IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

I TE KŌTI MATUA O AOTEAROA
AHURIRI ROHE

CIV-2019-441-6
[2019] NZHC 2489

BETWEEN	BRIAN DAMIEN HUNTER Appellant
AND	PHILLIP NICHOLAS ROSS First Respondent
AND	CLIFFORD ERNEST CHURCH Second Respondent

Hearing:	23 September 2019
Appearances:	C J Tennet for Appellant First Respondent appears in Person Second Respondent appears in Person
Judgment:	1 October 2019

JUDGMENT OF GRICE J
(Application for extension of time and appeals against: (1) substantive judgment (defamation); (2) refusal to recall substantive judgment)

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Introduction

[1] Messrs Ross and Church are barristers and solicitors each practicing in Napier and Hastings respectively. Mr Hunter is a former client of theirs. There is no love lost between Mr Hunter and his former lawyers. Mr Hunter, they say, defamed them in publications on his internet site and in letters posted to their clients. The first set of defamatory comments were published by Mr Hunter on 14 December 2016 under the title *The Terrible Two*. The second set was published on 15 December 2016 and focused on Mr Ross under the title *Coward of the County*.

[2] Messrs Ross and Church filed defamation proceedings in the District Court against Mr Hunter in late 2016. Mr Hunter did not file a statement of defence or take any other steps in the proceedings. He had been served by way of email.[1] The matter went to a formal proof hearing on 21 September 2017. Judgment was entered in favour of Messrs Ross and Church on 20 February 2018.[2] The Judge determined they had both been defamed and awarded general damages of $40,000 to Mr Ross and $24,000 to Mr Church, as well as exemplary damages of $10,000 to each of them.

[3] On 21 March 2018 Mr Hunter made an application for the recall of that decision on the basis he had not been served with the proceedings and was unaware of their existence until the day after the decision was published. The recall application was dismissed in a decision dated 17 January 2019.[3]

[4] Mr Hunter appeals both of these decisions.

District Court decisions

The formal proof

[5] In the first judgment, dated 20 February 2018, the Judge found:

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1 Directions for service were made enabling Mr Hunter to be served in this manner.
2 *Ross v Hunter* [2017] NZDC 22579 [*Formal Proof*].
3 *Ross v Hunter* [2019] NZDC 000319 [*Recall*].

(a) The published articles were defamatory of Messrs Church and Ross;

(b) The articles were actuated by malice and Mr Hunter had acted in "flagrant disregard of the rights" of Messrs Ross and Church;[4] and

(c) The defamatory material had been published to third parties by:

(i) Uploading them to Mr Hunter's "blog" site on the internet; and

(ii) Mailing copies of the articles to clients.

[6] A permanent injunction was granted restraining Mr Hunter from publishing "anything on his website that imputes about either [Mr Ross or Mr Church] that they are liars, lazy, unethical, dishonest or incompetent.[5]

[7] Mr Ross was awarded $20,000 general damages for the first article, *The Terrible Two,* $10,000 for the second article, *Coward of the Country*, and $10,000 for copies of the articles mailed to his clients.[6] Mr Ross was also awarded exemplary damages of $10,000. Therefore, he received an award of a total of $40,000 general damages and $10,000 exemplary damages.

[8] Mr Church was awarded the sum of $20,000 general damages for the first article, *The Terrible Two,* and $4,000 in relation to the copies of the articles mailed to his clients. Mr Church was also awarded exemplary damages of $10,000. Therefore, he received an award of a total of $24,000 general damages together with $10,000 exemplary damages.

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4 *Formal Proof*, above n 2, at [21].

5 At [38].

6 The Judge made a minor error in the decision when awarding damages for the articles being posted. At [45] of the decision it is noted that only $4,000 was awarded to Mr Ross and $10,000 to Mr Church. The correct award should have the parties the other way around. This error was later corrected at [50] when the Judge again specifies the amounts awarded.

[9] The Judge concluded that exemplary damages were justified as Mr Hunter had been motivated by malice in publishing the defamatory material.

[10] Costs were awarded by the Judge in favour of Messrs Church and Ross as litigants in person.

The recall judgment

[11] Mr Hunter's lawyer applied on his behalf to recall the defamation judgment on 21 March 2018. Mr Hunter contended that he had not been served with the proceedings and was unaware of them until 21 February 2018.

[12] The application for recall was the subject of a defended hearing on 18 December 2018 and a judgment was delivered on 17 January 2019. Mr Hunter was represented by a lawyer throughout the hearing. He also gave evidence and was cross-examined.

[13] Mr Hunter's argument he had not been served centred in terms of a substituted service order made by a Judge before the formal proof hearing. That order provided for Mr Hunter to be served by way of email at two registered email addresses. In support of that application Messrs Ross and Church had deposed that they did not know the physical address of Mr Hunter, but they believed that he was using the relevant email addresses. This was on the basis that less than a week before their substantive application, on 15 December 2016, they had received an email from Mr Hunter using one of these addresses.

[14] Mr Hunter gave evidence that he had never received the emails effecting service of the proceedings. He said he had either not checked the relevant email addresses or they had become invalid.

[15] The District Court Judge rejected Mr Hunter's denial of receipt of the proceedings by email. The Judge noted that Mr Hunter had taken one of the defamatory articles down after Messrs Ross and Church sent him an email at

the specified email addresses attaching a draft of these proceedings. The email was sent from the plaintiffs at 5.04 pm and the article was removed between then and 5.30 pm that same day.

[16] The Judge rejected Mr Hunter's explanation that this was a coincidence. He also noted:

(a) District Court administrative staff had sent emails to both of the service addresses that did not bounce back until 2 May 2017 when the emails began to bounce back as "undeliverable".

(b) Amazon Web Services had contacted Mr Hunter on 15 December 2019 to notify him that Mr Ross had requested the defamatory content be removed. The contact details provided to Mr Ross by Amazon Web Services for Mr Hunter matched the relevant email addresses in question.

(c) That the automated vacation email received by Mr Ross from one of Mr Hunter's service emails on 16 January 2017 indicated that the email was still being used by Mr Hunter at that time and was under his control. It suggested that for a relatively short period (until the end of January) Mr Hunter would be able to access the address only occasionally.

(d) Mr Hunter was not credible as a witness based on material in an article published in "Stuff" reporting on the dismissal of disciplinary proceedings against Mr Church initiated by Mr Hunter. The report described Mr Hunter as an unreliable witness and that he had previous convictions, including several for dishonesty. Mr Church had also given evidence as to Mr Hunter's significant history of fraud and dishonesty. The Judge commented that none of these allegations were challenged or "even addressed by Mr Hunter in his affidavit in

> support of his application".[7] The Judge also said this finding did not form a crucial basis for his conclusions

[17] For those reasons the District Court Judge found that the proceedings had been properly served by way of substituted service in December 2016. He noted at some point after that the communications, including advice of the date of the formal proof hearing, did not reach Mr Hunter as the emails were undelivered.[8] As Mr Hunter had been served and taken no steps the Judge concluded that the application for recall should be dismissed.

Scope of appeal

[18] Mr Tennet for Mr Hunter submitted that the applicable standard of appeal is that articulated by the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar*.[9] The appellate court has the responsibility of arriving at its own assessment of the merits of the case, but the appellant bears the onus of satisfying the Court that it should differ from the decision below. No deference is required beyond the customary caution appropriate when the tribunal had had a particular advantage, such as technical expertise or the opportunity to assess the credibility of witnesses.[10] Elias CJ summarised the position of the Supreme Court as follows:

> [16] Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate Court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate Court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ. In such circumstances it is an error for the High Court to defer to the lower Court's assessment of the acceptability and weight to be accorded to the evidence, rather than forming its own opinion.

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7 *Recall*, above n 3, at [15].
8 At [17].
9 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [5] and [16].
10 At [3] to [5], [13], [21].

Recall judgment appeal

Extension of time to appeal

[19] The notice of appeal against the recall decision was filed on 18 February 2019, one working day out of time.[11] Mr Hunter applies for an extension of time for filing the appeal.

[20] Messrs Ross and Church conceded that given that the notice of appeal was late by a day, they were unable to raise any real opposition to the extension of time sought to appeal.

[21] I am of the view the extension of time to appeal should be granted. The delay was short and there is no prejudice to Messrs Ross and Church.[12] Accordingly, the extension is granted.

Credibility and service

[22] Mr Hunter appeals against the recall decision on the basis that the Judge was wrong in assessing his credibility based on his old convictions. Therefore, he argues the Judge should have concluded that service had not properly been affected so the defamation judgment should be set aside for irregularity.

[23] An irregularity, such as a failure to serve the proceedings, will almost inevitably lead to the formal proof judgment being set aside.[13]

[24] Mr Tennet says the Judge made an error in his assessment of credibility. Mr Hunter does not deny his history of dishonesty and fraud, nor the fact of his convictions. However, the most recent conviction was entered in 2012 and the present defamation occurred in 2016. Mr Tennet's argued these convictions were too old and Mr Hunter should have been cross-examined on them and been given the opportunity to put them in context. Mr Tennet further argued that the failure to put them to Mr Hunter was a breach of natural justice.

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11 High Court Rules 2016, r 20.4(2)(b).
12 *Whaanga v Smith* [2013] NZCA 606.
13 *EA v Rennie Cox Lawyers* [2018] NZCA 33, [2018] 3 NZLR 202 at [14].

[25] There is some difficulty with those arguments. There is no dispute that the convictions for dishonesty and fraud exist as a matter of fact. Mr Hunter was also represented by counsel throughout. No objection was taken at the time to the manner they were introduced into evidence.[14] Mr Hunter was represented and gave evidence at the hearing. The Judge's conclusion about whether Mr Hunter had been served with the proceedings was primarily based on his findings as to the facts, not credibility. That is clear from his findings which precede the credibility comments as follows:[15]

> [14] I accept the evidence given by Mr Ross in his affidavit that he checked the defendant's website immediately before he sent an email on 19 December 2016 at 5:04 pm, and the articles were still posted, and then checked again at 5:30 pm, and they had been removed. He was not required for cross-examination on that evidence. The defendant, rightly, said he could not comment on it save that he said he had not received the email of 5:04 pm and he had decided on his own initiative to take the articles down. I do not accept that. The removal of the articles is far too close in time to the email sent on 19 December 2016 at 5:04 pm to be a coincidence. They can only have been removed as Mr Hunter had become aware, following receipt of the email and a copy of the draft proceedings that legal action was pending. Consequently I am satisfied that he received a copy of the proceedings and the minute of the Court dated 21 December 2016 when they were sent to him by Mr Ross at both email addresses … at 4:11 pm.

[26] There is no material error here.

[27] The appeal against the recall decision fails primarily because the Judge did not base his decision on Mr Hunter's credibility. It was open to the Judge to conclude as he did on the facts before him.

Formal proof appeal

Extension of time to appeal

[28] The notice of appeal against the formal proof decision was filed on 18 February 2019, out of time by approximately 11 months. Mr Hunter seeks

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14 While not argued before me, the evidence is veracity evidence and is therefore subject to s 37 of the Evidence Act 2006. There was no discussion of this rule in the District Court. In any case, it would appear the evidence is "substantially helpful" and would likely have been admissible under this rule. This was not a material error.

15 *Recall*, above n 3.

leave to extend the filing period for that decision. Messrs Ross and Church oppose that application.

[29] An application for an extension of time for filing appeal is made under r 20.9 of the High Court Rules. The Supreme Court in *Almond v Read* held that the ultimate question when considering the exercise of the discretion to extend time "is what the interests of justice require".[16] That necessitates an assessment of the particular circumstances of the case. The Supreme Court set out the factors which are likely to require consideration. These include the length of the delay; the reasons for the delay; the conduct of the parties, particularly the applicant; any prejudicial hardship to the respondents; and the significance of the issues raised by the proposed appeal both to the parties more generally.

[30] In this case while the delay was significant (approximately 11 months) Mr Hunter argues this was explained by his need to first pursue the recall application in the District Court before appealing the formal proof decision. Otherwise he says there was the risk of having two proceedings, based on the same facts, being dealt with in different courts.

[31] I can see no difficulty with filing an appeal at the time an application for recall was filed as it would be a matter of management of the timeframes to ensure the recall was dealt with before the appeal. Nevertheless, Mr Hunter must have relied on legal advice to adopt the strategy.

[32] I also note there was no real prejudice to the respondents. The matter was essentially stayed pending the recall application being determined. There is no suggestion that the recovery of damages has been significantly jeopardised by delay and the publications ceased in December 2016.

[33] It is clear that an extension would meet the overall interests of justice, and is granted.

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16 *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801.

Grounds of appeal

[34] The grounds relied on by Mr Hunter are that the Judge erred:

(a) In his findings on the defamatory meanings of the publications, their extent and the impact they had on the reputations of Messrs Ross and Church.

(b) In consideration of various affirmative defences.

(c) In assessing the quantum of damages.

[35] Mr Hunter also argued that the hearing was wrongly conducted in his absence. That matter has been dealt with as I have found that the Judge made no error in his finding that Mr Hunter had received the proceedings. It was then up to Mr Hunter to take steps including filing an address for service. He did not do so. Therefore, he cannot now complain of the matter being heard in his absence. That ground of appeal cannot succeed and I do not consider it further.

[36] I first turn to consider the nature of the defamatory comments.

The defamatory comments

[37] The Judge summarised the defamatory comments and the content of the first article, *The Terrible Two,* as follows:[17]

> [5] … [Mr Hunter's] website is published on the internet and functions as a blog where he publishes his views of various members of the Police, the Department of Corrections, and others involved in the administration of justice. The article published on 14 December 2016 on an internet site located at www.initiative.net.nz, although not authored by the defendant, was, I am satisfied, published by him. There are documents that link him to the website, in particular an email forwarded to the first plaintiff on 2 March 2014 authored by the defendant which concludes:
>
> > *Finally, and to give you some understanding, you might be interested in my website at www.initiative.net.nz. This has been*

[17] *Formal proof*, above n 2.

very successful in creating a culture, particularly with the local plods, that they are inclined to behave for fear of having their photos plastered on the internet. When a new article goes up unique hits on the site average around 1,200 per day which is not a bad result for this country.

The defamatory article 14 December 2016.

[6] Insofar as the first plaintiff is concerned, the first part of the article entitled *The Terrible Two* is alleged to be defamatory and with the defamatory works complained of underlined:

> *Starting with this as a basis for choosing a lawyer. If you are in Hawke's Bay then you can immediately eliminate Philip Ross from your lawyer shopping list. By his own admission he has stated that the police prosecutors are fine people who would never do anything wrong, would never lie and is utterly condemning anyone who does not see thing with same rose coloured glasses that he wears. Damion Davies is a known perjurer and yet Ross is quick to defend him and tell anyone who will listen what a fine chap he is.*
>
> *Don't ever turn your back on Philip Ross because he is as two faced as they come. His obsession with those who do not share his viewpoint and seek to challenge that is a well hidden but very mean streak. Ross is very good at acting on only half the information and seems to spend a lot of his spare time trolling the legal databases and coming up with conclusions and then offering unsolicited advice. The most recent examples being his unsolicited advice to Cliff Church on how me (sic) might close this website down, attempts that have of course met with spectacular failure. His latest stung being to encourage Cliff Church to have someone declared a vexatious litigant, once again based on his very subjective viewpoint and only half the information.*
>
> *Ross is not always in favour with the local judiciary and is obsessed with Judge Tony Adeane, looking for any excuse to appeal one of his decisions. Now that could be good or bad depending on what side of the fence you are sitting, but consider that Ross' motives for appealing will have nothing to do with what is in your best interests and is entirely motivated by his desire to get one over Judge Adeane.*
>
> *An academic who came in to law as a second career Ross' major failing is that he has no people skills and completely fails to understand the human condition. An example of this being that he once made a client wait over an hour to see him, whilst he chatted to his secretary. He was then unable to understand why the client did not wait around and was ever so slightly pissed off with him.*
>
> *A conversation with Ross is 90% having to listen to his lawyer war stories about how good he thinks he is and 10% about what you are there for. He has an inability to listen to the client and*

it is all about doing things his way. His ego motivated relationship with Dompost gutter journalist Marty Sharpe is further proof that Ross will stab you in the back in favour of getting his own ego stroked.

Philip Ross might well look at his own loyalties and consider whether integrity should take second place to loyalty. Initiative has direct knowledge of a situation where Ross was willing to retrospectively act as instructing lawyer to help a colleague avoid the wrath of the Law Society.

Ross has been particularly scathing of the website, perhaps because it calls a spade a spade and outs the likes of police nark Brent Willis a client of his. Or perhaps just because he cannot handle the truth. He has described it as libellous.

...

[7] As for the second plaintiff, Mr Church, he alleges the defamatory words in the article of 14 December 2016, insofar as they concern him, are as underlined. As with Mr Ross, he says not only were the defamatory words false but they were also published maliciously.

Cliff Church and Philip Ross are buddies and that is probably just as well for Church because there are very few lawyers in the area who want anything to do with him ...

Strike Cliff Church from your lawyer shopping list immediately! Some of his colleagues even speak of complaining to the Law Society about him. The prosecutors hate him and regularly complain about him. In some circumstances that might be to the client's advantage but not with this guy, who is forever getting off side for filing documents late or not at all, not turning up for meetings, forgetting to turn up at court and generally annoying the hell out of people. Clients routinely complain that he is not on their side, does not return calls and is just doing the bare minimum to get the money from legal aid.

Church has a track record for lying and seems oblivious to the consequences of his actions. He is directly responsible for one person losing custody in a Family Court matter where he lied to the Judge about not having received a draft affidavit and then kept lying. Court staff have become so frustrated with his regular claims that he did not receive emails that they now follow up, just to remove that excuse from his repertoire.

His own now former office person Denise Woodhams quite because, in her own words, she could no longer sit in the same office and listen to Cliff Church lie to his clients.

Speak to any of Church's former clients and you keep hearing the same thing, we do not feel that he was looking after our interests and did not work to advance the case. Recently he represented a person for whom he was supposed to be obtaining

> *a limited license* (sic). *This is a straight forward job that requires no special skills. Church was so inept at this and his documents were rejected so many times that he was eventually admonished by the Judge and court staff eventually did it for him, and encouraged the client to lay a complaint.*
>
> *It is only a matter of time before it all catches up with him. Fortunately you will not have to deal with Cliff Church as duty solicitor at any of the Hawke's Bay courts because he is too incompetent to be permitted on that exclusive list. But he does manage to sneak out of town every now and then to be duty lawyer at Dannevirke. So watch our Tararua people if you draw that short straw.*
>
> *An obsessive collector he has an unhealthy collective of pistols and rifles so don't piss him off. A peek at his Trademe feedback and you will see that he has his share of detractors there – bet they don't know how many guns he has stashed away.*
>
> [8] The article was sub-headed '*Consumer Watch*' and displayed photographs of both plaintiffs.

[38] The Judge went on to find that, in relation to Mr Ross, the defamatory meanings in the 14 December 2016 article were that he:[18]

(a) was unethical and placed his loyalty to his clients behind his relationship with the police.

(b) is unprofessional and ignores lawful instructions from clients.

(c) acts contrary to his client's interests, makes false assertions without making necessary inquiries to establish their validity.

(d) is obsessed with successfully appealing a particular judge and does so for personal reasons rather than the interests of his client.

(e) is a narcissist.

(f) is unethical and dishonest.

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[18] At [9]

[39] In relation to Mr Church the Judge noted the allegations of defamatory meanings contained in the 14 December 2016 article were that he:[19]

(a) has poor relationships with other practitioners.

(b) is lazy, dishonest and incompetent.

(c) does not meet and maintain professional standards as set out in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

(d) is a habitual liar.

(e) lies to his clients.

(f) someone who acts contrary to the interests of clients.

(g) an obsessive collector of firearms.

(h) someone who will threaten anyone who annoys him with his firearms.

[40] The Judge went on to consider the second article, *Coward of the Country*, which Mr Ross alleged was defamatory of him. The Judge said:

> [11] The second article the first plaintiff alleged was maliciously published by the defendant on the initiative.net.nz website and was defamatory of him was a publication at about 9.00 pm on 15 December 2016, under the heading *Coward of the County*, featured a photograph of the first plaintiff and read as follows:
>
> > *Philip Ross, featured in the Terrible Two is about as gutless as they come. Those who are regular followers of this site will know that there was recently an attempt to shut the site down. Ross made all sorts of extravagant claims about this site being "defamatory". But as a lawyer would know that this is not the case. But as a devious lawyer he used that position to threaten and intimidate a web hosting company to remove this site, when he knew that his claims had no basis.*

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19 At [10]

His own self-fulfilling prophecy of biblical proportions is about to come true and his actions soon to be under investigation by the New Zealand Law Society and no doubt in his typical cowardly fashion his response will be one of attack, rather than to address the issues he has created head on.

[12] The defamatory meanings the first plaintiff, Mr Ross, alleges in relation to this article are that he was a coward, had misused his position as a lawyer to threaten and bluff an internet company into terminating service to the defendant, and that he was dishonest and devious.

[41] The Judge then considered the law relating to defamation. He noted the relevant principles were set out by Blanchard J as follows:

[14] A summary of the relevant principles as to whether words are capable of an alleged defamatory meaning was given by Blanchard J in *New Zealand Magazines Ltd v Hadlee* in which he said, at p 5 of his judgment:

In determining whether the words are capable of bearing an alleged defamatory meaning:

(a) The test is objective: under the circumstances under which the words were published, what would the ordinary person understand by them?

(b) The reasonable person is taken to be one of ordinary intelligence, general knowledge and experience of worldly affairs.

(c) The Court is not concerned with the literal meaning of the words or the meaning which might be extracted on close analysis by a lawyer or academic linguist. What matters is the meaning which the ordinary reasonable person would as a matter of impression carry away in his or her head after reading the publication.

(d) The meaning necessarily includes what the ordinary reasonable person would infer from the words used in the publication. The ordinary person has considerable capacity for reading between the lines.

(e) But the Court will reject those meanings which can only emerge as a product of some strained or forced interpretation or groundless speculation. It is not enough to say that the words might be understood in a defamatory sense by some particular person or other.

(f) The words complained of must be read in context. They must therefore be construed as a whole with appropriate regard to the mode of publication and surrounding circumstances in which they appeared. I add to this that a

> jury cannot be asked to proceed on the basis that different groups of readers may have read different parts of an article and taken different meanings from them: *Charleston v Group Newspapers Ltd* [1955] 2 AC 65,72.
>
> Mr Latimour referred the Court to what has been said about the qualities of the notional ordinary reader: someone "not avid for scandal" and "fair minded" (*Lewis v Daily Telegraph Limited* [1964] AC 234, 260 and 268: *Morgan v Odhams Press Limited* [1971] 2 All ER 1156, 1177), not "unduly suspicious" (*Morgan* at p 1177) and not prone to fasten on one derogatory meaning when other innocent or at least suspicious meanings could apply" (*Mitchell v Faber & Faber Limited,* English Court of Appeal (Civil Division), 24 March 1994, p 3).

[42] It was not suggested that the principles set out above were wrong.

[43] The Judge then went on to conclude that the comments were defamatory as alleged, except those made about Mr Church and his firearms.

[44] The Judge concluded that the articles were defamatory of Messrs Church and Ross in that the statements were calculated to lower their personal and professional reputations in the estimation of right-thinking members of the community and bring them into odium and contempt. He said there was nothing in the complete article that removes or ameliorates the sting of the defamatory remarks concerning the plaintiffs".

[45] Mr Tennet argued that the Judge had erred in finding that the word "gutless" has a defamatory meaning in the modern day. He said the term has now lost its sting. The Judge had said:

> [16] … The meaning of the words are such that they would appear to a reasonable person to reflect on Mr Ross's skill, fitness and competence in his calling and meet the test proposed by Farwell J in *Leetham v Rank* where it was said:
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> > … It should be proved that the words are such as would produce a bad impression on the minds of average reasonable men.
>
> [17] So also to call Mr Ross "gutless", or with reference to him, head an article *Coward of the County* is also plainly defamatory. To call someone a coward has long been held to be defamatory; see *Russell v Sheriffs* and *McCarey v Associated Newspapers Ltd (No 2).* So also is the allegation that he is a "devious lawyer" who used his

> position to threaten and intimidate a web hosting company knowing his claims had no basis.

[46] However, in the course of argument, Mr Tennet conceded that most of the comments complained of could be defamatory of Messrs Church and Ross. While noting that concession he indicated the better view was that they were not seriously defamatory, which would go to damages.

[47] I am satisfied that the Judge made no error determining the defamatory meanings and making the above findings. There is no doubt that the comments would "tend to lower the plaintiff in the estimation of right-thinking members of society generally".[20] The defamatory meanings are clear from the articles and aimed at the lawyers' professional reputation. In the surrounding context of the second article, it is clear that the word gutless can have a defamatory meaning like that which the Judge found.

[48] There was no error in the Judges findings.

Affirmative defences

[49] I now turn to the affirmative defences that Mr Hunter says were not properly considered by the Judge. These were the defence based on the right to free speech and the defences of "responsible communication on a matter of public interest" and "honest opinion".

[50] First, I note that these affirmative defences were not pleaded as no statement of defence was filed before the formal proof hearing. Therefore, the Judge did not have these defences before him. Nevertheless, where judgment by default is sought and the claim proceeds by way of formal proof, the Court does not simply rubber stamp the claim. The plaintiff must establish their claim to a judge's satisfaction.[21] The Judge appropriately considered what was before him and found the claims proved. He was not required to consider affirmative

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20 *Sim v Stretch* [1936] 2 All ER 1237 (HL) at 1240 per Lord Atkin

21 District Court Rules 2014, r 15.9.

defences which were not pleaded.[22] That is the short point which disposes of these arguments.

[51] However, even if they were before the Judge there was no merit in the affirmative defences on the material before the Judge. Mr Tennet noted there is a grey area due to the timing of the judgment in this case as to whether the defence raised should have been one of qualified privilege or "communications on the matter of public interest".[23] The latter defence was established after the hearing in the District Court. However, it makes no difference as neither defence had merit on the facts of the case.

[52] In relation to the "responsible communication on a matter of public interest" defence, the publication was not of public interest. The comments made were made in the context of a personal dispute between Mr Hunter and his lawyers. Mr Hunter's ill will toward the lawyers appears to have been precipitated by disciplinary proceedings initiated by him against Mr Church, being dismissed by the Lawyers and Conveyancers Disciplinary Tribunal. There was no discernible public interest in publishing the article. Secondly, the communication was not responsible. No attempt has been made to establish that the comments the subject of the defamation were factually correct. They were clearly intended to be derogatory apparently and had no apparent basis. In addition, the Judge found that Mr Hunter was acting out of malice. He was personally involved in disputes with the lawyers. Therefore, the defence had no chance of success even if it had been raised.

[53] Similarly, the defence of honest opinion, if it had been raised, would have had no chance of success. The statements are obviously not honest opinion. They purport to be fact and motivated by malice as the Judge found. There is no evidential basis for a defence of honest opinion. Mr Tennet

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22 Rule 5.50(4).

23 The decision under appeal was decided before *Durie v Gardiner* [2018] NZCA 278, [2018] 3 NZLR 131 which developed the new defence based on the subject matter of (a) the publication being of being of public interest; and (b) the communication was responsible.

acknowledged that given the finding of malice which he accepted could not be successfully appealed, any defence of honest opinion would have no merit.

[54] I now turn to the quantum of damages. Mr Tennet adopted this as his strongest ground in support of the appeal.

Extent of publication

[55] Mr Tennet for Mr Hunter argued that the damages assessed were too high. First, he said the quantum of general damages was too high and secondly no punitive or exemplary damages should have been awarded in the circumstances.

[56] Mr Tennet pointed to the fact that the articles were published on the web on 14 and 15 December 2016. On 19 December 2016 the articles were taken down from the internet. Therefore, the earliest article was on the site for five days. The Judge was satisfied there was publication on Mr Hunter's "blog" site and that the site had "its own community of users enabling them to record comments on the articles".[24] A number of readers' responses appeared on the website all apparently supportive of the defamatory comments. In the course of argument on appeal, Mr Tennet indicated he accepted that most of those commentators would have been within New Zealand but there could have been at least one from overseas.

[57] One person who contacted Mr Ross was from Michigan, therefore outside the New Zealand jurisdiction. Mr Ross indicated he had done some work in Michigan and he was concerned about his reputation over there. The Judge did not take into account that overseas publication when assessing damages.

[58] In addition, copies of the defamatory comments were sent by mail to clients of Mr Ross. The articles were posted to Mr Ross' clients prior to publication of the defamatory comments on the internet in December 2016.

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[24] *Formal Proof*, above n 2, at [33].

They arrived in envelopes that were posted within the North Island but did not identify a sender. A copy of the article entitled *The Terrible Two* was posted to a sentenced prisoner in Auckland on 29 March 2017 with the article headed *Initiative, Illegitimi Non Carborundum,* a faux Latin aphorism meaning *Don't Let the Bastards Grind you Down*. Mr Ross deposed to receiving a phone call from a client on 15 December 2016 drawing his attention to the first article. Mr Church deposed that copies of the article entitled *The Terrible Two* was posted to various of his clients, several of whom communicated that fact to him.

[59] The Judge noted that Mr Hunter had emailed Mr Ross on 2 March 2014 stating that the number of "unique hits on his website averaged 1,200 per day".

[60] Mr Tennet argued that as Messrs Ross and Church say that Mr Hunter was not credible, his claim that he had 1,200 unique hits on his site each day could not be trusted. Mr Tennet submitted that, while he accepted there was some publication it was small.

[61] In response Mr Ross submitted that while he had diligently attempted to find the extent of publication, it was almost impossible to ascertain the number of people who had seen the articles. He noted that the internet publication was available to anyone. He said he had produced evidence of publications and pointed out that Mr Hunter had failed to produce material, which would have been within his control, to show how many hits had been recorded on the articles on the website. This was information available to the proprietor of the websites but not to Messrs Church and Ross. Mr Tennet said Mr Hunter should not have to produce this, it was up to the respondents to prove.

[62] A further point noted by the Judge was that Mr Hunter had told Mr Ross that the meta data included by Mr Hunter for the purpose of search engine indexing of the page included the highlighted string "tag–cathedral–blame–law tag–philip–ross–cop–lover tag –philip–ross–dodgy–lawyer tag–philip–ross–lawyer tag–philip–ross". Similar source code displaying meta data tags for

search indexing in respect of the article *The Terrible Two* was created with meta tags for search engine indexing being "tag–cathedral–lane–law tag–cliff–church tag–cliff–church–dodgy–lawyer tag–cliff–church–law tag–cliff–church–lawyer tag–philip–ross tag–philip-ross–cop–lover tag–philip–ross–dodgy–lawyer tag–philip–ross–lawyer".[25] Mr Ross' firm is Cathedral Lane Law, hence the reference to "cathedral" in the meta data tags.

[63] Some internet sites attract relatively few views as Mr Tennet suggested. However, others attract millions and material posted on them can go "viral". In this case Mr Hunter himself boasted 1,200 unique views per day which he described as "not a bad result for this country".[26] The Judge was entitled to take this into account. It was an assertion by Mr Hunter himself. No evidence was put in by Mr Hunter contrary to this statement. Even taking into account some exaggeration and discounting the figure 1,000 unique hits per day, the defamatory comments would have been viewed by 5,000 people on the internet site. In addition, the people taking an interest may be people who were or might be clients of the respondents as well as people looking for lawyers.

[64] The Judge found that the tags linked to the website were plainly intended to lead directly by a google search using those words to the respondents. He found that this illustrated the express "malice, spite and ill-will" aimed at Messrs Church and Ross.[27]

Quantum of damages

[65] Mr Tennet submitted that the quantum of damages was too high in relation to general damages and that exemplary damages should not have been awarded at all.

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25 At [26]–[27].
26 At [34].
27 At [28].

[66] He referred to the decision in *Williams v Craig* pointing to the differences between aggravated compensatory damages and punitive damages. The Court of Appeal said:[28]

> [33] Compensatory damages may be aggravated where a jury is satisfied the defendant has acted towards the plaintiff in a manner which compounds or increases the effect of the original defamation.[29] The defendant's behaviour after the original publication, including in conducting his or her defence, can operate in this way.[30] That principle featured importantly in this trial, as we shall explain.
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> [34] Punitive damages fall into a different category. Their purpose is to punish a defendant who has "acted in flagrant disregard of the rights of the plaintiff".[31] As Katz J noted, punitive damages awards are relatively rare and are only justified where there is a need to punish the defendant beyond the award for general damages.[32]

[67] Mr Tennet said that it is possible that the factual matters relied upon by the Judge to support the punitive damages might properly have been described as aggravated damages but even then the general damages were still too high in the circumstances.

Exemplary damages

[68] The Judge correctly identified the basis for exemplary damages. He noted they are awarded to punish defendants for their behaviour and so to deter defendants and others from engaging in similar conduct.[33] He noted that the particularisation required under s 44 of the Defamation Act 1992 specifying the facts or circumstances alleged to justify the award of punitive or exemplary damages had been provided. He said they were established in that Mr Hunter made the defamatory publication in retaliation for publication in the Dominion newspaper and Stuff of his name and photograph and the description of him as "*conman*". The Judge found that the particular that Mr Hunter had been ordered to pay costs to the New Zealand Law Society, had not been substantiated. Nevertheless, he found that the remainder of the particulars were

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28 *Williams v Craig* [2018] NZCA 31, [2018] 3 NZLR 1 at [33].
29 *Siemer v Stiassny*, above n 29, at [51]–[56].
30 *John v MGN Ltd*, above n 30, at 611.
31 Defamation Act 1992, s 28.
32 *Williams v Craig* [2017] NZHC 724, [2017] 3 NZLR 215 at [41].
33 *Formal proof*, above n 2, at [47].

made out. The publications, the Judge found, were motivated by malice and so deserving of exemplary or punitive damages of $10,000 in favour of Messrs Ross and Church.[34]

[69] It was open to the Judge to make that award of punitive or exemplary damages in the circumstances. While such awards may be rare, in circumstances where a Judge properly finds that a defendant has acted in flagrant disregard of the rights of the plaintiff and there is need to punish the defendant beyond an award for general damages. The Judge made no error in awarding exemplary or punitive damages.

[70] I now turn to the quantum of general damages.

General damages

[71] Mr Tennet referred again to *Craig v Williams.*[35] The Court set out a range of damages awarded in defamation cases from 2013 to 2019 were set out. It included in that list the District Court damages award made in the present case.

[72] All the awards of damages were substantially more than were awarded in the present case except with the exception of *Wiremu v Ashby* where an award of $10,000 was made in relation to comments made on two Facebook pages.[36] The background to that case was that Mr Wiremu was involved with the Canterbury Mini Motocross Club Inc and had served as President of the club. Mr Ashby posted a collage of photographs to his Facebook with annotations stating in various ways that Mr Wiremu was a cheat. The Judge accepted that at least 17 people and probably significantly more would have seen the posts.[37] He noted that the fact of internet publication does not create a presumption of law that there has been a substantial publication but concluded in the case of general and accessible web pages and bulletin boards with many

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34 At [48] and [49].
35 *Williams v Craig*, above n 28.
36 *Wiremu v Ashby* [2019] NZHC 558.
37 At [41].

subscribers "it may be inferred that publication has occurred".[38] The Judge found on a claim of qualified privilege that Mr Ashby had been responding to various exchanges with Mr Wiremu, but the responses exceeded the legitimate level of defence which is permitted.[39] The Judge referred to the decision under appeal in this case and commented:

> [109] … damages awarded in particular cases are, by their nature, fact-specific but referred me to four cases in which damages had been awarded. Two of them were cases involving professionals against whom serious allegations of impropriety and dishonesty were made.[40] In another instance, the defamation was published in a newspaper alleging criminal conduct by the plaintiff.[41] Both the gravity of the allegations and the likely impact on professional reputation put those cases in a different category to the present.

[73] As Justice Osborne in *Wiremu* noted levels of damages are fact specific and difficult to compare. However, it is clear that the likely effect of the defamation on the reputation of Messrs Ross and Church, given their position as lawyers, was likely to be more serious and thus deserving of a higher award of general damages than was the case in relation to the defamation in *Wiremu v Ashby*.

[74] In this case the District Court Judge summarised the position as follows:[42]

> [43] While the defamatory material in these proceedings has been removed from the defendant's websites, which occurred after service of the proceedings, they were available to be read there for approximately five days and were, I am satisfied, seen by a number of people. The articles were plainly defamatory and were clearly designed to injure the plaintiffs in their professional reputation and expose them to public odium and contempt. Although the falsehoods were wounding and published with deliberate intention of humiliating and ridiculing the plaintiffs, the degree of public odium and content and damage to reputation and character seems to me to be such that the damages claimed for the first cause of action, namely $20,000 each

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38 At [40].
39 At [99].
40 *Reeves v Mace* HC Auckland CP22/00, 125 June 2001 (compensatory general damages of $95,000); *Ross v Hunter* [2017] NZDC 22579, [2018] DCR 770 (general damages of $40,000 and exemplary damages of $10,000 to the first plaintiff; general damages of $24,000 and exemplary damages of $10,000 to the second plaintiff).
41 *Ahn v Lee* [2009] DCR 298 (general damages of $85,000 awarded).
42 *Formal Proof*, above n 2.

> as general damages are awards that may properly be made, and I do so.

[75] Mr Tennet also referred to the High Court decision of *Christiansen v Harrison* in which damages awarded in the District Court of $25,000 were reduced to $7,500.[43] This followed a finding on appeal that the Judge had assessed damages on the basis of theft, when the only justified imputations were of untrustworthiness and dishonesty. In those circumstances the High Court considered the award could not be sustained. The publication of the defamatory comments had been made by statements to customers of the firm in which respondent had been employed. Therefore, there had been a relatively limited publication.

[76] The second case Mr Tennet referred to was the 2002 High Court decision in *Heptinstall v Francken.*[44] In that case the plaintiff, a chef, had been defamed by his former employer. The defamatory comments took place in telephone conversations with a business manager of the "Otago Daily Times" and with the head of the School of Hospitality and Service Centre Management at Otago Polytechnic for whom the plaintiff had worked. The defamatory comments related to a suggestion that the plaintiff had had an affair, was unreliable and was unstable due to matrimonial and financial problems and that he had walked out of the kitchen prior to 200 people arriving for dinner. Again, there was limited publication of the defamation. There was no internet publication. The defamation, while no doubt serious for the plaintiff, was not of the scale that appears in this case where professionals have been defamed and their reputation questioned in a malicious manner both targeted but also widely available.

[77] Mr Hunter's website was open to anyone to view and people did in fact view it (although there was some suggestion Mr Hunter himself had written some of the comments on the report). Traffic may well have been driven to site due to the tags. This could have included searches by looking for legal advice or specifically looking for details of Mr Ross or Mr Church, or their firms. In

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43 *Christiansen v Harrison* HC Napier 11 March 1999 AP 5598.
44 *Heptinstall v Francken* HC Dunedin CP62/00 15 February 2002.

the absence of any evidence to the contrary the Judge was entitled to find that the publication, while only up for five days at most, was sufficiently damaging to justify an award of general damages of $20,000 for each respondent. In addition, Mr Ross was awarded a further $10,000 for the second defamatory article entitled *The Coward of the County.* Again, in view of the defamatory comments and the likely extent of publication this was within the appropriate range.

[78] Mr Church was awarded a further $4,000 for the articles mailed to his clients containing the defamatory material, two of whom were located in Napier and one in the Wairoa area. The Judge was satisfied they were sent by Mr Hunter with defamatory intent. Again the targeted mailing of the defamatory articles to clients was deserving of the amounts of general charges awarded for those

[79] Accordingly, in my view the District Court Judge was not in error in awarding the amounts of general damages that he did. Nor was the Judge in error in awarding punitive damages at the level at which he did.

Conclusion

[80] The appeal is dismissed.

Costs

[81] Mr Ross and Mr Church appeared on behalf of themselves, as lawyer self-represented litigants. They indicated that following the Supreme Court decision in *McGuire* they were entitled to costs.[45] Mr Tennet submitted that in the event of an award of costs, only one award of costs for the two respondents should be made. Mr Ross took primary carriage of the argument and he agreed with that proposition. Counsel agreed costs should be awarded on a 2B basis. Mr Ross indicated he agreed scale costs on that basis should be awarded for one respondent to satisfy costs for both.

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[45] *McGuire v Secretary for Justice* [2018] NZSC 116, [2019] 1 NZLR 335 at [88].

[82] Accordingly, I am of the view it is appropriate to award costs on a 2B basis for one respondent only (to cover both the first and second respondent jointly).

[83] If counsel wish to take issue with that proposed award submissions should be filed within three days of the date of delivery of this judgment.

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Grice J