaded defamatory meanings were struck out in whole or part (12 of the 129 defamatory meanings pleaded against the first defendant and 21 of the 159 meanings pleaded against the second and third defendants);[3]

(d) the fourth and fifth defendants' application to strike out the claim against them because it was speculative or false or incapable of founding legal liability was declined;

(e) the defendants' applications to strike out the ss 39 and 41 notices were declined; and

(f) the plaintiffs' applications to strike out the first defendant's affirmative defence and requiring him to give particulars were declined as was the plaintiffs' application to recall the latter of these decisions.[4]

[2] At the end of the judgment, I stated:[5]

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1 *Sellman v Slater* [2017] NZHC 2392.
2 At [2]–[5], [120], [122].
3 The judgment suggested (e.g. at [4]) there were 161 pleaded meanings which was an error.
4 Minute No 8 of 10 October 2017.
5 At [126].

> I am inclined to let costs lie where they fall, since each party has had a measure of success. If, despite that indication, any party wishes to apply for costs, they have leave to file submissions within 15 working days and any responses are to be filed within 10 working days of that.

Submissions

Plaintiffs

[3] The plaintiffs submit they were substantively successful in opposing the defendants' strike out applications and costs should follow the event. They submit:

(a) The first defendant failed completely in three applications and succeeded only in striking out 11 meanings in whole, and one in part, of 131 challenged meanings.[6]

(b) The second and third defendants failed completely in three applications and succeeded only in striking out 18 meanings in whole, and three in part, of 134 challenged meanings.

(c) The fourth and fifth defendants had no success at all.

(d) The plaintiffs' application against the first defendant was dismissed but his only formal step was to file a notice of opposition, late and without leave, and the application had been deferred by agreement of the parties, so costs should lie where they fell.

(e) The importance or novelty of the legal issues is not a reason to depart from the rule costs should follow the event. The defendants were wholly unsuccessful in seeking to develop the law in relation to *Jameel* abuse of process, the single publication rule and accessory liability. The plaintiffs' subsequent voluntary elaboration of their pleading is immaterial.

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[6] By my count, the first defendant challenged all 129 meanings pleaded against him, but the difference in numbers is immaterial for present purposes.

(f) The plaintiffs are entitled to costs on each of the notices of opposition they prepared which were not the same. The need for the three memoranda after the hearing was occasioned by the defendants' applications.

[4] The plaintiffs seek costs on a 2B basis, plus disbursements:

(a) from each of the defendants in relation to all pre-hearing steps on each of the defendants' applications;

(b) from the fourth and fifth defendants in respect of each set of supplementary written submissions filed following the hearing;

(c) from the defendants jointly and severally in respect of the one-and-a-half-day hearing on 9 and 10 February 2017.

First defendant

[5] The first defendant agrees with my indicated inclination in the judgment that costs should lie where they fell. He submits both plaintiffs and defendants had successes and the consequence of the judgment is the plaintiffs have had to replead with significant changes. He also submits he was acting in the public interest in his application in respect of abuse of process, I would be justified in refusing costs to all parties in the overall justice of the case, and there was a very considerable element of political debate involved.

Second and third defendants

[6] The second and third defendants support the other defendants' submissions. In addition, they submit, if any costs are awarded to the plaintiffs, it would be inappropriate to award full scale costs in respect of the applications by each of the defendants given the considerable overlap in the plaintiffs' notices of opposition and submissions in response.

Fourth and fifth defendants

[7] The fourth and fifth defendants support my initial indicated inclination in the judgment because:

(a) the defendants had a measure of success in striking out 21 meanings, and the plaintiffs have had to file a second amended statement of claim;

(b) the applications raised important issues as to the substance and procedure of defamation law, which go to costs:

(i) in the course of the judgment clarifying observations about alleged responsibility for continued publication led to amendment of the statement of claim;

(ii) in rejecting application of *Jameel* abuse of process the judgment recognised and applied a threshold of seriousness of damage, so the application was not completely unsuccessful;

(iii) although the judgment declined the fourth and fifth defendants' strike out application, it noted it was capable of being amended, and that is what subsequently occurred.

[8] Should I decide against costs lying where they fell, or ordering reduced costs under r 14.7, the fourth and fifth defendants submit:

(a) a single global sum should be awarded in relation to pre-hearing steps given the substantial duplication in responding to the applications;

(b) there should be no order in respect of the three memoranda or submissions following the hearing.

Decision

[9] It is a fundamental principle of New Zealand civil law that costs follow the event – a losing party pays a winning party a contribution towards their legal costs.[7] The question of who has won and who has lost is guided by the interests of justice and must be viewed in terms of "who in reality has been the successful party".[8]

[10] Deciding who won and who lost in relation to these applications is not altogether straightforward. But, on further reflection and contrary to my initial inclination, I consider such an assessment is possible. Overall, I consider the plaintiffs did enjoy substantive success. While they have had to replead, their defamation suit remains substantially intact. But the costs need to reflect the overlap in the defendants' applications and submissions.

[11] I consider the relative and success and failure of the applications to strike out the proceeding was as follows:

(a) The time-bar strike-out applications by all five defendants involved argument about, and determination of, a relatively untested aspect of New Zealand defamation law, based on policy considerations. But the applications all failed. I award costs to the plaintiffs in respect of this aspect of the applications on a 2B basis.

(b) The abuse of process strike-out applications also failed. However, their determination yielded application of a minimum threshold of harm, which was the basis on which six of the 129 challenged meanings pleaded against the first defendant (around five per cent) and seven of 134 of the challenged meanings pleaded against the second and third defendants (around five per cent) to be struck out in whole or part. Strictly, each party should be awarded costs for the proportion in which they were successful. On a net basis, accordingly, I award costs to the

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7 Rule 14.2(a) of the High Court Rules and *Manukau Golf Club Inc v Shoye Venture Ltd* [2012] NZSC 109, [2013] 1 NZLR 305 at [8].

8 *Waihi Mines Ltd v AUAG Resources Ltd* (1999) 13 PRNZ 372 (CA) at [5]. See also *Packing in Ltd (in liq) formerly known as Bond Cargo Ltd v Chilcott* (2003) 16 PRNZ 869 (CA) at [6] (calling for "a realistic appraisal of the end result").

plaintiffs of 90 per cent of this aspect of the application against the first defendant and against the second and third defendants.

(c) The applications to strike out meanings on the basis they could not bear the meaning pleaded were successful in respect of six of the 129 pleaded meanings challenged by the first defendant (around five per cent) and 14 of the 134 pleaded meanings challenged by the second and third defendants (around 10 per cent). On a net basis, accordingly, I award costs to the plaintiffs, in respect of this aspect of the applications, of 90 per cent against the first defendant and 80 per cent against the second and third defendants.

(d) The fourth and fifth defendants' strike out application failed. Repleading by the plaintiffs was required, but that possibility is a standard assumption of the law of strike out. Novel elements of accessory defamation law were canvassed. But the application still failed. I award the costs to the plaintiffs for the fourth and fifth defendants' strike-out application on a 2B basis.

[12] Assuming, as I do for this purpose, that each of the three aspects of the strike-out applications of the proceeding by the first, second and third defendants were of equal weight, the result is that I award to costs to the plaintiffs of 93 per cent of the costs for the first defendant's strike out application, and 90 per cent of costs for the second and third defendants' strike out application.

[13] But I agree there is an element of duplication in the plaintiffs' response to the applications by the first defendant and the second and third defendants. They did not require completely separate responses and, therefore, completely additional costs. I discount each award by a third. So the first defendant will pay 62 per cent, and the second and third defendants will pay 60 per cent, to the plaintiffs for their applications on a 2B basis.

[14] In relation to the other applications, the hearing and disbursements:

(a) The first, and the second and third defendants' applications to strike out the ss 39 and 41 notices simply failed. They will each pay two thirds of the costs of that to the plaintiffs on a 2B basis.

(b) The plaintiffs failed in their two applications regarding the first defendant but he had to replead anyway. The first defendant did not make written or oral submissions about these applications and the notice of opposition was late and without leave. The costs of these applications will lie where they fell.

(c) The three memoranda containing submissions following the hearing were required in order to update the Court on developments in case law. The case law and submissions assisted the Court. Costs will lie where they fell in relation to those memoranda.

(d) All defendants will pay the costs of the one-and-a-half-day hearing and the plaintiffs' disbursements jointly and severally.

[15] Overall, I consider these somewhat complex calculations of costs reflect a fair measure of the success of the plaintiffs regarding the applications dealt with in the judgment.

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Palmer J