IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2017-409-000548
[2019] NZHC 1334

BETWEEN	DION MOHI WIREMU Plaintiff
AND	BRIAN ASHBY Defendant

Appearances: T J Mackenzie for Plaintiff
P N Allan and A McKenzie for Defendant

Judgment: 13 June 2019

Determined on the papers

JUDGMENT OF OSBORNE J
(Costs)

Introduction

[1] At trial, the plaintiff obtained a declaration that the defendant was liable in defamation. The Court also awarded general damages of $10,000 together with costs and disbursements. The amount of costs, if not agreed, was to be the subject of written submissions, which have now been received.

Costs – the applicable principles

[2] Counsel agree that the Court should apply the primary principle, under r 14.2(1)(a) High Court Rules, whereby costs follow the event.

Adoption of High Court scale

[3] This proceeding, as it came to trial, could have been brought in the District Court. Whereas the plaintiff's initial claim (in August 2017) included general damages of $400,000, the amended claim on which the plaintiff proceeded to trial reduced the general damages claim to $50,000.

[4] This situation is addressed by r 14.13 High Court Rules which provides:

> **14.13 Proceedings within jurisdiction of District Court**
>
> Costs ordered to be paid to a successful plaintiff must not exceed the costs and disbursements that the plaintiff would have recovered in the District Court if the proceeding could have been brought there, unless the court otherwise directs.

[5] Counsel for the defendant submit that the default rule should apply, with the consequence that the calculation of costs should be upon the District Court scale. For the plaintiff, Mr Mackenzie explained that, particularly for litigation involving the complexity of defamation issues, the parties were more likely to obtain a timely trial and outcome in the High Court. In his submission this observation weighed in favour of the Court exercising a discretion to allow costs on the High Court scale.

[6] There is established authority in relation to the operation of r 14.13 and its predecessors.

[7] In *Killalea v In Print Publishing Co Ltd,* Woodhouse J identified the ultimate question as being whether the case was proper one to be brought in the (then) Supreme Court.[1] His Honour observed that in the final analysis the problem becomes one of degree.

[8] In *Fuehrer v Thompson,* the Court of Appeal considered factors which are relevant when the Court is considering an application for transfer of a proceeding from the District Court to the High Court.[2] Relevant factors include:

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1 *Killalea v In Print Publishing Co Ltd* [1966] NZLR 70 (SC) at 71.
2 *Fuehrer v Thompson* [1981] 1 NZLR 699 (CA).

(a) the amount of the claim;

(b) its nature and complexity;

(c) the type of issues raised by the pleadings, its public or other importance; and

(d) such other considerations as relate to the proceedings and render it desirable that they be heard in the High Court.[3]

[9] Those factors are similarly relevant when the Court is asked to exercise the discretion as to costs under r 14.13.

[10] I am not satisfied in this case that it is appropriate to allow the plaintiff costs beyond the District Court scale. All the particular factors identified in *Fuehrer v Thompson* tend in favour of my viewing the District Court as the appropriate court. A possible timing advantage in relation to the availability of trial in this Court is not such as to outweigh those other factors.

[11] I accordingly direct that the plaintiff's costs be calculated in accordance with the District Court scale.

Application of s 43 Defamation Act 1992

[12] Counsel for the defendant invoke the requirements under s 43(2) Defamation Act 1992 which provides:

43 Claims for damages

(1) …

(2) In any proceedings for defamation, where—

(a) judgment is given in favour of the plaintiff; and

(b) the amount of damages awarded to the plaintiff is less than the amount claimed; and

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3 *Fuehrer,* above n 2, at 701.

> (c) in the opinion of the Judge, the damages claimed are grossly excessive,—
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> the court shall award the defendant by whom the damages are payable the solicitor and client costs of the defendant in the proceedings.

[13] Counsel submit that s 43(2) applies in this case because:

(a) in terms of s 43(2)(b), the plaintiff recovered less than the amount claimed ($10,000 instead of $50,000); and

(b) the damages claimed were grossly excessive.

[14] Counsel submit that the difference between the $10,000 award and the $50,000 claimed in itself represents a grossly excessive margin. Alternatively, they submit that the Court must apply s 43(2) by reference to the sum of $400,000 initially claimed by the plaintiff, in which event the claim was, even more clearly, grossly excessive.

[15] Having regard to the difference between the amount claimed at trial and that awarded, it is fair to describe the claim as having been "excessive". But such does not trigger the requirements of s 43(2).

[16] The qualification of "grossly" must be given its normal meaning. I adopt the references identified by John Hansen J in *Court v Aitken*:[4]

> [6] The 'Shorter Oxford English Dictionary' defines "grossly" as "in a gross manner; plainly; excessively, flagrantly …".
>
> [7] The reference back to the definition of "gross" in the same dictionary is defined as "3. of conspicuous magnitude; palpable, striking; plain, evident … 4. glaring; flagrant; monstrous".

[17] Once the term "grossly excessive" is considered in that light, the plaintiff's claim of $50,000 at the time of trial cannot be considered grossly excessive. Equally, I am not persuaded that it is relevant to consider the plaintiff's previous claim in a previous version of his pleading. Section 43(2) operates at the point that judgment has been given in favour of the plaintiff by reference to the plaintiff's claim. That is clearly

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4 *Court v Aitken* HC Dunedin CIV-2005-412-519, 2 May 2006.

a reference to the claim as advanced by the plaintiff in the pleadings which applied at trial.

[18] Accordingly, s 43(2) does not apply in this case.

Calculation of costs and disbursements

[19] The correct calculation of costs in terms of this judgment is set out in Schedule A to this judgment and in accordance with the District Court scale. The appropriate sum of costs is accordingly $18,601.

[20] The plaintiff claimed disbursements by reference to the High Court fees paid. I accept the submissions of counsel for the defendant that the disbursements to be awarded should be calculated by reference to District Court fees. Accordingly, the appropriate sum of disbursements is $3,965, as identified in Schedule A.

Orders

[21] I order the defendant to pay to the plaintiff his costs and disbursements in the sums of $18,601 and $3,965 respectively, totalling $22,566.

Osborne J

Solicitors:
Ronald W Angland & Son, Leeston (for Plaintiff)
Counsel: T Mackenzie, Christchurch
Joseph Tupaea, Solicitor, Christchurch (for Defendant)
Counsel: P N Allan and A McKenzie, Barristers, Christchurch

SCHEDULE A

Item	Description	Band	Days	Amount
1	Preparing statement of claim	2B	1.5	$2,670
7.4	Amended pleading x 2 (13/1017 and 25/6/18)	2B	0.4 x 2 = 0.8	$1,424
8.1	Preparation (JSC)	2B	0.25	$445
20	Attending (telephone) conference (26/2/18)	2B	0.2	$356
8.2	Attending issues conference	2B	0.5	$890
17.1	Preparation for trial	2B	4 (2 x trial time)	$7,120
18.1	Trial	2B	2	$3,560
9.16	Sealing order or judgment	2B	0.2	$356
20 – other steps Notices/memos	2 x notice that opinion not genuine (13/10/17) and 5/7/18) 2 x memoranda (regarding defendant's timetable breaches by not serving evidence and regarding 5-day trial sought on basis of 30 defence witnesses (27/8/18 and 4/12/18) Total 6 different notices/memoranda	2B	1	$1,780
		Total	10.45	$18,601

Disbursements

Filing fee	$200
Service agent fee	$115
Scheduling fee	$900
Hearing fee	$2700
Fee for sealing order	$50
Total disbursements	$3,965

Total costs and disbursements

Costs and disbursements	$22,566