IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2019-404-001818
[2023] NZHC 424

UNDER	the Defamation Act 1992
BETWEEN	GRAHAME CHRISTIAN Plaintiff
AND	MURRAY IAN BAIN Defendant

Hearing: On the papers

Judgment: 7 March 2023

JUDGMENT OF WALKER J
[COSTS]

This judgment was delivered by me on 7 March 2023 at 4 pm
Pursuant to Rule 11.5 High Court Rules

Registrar/Deputy Registrar

[1] This costs judgment follows my substantive judgment in this defamation claim.[1] In that judgment, I held:

(a) Mr Bain was a joint tortfeasor in respect of publication of the articles in NZME print and website publications for the purposes of the law of defamation.

(b) The articles were defamatory of and concerning Mr Christian and bore some of the pleaded meanings.

(c) Mr Bain's defence of responsible communication on a matter of public interest succeeded.

[2] The result was that I dismissed Mr Christian's claim.[2] The parties have since been unable to resolve questions of costs.

[3] In addition to costs on my substantive judgment, I now also determine costs on pre-trial interlocutory applications in which costs were reserved.

Memoranda filed

[4] Mr Bain seeks costs of $169,092 and disbursements of $9,068 in respect of the substantive proceeding. This is primarily calculated in accordance with 2B costs, save for a small number of steps which are said to warrant 2C costs and one step warranting a 2A assessment. Mr Bain seeks a 50 per cent uplift on "scale" costs for the evidence and trial preparation phase.

[5] Mr Christian argues that there should be no award of costs to Mr Bain or, alternatively, any costs award should be significantly reduced by approaching costs on an issue by issue basis. That is, awarding costs in respect of the defences on which Mr Bain succeeded. If the Court adopts this approach, Mr Christian argues that costs should be reserved pending the outcome of his appeal and Mr Bain's cross-appeal to avoid redundancy.

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1 *Christian v Bain* [2022] NZHC 3394.

2 It was unnecessary to determine the defence of honest opinion in those circumstances.

[6] Mr Christian also seeks costs in respect of Mr Bain's unsuccessful applications to strike out the claim, for a change in venue and to vacate the trial. He seeks costs on his own application for directions in respect of without prejudice correspondence which I ultimately found moot in view of my conclusion on the strike out application.

[7] Mr Bain does not oppose an award nor the quantum of 2B costs on the first three applications but contends that he is entitled to costs on the application for directions.

Analysis

[8] Costs are at the discretion of the Court.[3] The overall objective is to achieve the outcome that best meets the interests of justice. Naturally, the discretion is not unfettered. It is qualified by the applicable cost rules. The exercise of discretion must be consistent with established principles. One of the fundamental principles in respect of questions of costs is that the party who fails with respect to a proceeding should pay costs to the party who succeeds.[4] There must be good cause to depart from this position.[5]

Costs on interlocutory applications

[9] Costs for three interlocutory applications (and one collateral application for directions) are in issue:

(a) an unsuccessful interlocutory application to strike out the claim brought by Mr Bain,[6]

(b) an unsuccessful application for a change of venue, brought by Mr Bain concurrently with the strike out application, and

(c) an unsuccessful application to vacate the substantive fixture, also brought by Mr Bain concurrently with the strike out application.

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3 High Court Rules 2016, r 14.1.
4 Rule 14.2(1)(a)
5 *Shirley v Wairarapa District Health Board* [2006] NZSC 63, [2006] 3 NZLR 523 at [19].
6 *Christian v Bain* [2021] NZHC 3390.

[10] In that context, Mr Christian sought directions allowing the production of without prejudice documentation. It became unnecessary to determine the question. There was no need to have recourse to the without prejudice communications to determine the strike out application because the terms of the settlement agreement answered the key question. I indicated in my judgment that, if it had been necessary for the determination of that question, I would have set aside privilege.

[11] Both parties seek costs of that application in the sum of $4,182.50. Ms Dickson argues that Mr Bain was the successful party. Effectively, Mr Patterson submits that the directions sought were parasitical; standing and falling on the outcome of the strike out application. Both submissions are correct. The appropriate response is to let those costs lie where they fall. It was not an unmeritorious directions application; it was inextricably linked to the application to strike out but Mr Bain's opposition was successful.

[12] Mr Christian is entitled to an award of 2B costs totalling $13,384 in respect of those applications and I make that order accordingly.[7]

Reservation of costs

[13] Regardless of whether I accept the approach advanced by Mr Patterson, I reject the submission that costs for the substantive proceeding ought to be reserved pending the outcome of the appeal and cross-appeal. An appeal does not operate as a stay on questions of costs. On the contrary, the costs regime anticipates that costs be dealt with expeditiously following determination of a proceeding. The Court of Appeal routinely revisits questions of costs on determination of an appeal.

Substantive costs

[14] Mr Christian does not dispute any of the disbursements claimed by Mr Bain. As far as I am able to tell, they appear to be reasonable and justified. I approve the witness expenses under r 14.12(2)(a)(i) and award disbursements to Mr Bain of $9,068.

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7 Mr Christian did not seek any disbursements.

[15] This proceeding has already been determined to be a Category 2 proceeding. I agree with that assessment.

[16] Mr Bain's cost claim of $169,092.50 is made up of:[8]

(a) 2B costs for most of the steps in the proceeding in accordance with the schedule provided, including a claim for second counsel, save for preparation of one memorandum for which 2A costs are claimed.

(b) 2C costs for three steps:

(i) a memorandum responding to the plaintiffs' admissibility challenges to the briefs of Messrs Bain and Valintine;

(ii) Mr Bain's affidavits of documents in the discovery phases;

(iii) inspection of documents; and

(c) an uplift of 50 per cent on evidence preparation, common bundle preparation and trial preparation calculated by reference to the graduated time allocation provided in sch 3 to the High Court Rules 2016.[9]

[17] Mr Christian does not specifically engage with the items or steps in the schedule produced on Mr Bain's behalf, nor the time band categorisation.

[18] I accept that Mr Bain's response to the admissibility challenges justify assessment under band C. The memorandum was over 80 pages including annexed schedules. It was necessary to respond in this level of detail to the challenges, most of which were rejected.

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8 As per the costs schedule annexed to the memorandum of counsel dated 9 February 2023.

9 This graduated schedule reduces costs proportionately across three periods of the duration of a trial – the first to fifth hearing days, the sixth to tenth hearing days and subsequent days. The Rules presume that preparation in the usual case proportionally decreases as the hearing lengthens beyond the two thresholds.

[19] I accept that the inspection phase of the proceeding involved voluminous material discovered by the Thames Coromandel District Council (**TCDC**). NZME Publishing Ltd, the first defendant at the time, applied for non-party discovery against TCDC and Smart Environmental Limited. Two discovery affidavits were provided by TCDC. The first list was between 70 and 80 pages long. It was followed by a 39 page list of documents. Objectively speaking, the volume of documents alone (let alone the nature of some of the complex technical spreadsheet data) means that a 2C assessment is warranted.

[20] I am not persuaded however that a 2C assessment is warranted in respect of Mr Bain's list of documents. There are no objective indicia substantiating that assessment and no material indicating the actual number of days or hours in which counsel was actually engaged.

[21] I note that Mr Bain includes as one of the claimed steps, the costs of preparing the costs claim, or 'costs on costs'. There is no inflexible rule in relation to 'costs on costs' steps.[10] I am satisfied that it is proper to seek a 2B allowance of $956 for the memorandum given the diametrically opposed approach to costs.

[22] There appears to be duplication at step 11 in Mr Bain's schedule of costs. The memorandum responding to memorandum of counsel for the plaintiff containing particulars dated 25 January appears twice in the schedule.

[23] Mr Bain seeks costs for second counsel. The default position in sch 3 of the High Court Rules 2016 is that provision is made for one counsel in a proceeding. Whether second counsel should be certified is an assessment based on the nature of the proceeding. Mr Patterson has not challenged this aspect of the costs claim. I am satisfied that a 12.5 day trial in the defamation jurisdiction, with complex technical evidence (in part) and 13 witnesses warrants second counsel. I allow this claim.

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[10] *Gibson v Official Assignee of New Zealand* [2015] NZHC 3200. No costs are sought in respect of the reply memorandum on behalf of Mr Bain.

[24] In summary, the starting point of "scale" costs to which Mr Bain is entitled are as per the steps in the fifth column of the costs schedule provided by Mr Bain (the dollar value column) save for the following:

(a) 2B instead of 2C costs at step 20, and

(b) removal of duplicated memorandum item of $956.00.

Is there any reason to decline or reduce costs?

[25] Rule 14.7 of the High Court Rules provides that the court may refuse to make an order for costs or may reduce the costs otherwise payable in certain circumstances. Mr Patterson submits that r 14.7(d), (f) and/or (g) are engaged on the basis that:

(a) Mr Bain's conduct (including the raising of other defences) significantly increased Mr Christian's costs in the proceedings by contributing unnecessarily to the time or expense of the proceeding or a step in it.

(b) Mr Bain failed in relation to a cause of action or issues which significantly increased the costs of the party opposing costs.

[26] The crux of Mr Patterson's submission is that Mr Bain's various defences contributed unnecessarily to the time or expense of the proceeding aggravated by the late disclosure of the identity of previously confidential sources. As Mr Patterson put it:

> This is of particular significance in the context of the responsible communication defence. Where such a defence is raised, up until cross-examination can occur, the defamed party (Mr Christian) has no ability (absent what is disclosed by the defendant, Mr Bain) to ascertain whether reasonable due diligence has been undertaken by the defendant(s) pre-publication so as to render it unlikely that the responsible communication defence will be upheld.

[27] And later:

> In short, the responsible communication defence unusually, and contrary to normal acceptable judicial principles, forces a plaintiff to make litigation risk

> assessments and/or choices in the context of a pool of information which is wholly under the defaming parties' control all the way through to cross-examination at least and, in particular, where (as here) the defaming parties have chosen to primarily rely upon confidential sources. There is an inherent injustice in the costs consequences nonetheless falling unabated on the unsuccessful defamed party in such cases.

[28] I am not persuaded that it is appropriate to approach costs questions in this way given the interrelationship between all issues. By way of illustration, Mr Christian had the onus of establishing that Mr Bain was a joint publisher. Mr Bain denied such and this argument took up a significant part of the trial. Mr Bain's denial was not unreasonable. The legal principles of participation in publication are not particularly settled and the relationship between source and publisher is novel in this jurisdiction. The factual matters relevant to this issue dovetailed with matters relevant to the defence of responsible communication.

[29] Similarly by way of illustration, there is no bright line between the factual matters relevant to the defence of honest opinion (including the publication facts) which was advanced and those relevant to the defence of responsible communication in this particular case.

[30] The Court of Appeal decision in *Weaver v Auckland Council* is helpful.[11] The Court noted the need to deal with issues as to costs "in the round", adopting a realistic appraisal rather than unpicking in detail the extent to which each initiator of a step won or lost in respect of that step. In that case—a leaky building claim—the Court was satisfied that there was a doubling of time and effort required by the taking of unsuccessful points which was "significant" in terms of r 14.7(d).

[31] In the case at hand, the arguments as to defamatory meaning did not increase Mr Christian's costs. Those arguments comprised legal submission rather than evidence given that Mr Christian relied on the natural and ordinary meaning.

[32] Mr Christian points to the lack of success of Mr Bain's honest opinion defence. I did not ultimately determine this defence but observed there were obstacles in its path in view of my finding on defamatory meaning. It proved unnecessary to make

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11 *Weaver v Auckland Council* [2017] NZCA 300, [2017] 24 PRNZ 379 at [18].

final determinations following Mr Bain's success on the defence of responsible communication on a matter of public interest. I am not persuaded to reduce costs on this basis given the relevance of the pleaded publication facts to the overall picture.

[33] Mr Christian points to the fact that Mr Bain's ultimately successful defence was pleaded late in the day. This is true but must be seen in the overall context. A defence of responsible communication had been pleaded by the first and second defendants, NZME and Mr Valintine, as early as 14 October 2019. Mr Christian settled against those parties in September 2021. It was shortly thereafter that Mr Bain filed an amended defence as the sole remaining defendant. Mr Bain would have been the beneficiary of that defence pleaded by his co-defendants. I therefore reject the argument that the temporal sequence of events denied Mr Christian an opportunity to consider whether a defence of responsible communication might succeed.[12]

[34] I do not accept that several witnesses and significant quantities of documentation were produced at trial which ultimately had no relevance to the responsible communication defence justifies a reduction in costs. The reliability of that information, its source and how it was dealt with was a fundamental element of the responsible communication defence.

[35] Mr Christian is critical of the fact that until service of Mr Bain's various witness briefs in the period 14 to 19 January 2021, Mr Bain (and earlier Mr Valintine) invoked confidentiality of sources. For many (but not all) of those sources, the cloak of confidentiality fell away when the briefs of evidence were served. Mr Christian asserts that this was a tactical ambush, and a material and fundamental shift in the nature of the evidential case. I accept these events were material in the overall scheme of the trial. I understand that Mr Bain had not forewarned Mr Christian so that Mr Christian's opposition to the application to vacate the trial occurred without any appreciation of this development.

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[12] By way of counterfactual, Mr Christian is of course appealing the availability of the defence of responsible communication on a matter of public interest so it can hardly be suggested that any earlier pleading of the defence would have influenced his decision to proceed to trial.

[36] Mr Christian had not challenged the confidentiality of source assertion in Mr Bain's affidavit of documents nor sought any direction compelling the identity of those sources. He did however oppose Mr Valintine's application for a direction that he need not answer interrogatories that would disclose journalistic sources.[13]

[37] Ms Dickson submitted that it was Mr Christian's brief of evidence which squarely alleged that Mr Bain and Mr Valintine had fabricated sources for the article. This occurred close to commencement of the trial due to compression of the timetable. This materially impacted the case that Mr Bain had to meet. The inference is that this led to the need to identify the sources.

[38] None of these or any other matter raised in Mr Christian's memorandum justify departing from the principle that costs follow the event or justify reducing Mr Bain's entitlement to costs. The short answer is that, in my assessment, none of Mr Bain's unsuccessful defences or arguments significantly increased Mr Christian's costs.

Is there any justification for increased costs?

[39] Ms Dickson submits that an uplift of 50 per cent is justified for hearing and evidence preparation. She relies on r 14.6(3)(a), (3)(b)(ii), (3)(b)(iii) and (3)(d). I set out those parts of Rule 14.6 which are relevant:

> **14.6 Increased costs and indemnity costs**
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> (3) The court may order a party to pay increased costs if—
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> (a) the nature of the proceeding or the step in it is such that the time required by the party claiming costs would substantially exceed the time allocated under band C; or
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> (b) the party opposing costs has contributed unnecessarily to the time or expense of the proceeding or step in it by—
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> …
>
> (ii) taking or pursuing an unnecessary step or an argument that lacks merit; or

[13] *Christian v NZME Publishing Ltd* [2021] NZHC 1278.

(iii) failing, without reasonable justification, to admit facts, evidence, documents, or accept a legal argument; or

…

(d) some other reason exists which justifies the court making an order for increased costs despite the principle that the determination of costs should be predictable and expeditious.

[40] Ms Dickson advances the following grounds to support an uplift:

(a) the novelty of the publication argument and the lack of clarity in the pleading, relying on my observations in the substantive judgment that the basis for publication liability shifted;

(b) the complexity of the pleaded case in terms of alleged meanings;

(c) the length of some of the written briefs of evidence and technicality of the evidence;

(d) the multiple challenges to evidence and documents;

(e) the unsuccessful application to have Mr Bain's evidence-in-chief led, or parts of his evidence led orally;

(f) Mr Christian's refusal to accept the authenticity of key documents until an affidavit from TCDC was provided to the Court, despite the fact that he had the ability to authenticate those documents himself as a director of Smart Environmental Limited;

(g) Mr Christian's persistence in arguing that various other iterations of the data sets could have been altered notwithstanding provision of the TCDC affidavit; and

(h) the complexity of the issues which necessitated extensive written submissions for closing.

[41] The memorandum filed on behalf of Mr Christian does not specifically engage with the claim for increased costs but is inferred from his overall approach. Each of Mr Christian's points advanced in support of his contention that costs should be reduced are counterpoints to Ms Dickson's submissions.

[42] I accept the submission that this trial involved more complex issues than typical in a trial of 12.5 days but it was not so complex that a 50 per cent uplift is justified. Factors pointing toward some uplift being justified on the basis of the nature of the proceeding and approach taken are:

(a) the pleadings which straddled conceptually different paths to tortious liability without clear differentiation.

(b) the arcane and technical nature of the law of defamation more generally.

(c) the novelty of the arguments around publication liability deriving from participation.

(d) the underlying data or information at the heart of the publication and defence was spreadsheet data comprising thousands of lines of technical data and evidence which introduced complexity.

(e) wholesale challenges to Mr Bain's evidence.[14]

(f) challenges to the authenticity of the Smart spreadsheet data. Although Mr Christian was entitled in an adversarial context to take the approach he did, this took up trial time and ultimately proved to be a red herring.

[43] Balancing these factors against the matters raised by Mr Patterson in support of his approach, I consider an uplift of 25 per cent is justified for the preparatory stages of trial.

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[14] This aspect is in part dealt with by allocating the time band C to preparation of the memorandum responding to these challenges.

Result

[44] I award costs in relation to the substantive judgment to Mr Bain as follows:

(a) Costs of $145,670.50 as per the costs schedule produced by Mr Bain with the following amendments:

(i) Step 20 – 2B costs instead of 2C.

(ii) Removing step 11 – (duplicate) memorandum dated 25 January 2022 in response to plaintiff's memorandum dated 17 December 2021 containing particulars.

(iii) Reducing the calculated uplift on steps 33 and 33B to 25 per cent.

(b) Disbursements of $9,068.

[45] I award costs of $13,384 to Mr Christian in respect of the interlocutory applications.

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Walker J