IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2016-404-1312
[2019] NZHC 467

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 …/2

Hearing:	On the papers
Counsel	J P Cundy for the Plaintiffs B P Henry and S S Singh for the First Defendant E J Grove for the Second and Third Defendants W Akel and J W S Baigent for Fourth and Fifth Defendants
Judgment:	18 March 2019

JUDGMENT No 7 OF PALMER J
[Costs]

This judgment is delivered by me on 18 March 2019 at 3.30 pm pursuant to r 11.5 of the High Court Rules.

.....
Registrar / Deputy Registrar

Counsel/Solicitors:
Lee Salmon Long, Auckland (plaintiffs)
Brian Henry, Barrister, Auckland (1st defendant)
Shanahans Law Ltd, New Lynn, Auckland (1st defendant)
Chris Patterson Barrister Ltd, Auckland (2nd & 3rd defendants)
Andrew Walter Graham & Co, Auckland (2nd & 3rd defendants)
William Akel, Barrister, Auckland (4th & 5th defendants)
Simpson Grierson, Auckland (4th & 5th defendants)

CARRICK DOUGLAS MONTROSE GRAHAM
Second Defendant

FACILITATE COMMUNICATIONS LIMITED
Third Defendant

KATHERINE RICH
Fourth Defendant

NEW ZEALAND FOOD AND GROCERY COUNCIL INC
Fifth Defendant

November 2018 interlocutory judgment

[1] On 23 November 2018, I issued judgment no 6 in this proceeding, on interlocutory issues.[1] The summary was:

> [1] Dr Doug Sellman, Dr Boyd Swinburn and Mr Shane Bradbrook sue Mr Cameron Slater, Mr Carrick Graham and Mr Graham's company Facilitate Communications Ltd (FCL) for defamation and Mrs Katherine Rich and the New Zealand Food and Grocery Council Ltd (NZFGC) for procuring defamation. In this judgment I determine a second set of interlocutory applications:
>
> (a) I decline Mr Slater's application to exclude hacked documents obtained by the plaintiffs from Mr Nicky Hager at this stage of the proceeding because the evidence does not satisfy me they are inauthentic and they appear relevant to the applications about discovery.
>
> (b) I grant a narrower version of the plaintiffs' applications for particular discovery by Mr Slater, Mr Graham and FCL because there are grounds for believing they have not discovered relevant documents but the original applications were too broadly framed.
>
> (c) I grant the plaintiffs' applications for particular discovery by Mrs Rich and the NZFGC but only to a limited extent, for the avoidance of doubt and for updating purposes.
>
> (d) I decline Mrs Rich's and the NZFGC's application for particular discovery by the plaintiffs because:
>
> (i) The court's ability to strike out a proceeding for abuse of process is not a parameter for discovery for the purposes of its trial.
>
> (ii) Defamation law presumes a defamatory statement damages a plaintiff's reputation in the eyes of those who may read it. The presumption cannot be rebutted by evidence of lack of consequences of harm to the plaintiff's reputation in the eyes of groups of people who may or may not have read it. Otherwise every trial of the defamation of a plaintiff would turn into a detailed evaluation of the plaintiff's reputation, which would be as unattractive as it is likely to be time-consuming.
>
> (iii) The plaintiffs' public and academic profiles, publications, media and social media comments of the plaintiffs are not sufficiently relevant to the allegedly defamatory statements to mitigate damages.

---

1 *Sellman v Slater* [2018] NZHC 3057.

(e) I grant the plaintiffs' application to examine Mr Slater and Mr Graham orally because I consider they have made insufficient answers to interrogatories, particularly about whether blog posts were posted on the Whale Oil website for reward.

[2] On costs, I said "[i]f costs cannot be agreed between the parties they have leave to file written submissions of no more than five pages within 10 working days of the date of the judgment".[2]

Further developments

[3] The plaintiffs filed submissions on costs within the deadline. Counsel for Mr Graham, FCL, Mrs Rich and the NZFGC filed submissions in reply. Mr Slater applied for a temporary stay of the proceeding. While I did not stay the proceeding, I lengthened the deadlines for the next steps involving Mr Slater including extending the deadline for submissions on costs until 18 February 2019.[3] At a teleconference on 15 February 2019, that was further extended to Friday 22 February 2019.[4]

[4] On Monday 25 February 2019, Mr Henry, his junior and his instructing solicitor sought to withdraw from representing Mr Slater because they no longer had instructions as at Friday 22 February 2019. He advised Mr Slater had voluntarily applied to be adjudicated bankrupt, needed to be isolated from stress and there were extensive legal fees outstanding. At a teleconference on 26 February 2019, Mr Henry agreed to deal with the memorandum on costs and to file the application required for the solicitor to withdraw. I indicated leave to withdraw would be conditional on the memorandum on costs being filed by 1 March 2019.[5] I also appointed Mr Henry as counsel assisting the court, in case assistance is required.

[5] On 1 March 2019, Mr Henry advised that Mr Slater had been adjudicated bankrupt on 27 February 2019. He, his junior counsel and his instructing solicitor applied for leave to withdraw. Mr Henry inquired as to whether I still required a costs memorandum. I did still require a costs memorandum, which I indicated should include submissions about the effect of bankruptcy on costs. I also gave leave to the

---

2 At [66](f).
3 Minute No 11, 18 December 2018, at [12](d).
4 Minute No 12, 15 February 2019, at [2](a).
5 Minute No 13, 26 February 2019, at [3].

plaintiff to file a very brief memorandum in reply in relation to the implications of bankruptcy for costs. Both memoranda were filed accordingly.

Law of costs

[6] As I observed in judgment no 5 in this proceeding, 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.[6] 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", though what happened need not be unpicked in detail.[7] Success on more limited terms than originally sought is still success for the purposes of costs, though if the time and resources required of the losing party is significantly increased by the ultimately unsuccessful arguments, costs may be reduced.[8]

[7] Costs are awarded on the basis of three categories of complexity of the proceedings under r 14.3. Under r 14.5, one of three bands is applied to each step of the proceeding depending on how much time is reasonably spent on it: a normal amount of time, a comparatively small amount or a comparatively large amount of time. The distinctions between the bands are relative, which I have previously likened to Goldilocks' choices.[9]

Submissions on costs

[8] Mr Salmon, for the plaintiffs, seeks costs on their successful applications and costs on the unsuccessful applications of Mr Slater, Mrs Rich and the NZFGC. They do not seek costs on Mr Graham's and FCL's application as it was deferred. They seek costs on a band B basis, except in relation to: filing their application (band C); filing two memoranda and appearance at a teleconference (band A); and filing an amended

---

6 *Sellman v Slater* [2018] NZHC 58 at [9], citing r 14.2(a) of the High Court Rules 2016 and *Manukau Golf Club Inc v Shoye Venture Ltd* [2012] NZSC 109, [2013] 1 NZLR 305 at [8].

7 *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") and *Weaver v Auckland Council* [2017] NZCA 330 at [24].

8 *Weaver v Auckland Council,* above n 7, at [26].

9 *TSB Bank Ltd v Dollimore* [2016] NZHC 253 at [7].

application (band A). Mr Salmon submits it is appropriate for the Court to determine the amount of Mr Slater's costs liability notwithstanding his bankruptcy, since a costs award constitutes a debt provable in the bankruptcy. The total of costs sought by the plaintiffs is $24,063.90.

[9] Mr Henry, for Mr Slater, submits a hearing would not have been necessary if the scope of the discovery orders sought had been limited to those ultimately granted against Mr Slater. He submits costs should be reserved until the outcome of the oral examination of Mr Slater is determined. He does not dispute that a costs award can constitute a debt provable in a bankruptcy.

[10] Mr Grove, for Mr Graham and FCL, does not oppose an award of costs in favour of the plaintiffs for their applications against them. He raises questions about minor details of the costs claimed and proposes the plaintiffs' costs of opposing Mr Graham's and FCL's application be reserved as it has not yet been determined.

[11] Mr Akel, for Mrs Rich and the NZFGC, submits costs should lie where they fall between them and the plaintiffs. He submits the order made in favour of the plaintiffs was much narrower than sought, and if narrower orders had been sought originally a hearing may not have been necessary. He submits the judgment declining Mrs Rich's and the NZFGC's application contained words indicating some discovery may be required. He submits neither party achieved the desired result of their respective applications.

Costs award

[12] I consider the plaintiffs succeeded in relation to the applications, as follows:

(a) completely, in opposing Mr Slater's application to exclude documents from the proceeding;

(b) substantially, in applying for particular discovery by Mr Slater, Mr Graham and FCL;

(c) to a limited extent, for the avoidance of doubt and for updating purposes, in applying for particular discovery against Mrs Rich and the NZFGC;

(d) substantially, in opposing Mrs Rich's and the NZFGC's application for particular discovery;

(e) completely, in applying to examine Mr Slater and Mr Graham orally.

[13] That means the plaintiffs succeeded substantially or completely in relation to four of the five issues: three applications in relation to Mr Slater; two applications in relation to Mr Graham and/or FCL; and one application in relation to Mrs Rich and NZFGC. They succeeded only to a limited extent in relation to one issue and application relating to Mrs Rich and the NZFGC.

[14] It is difficult to disentangle all the steps of the proceeding in relation to the various applications and I do not attempt to do so. I agree with the plaintiffs' Goldilocks' calculation. I consider the overall interests of justice are best served by awarding costs, as sought, to the plaintiffs, to be borne: 50 per cent by Mr Slater; 33 per cent by Mr Graham and FCL; and 17 per cent by Mrs Rich and NZFGC.

Palmer J