IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
KIRIKIRIROATĀMAKI MAKAURAUROHE

CIV 2020-419-196
[2024] NZHC 1367

BETWEEN	DONG (ANNE) CAO First Plaintiff
AND	PAUL OULTON Second Plaintiff
BETWEEN	STUFF LIMITED First Defendant
AND	GARY JAMES FARROW Second Defendant

Hearing: on the papers

Counsel: K J Crossland & J K Boparoy for plaintiffs
R K P Stewart & P K J Roycroft for defendants

Judgment: 28 May 2024

COSTS JUDGMENT OF JOHNSTONE J

This judgment was delivered by me on 28 May 2024 at 3pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
Sheiff Angland, Auckland
Darroch Forrest, Wellington

[1] Most years since 2017, Dong (Anne) Cao and Paul Oulton have run the Waikato Cherry Tree Festival at their semi-rural home on the outskirts of Hamilton. Prior to and during the period of the planned 2019 festival, a media organisation, Stuff Ltd, published a series of news articles written by its reporter Gary Farrow. Stuff also published news articles, and Mr Farrow published an online broadcast, after the planned 2019 festival. Ms Cao and Mr Oulton were unhappy with the news articles and broadcast. They sued, seeking declarations that Stuff and Mr Farrow were liable to them in defamation.

[2] I heard the case with a jury. The jury found that:

(a) An online article first published on 15 September 2019 defamed Ms Cao and Mr Oulton, by asserting that they operated their 2017 and 2018 festivals without the resource consent that was required for those festivals to have operated lawfully.

(b) The entire balance of Ms Cao and Mr Oulton's case, relating largely to what the articles said about the planned 2019 festival, was not made out. The articles did not mean what was alleged, or if they did those meanings were not defamatory, or if they were such defamation caused no more than minor harm.

[3] In respect of the defamatory aspect of the 15 September 2019 article, I found that Stuff and Mr Farrow were not protected by the modern defence of responsible publication on a matter of public interest. Accordingly, I granted the declaration sought in respect of that article.[1]

[4] Stuff and Mr Farrow now seek an award of costs, on the basis that before the trial they made various written offers to Ms Cao and Mr Farrow, stated to be without prejudice except as to costs. As required by r 14.10 of the High Court Rules 2016, the offers were not communicated to the Court until the question of costs arose. Stuff and Mr Farrow say that the offers, and the consequent effect of r 14.11, in combination entitle them to costs.

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1 *Cao v Stuff Ltd* [2024] NZHC 44.

Written offers without prejudice except as to costs

The general rules

[5] Rule 14.10 provides that parties to proceedings may make written offers except as to costs. Under r 14.11:

> (1) The effect (if any) that the making of an offer under rule 14.10 has on the question of costs is at the discretion of the court.
>
> (2) Subclauses (3) and (4)—
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> (a) are subject to subclause (1); and
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> (b) do not limit rule 14.6 or 14.7; and
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> (c) apply to an offer made under rule 14.10 by a party to a proceeding (**party A**) to another party to it (**party B**).
>
> (3) Party A is entitled to costs on the steps taken in the proceeding after the offer is made, if party A—
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> (a) offers a sum of money to party B that exceeds the amount of a judgment obtained by party B against party A; or
>
> (b) makes an offer that would have been more beneficial to party B than the judgment obtained by party B against party A.
>
> (4) The offer may be taken into account, if party A makes an offer that—
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> (a) does not fall within paragraph (a) or (b) of subclause (3); and
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> (b) is close to the value or benefit of the judgment obtained by party B.

Costs consequences of defamation claims for declarations only

[6] For Ms Cao and Mr Oulton, Mr Crossland and Ms Boparoy submit that much of the Court's discretion to award costs in a defamation setting, where the plaintiffs are seeking merely to restore their reputation, should turn on whether costs exposure is "unacceptably chilling". Here, they draw on the judgment of Elias J (as she then was) in *Lange v Atkinson and Australian Consolidated Press NZ Ltd,* discussed in my substantive judgment.[2] They say that costs should logically be borne by the party lowering the reputation, or otherwise costs should lie where they fall. Implicitly, they

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[2] *Lange v Atkinson and Australian Consolidated Press NZ Ltd* [1997] 2 NZLR 22 (HC) at 48. On appeal, the Court did not express a final view on the observation of Elias J: *Lange v Atkinson and Australian Consolidated Press NZ Ltd* [1998] 3 NZLR 424 (CA) at 433.

submit that plaintiffs unsuccessfully seeking declarations of liability in defamation should not face adverse costs consequences.

[7] I do not accept that submission.

[8] Section 24(2) of the Defamation Act 1992 establishes a presumption that successful plaintiffs who seek only a declaration of liability in defamation and costs should be awarded solicitor and client costs. It appears intended to support non-monetary vindication of reputation by providing that unsuccessful defendants to such claims should ordinarily face a severe costs consequence.

[9] However, the presumption applies only to successful plaintiffs. Plaintiffs should not be encouraged to bring unmeritorious claims for declarations, particularly if doing so in proceedings such as this, tried by a judge and jury. Rather than placing an unacceptable chill upon such claims, the disciplinary effect of unsuccessful plaintiffs being exposed to a potential costs award continues in my view to be important.

[10] The Court of Appeal's judgment in *Bluestar Print Group (NZ) Ltd v Mitchell* is relevant.[3] In that case, an employee had been awarded $10,000 upon a personal grievance against his former employer. And the Employment Court had disregarded the employer's pre-judgment offer to settle, made without prejudice save as to costs.

[11] The Court found the Employment Court judge to have erred in two ways:

(a) on the facts, in finding that the employee had abandoned his claim for exemplary damages and thus was apparently motivated primarily by vindication and not by money;[4] and

(b) in principle, when ignoring the settlement offer because of the plaintiff's non-monetary motivation.[5]

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3 *Bluestar Print Group (NZ) Ltd v Mitchell* (2010) 7 NZELR 494 (CA).
4 At [13]–[14].
5 At [15].

[12] On the latter point, the Court found that there may be cases where vindication through seeking a statement of principle in the employment context may be relevant to the exercise of the court's discretion, and that the relevance of such reputational factors means that costs assessments are not confined solely to economic considerations.[6] However, an offer to pay compensation at a level that is reasonable "might well be regarded as conveying a distinct element of vindication to the plaintiff".[7] Emphasising this point, the Court added:[8]

> It has been repeatedly emphasised that the scarce resources of the Courts should not be burdened by litigants who choose to reject reasonable settlement offers, proceed with litigation and then fail to achieve any more than was previously offered.

The present case

[13] Accordingly, in this case, where the substantive judgment awarded a declaration rather than an amount of damages which would have permitted like for like comparison, questions arise whether:

(a) any of the offers made by Stuff and Mr Farrow "would have been more beneficial to [Ms Cao and Mr Oulton] than the judgment obtained" by them, in terms of r 14.11(3)(b); and

(b) if so, any of the offers made prior to such an offer "is close to the value or benefit of the judgment obtained" by them, in terms of r 14.11(4)(b)?

[14] I will consider these questions having first noted Ms Cao and Mr Oulton's limited substantive success.

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6 At [19].
7 At [19].
8 At [20].

The plaintiffs' limited substantive success

[15] I mentioned the s 24(2), Defamation Act presumption in my substantive judgment, and added that in this case, the presumption might be argued strongly not to apply. This is because:[9]

(a) Ms Cao and Mr Oulton originally sued upon two, then three, articles. Yet these did not include the 15 September 2019 article in respect of which they succeeded. On 30 June 2022, the close of pleadings date, they added claims relating to the 15 September 2019 article and one other, and they dropped their claim for damages. But they still did not plead the 15 September 2019 article's allegedly defamatory meaning, claiming only that it was "speculative and misleading". It was not until 31 October 2023, the second day of the jury trial, that they alleged that the 15 September 2019 article carried two particular meanings:

(i) first, that they operated their 2017 and 2018 festivals without the resource consent that was required for those festivals to have operated lawfully; and

(ii) second, that they were deliberate rule breakers, running the 2017 and 2018 festivals without obtaining a resource consent.

(b) The jury found that the 15 September 2019 article carried the first meaning and defamed Ms Cao and Mr Oulton. The jury rejected the entire balance of Ms Cao and Mr Oulton's case, including the allegation that the article claimed they deliberately operated the 2017 and 2018 festivals without the necessary resource consent.

(c) Ms Cao and Mr Oulton admitted in evidence that attendees of the 2018 festival were far in excess of the numbers permitted for temporary events under the District Plan. The council's warning letter of 24 October 2018 referred not only to excessive attendee numbers but

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9 *Cao v Stuff Ltd*, above n 1, at [112]–[113].

also to operating hours. Thus, although Stuff and Mr Farrow defamed Ms Cao and Mr Oulton by asserting that they operated the 2017 and 2018 festivals unlawfully by doing so without a resource consent, it would have been correct to assert simply that they operated the 2018 festival unlawfully.

(d) Ms Cao and Mr Oulton adduced considerable evidence that they were harmed as a consequence of publicity relating to the 2019 festival. But the articles published by Stuff and Mr Farrow were not defamatory. And in my view, the bulk of that harm derived from their own organisational failures.

(e) No particular harm appears to have arisen from the 15 September 2019 article's reference to the 2017 and 2018 festivals.

(f) Accordingly, while the jury found that Stuff and Mr Farrow had not proved that that harm was no more than minor, its extent cannot be discerned with precision, and in both relative and absolute terms appeared modest.

[16] In summary, Ms Cao and Mr Oulton achieved the barest of success in their claims to have been defamed. In my view, these factors show why, but for the 31 August 2023 letter (which I address below), it would indeed have been appropriate that costs be left to lie where they fall. They address the point made for the plaintiffs outlined at [6] above.

Would any of the offers made have been "more beneficial" than, or "close to the benefit of" the judgment?

The 26 April 2023 offer

[17] The defendants' first offer was made on 26 April 2023. It offered a payment to Ms Cao and Mr Oulton of $20,000, "with no apology or admission of liability", on

the basis that the settlement would "remain confidential to the parties and their advisors".

[18] Mr Crossland and Ms Boparoy submit that the wording of the 26 April 2023 offer "made it sound like these were 'accidental errors'". Yet Mr Farrow was found to have written the 15 September 2019 article deliberately. Accordingly, the offer did not address the personal vindication element which was at the heart of the plaintiffs' claim, and was therefore of little or no value to them compared to the declaratory relief they sought.

[19] I find it difficult to accept that the manner in which the offer portrayed the publications has relevance. The offer was of a confidential settlement. If the proceeding had settled, whether the offer "made it sound like" the defendants' conduct was accidental would not become known beyond the parties. But in any event, in line with the then current pleadings, the offer was focussed upon the publications relating to the 2019 festival and their impact. The jury found those publications not to be defamatory, or if defamatory, then of no more than minor negative impact. Accordingly, the offer appears largely correct in its characterisation of the defendants' articles and thus their conduct.

[20] That said, in my view the confidential nature of the proposed settlement has potential relevance in another way. A confidential settlement may obscure the "element of vindication" which the Court of Appeal in *Bluestar Print* said it might be possible for a reasonable monetary offer, made in response to a claim based on reputational impact, to convey.

[21] In this case, despite the modest nature of the plaintiffs' success, I find that a confidential settlement would not have offered any appreciable vindication of their reputations, and thus the 26 April 2023 offer was not close to the value of the benefit of the judgment they obtained. Ms Cao and Mr Oulton would have been entitled to advise others of the fact of settlement, but not that they had been paid even the relatively small sum of $20,000.

The 31 August 2023 offer

[22] The defendants' second offer was made on 31 August 2023. It offered: an apology, in print, online, and broadcast by Mr Farrow; removal of the 19 September 2019 article from Stuff's news website, and a contribution to the plaintiffs' costs of $75,000. It was prompted by the defendants' receipt of an opinion to the effect that it may not have been responsible for Stuff to have asserted in the 19 September 2019 article that upon cancelling the 2019 festival, Ms Cao and Mr Oulton were "keeping half the ticket money". Following the 19 September 2019 article, all 2019 ticket holders were refunded.

[23] Mr Crossland and Ms Boparoy submit that the 31 August 2023 offer was of only a generic apology, without personal vindication. Further, the articles would remain online because Chinese media had republished them and because members of the public who had had access could recirculate them.

[24] Despite these criticisms, I find that the 31 August 2023 offer, had it been accepted, would comfortably have been more beneficial to Ms Cao and Mr Oulton than the judgment they obtained. This is because:

(a) As described above, the defamation that the plaintiffs succeeded in proving was modest at best. It was particularly modest when compared to the range of publications upon which they sued, and the broad thrust of their case, which focussed upon the 2019 festival.

(b) One of their major complaints was over the "keeping half the ticket money" article of 19 September 2019. The jury found that the article implied the money was still available to them, but that the harm the plaintiffs suffered in consequence was no more than minor.

(c) The draft apology "for any distress or embarrassment the incorrect statement may have caused", which was drafted to clarify that it was the liquidator of the plaintiffs' company who was responsible for refunding ticket holders, and that ticket holders were refunded, would

in my view have addressed such minor harm as was caused by this defamatory aspect of the 19 September 2019 article.

(d) The settlement was not to be confidential. The payment to the plaintiffs of $75,000, whether tagged as a contribution to their costs or otherwise, could have been stated publicly and would have provided ample vindication of the plaintiffs' reputations, to the extent those reputations were compromised by the suggestion they ran the 2017 and 2018 festivals in breach, but not knowingly, of a (non-existent) requirement to have a resource consent.

Subsequent offers

[25] In light of the above, it is not necessary that I consider whether subsequent settlement offers were more beneficial to Ms Cao and Mr Oulton than the judgment they obtained.

Application of r 14.11

[26] I have found that the 31 August 2023 offer, had it been accepted, would have been more beneficial to Ms Cao and Mr Oulton than the judgment they obtained. Applying r 14.11(3)(b), Stuff and Mr Farrow are entitled to costs on the steps taken in the proceeding after that offer was made, subject to my discretion to order otherwise.

[27] Mr Crossland and Ms Boparoy submit that the manner in which Mr Stewart and Mr Roycroft, counsel for Stuff and Mr Farrow, conducted the case for their clients should give rise to a reduction in post-offer costs.

[28] I disagree. The correct procedural approach to claims in defamation which are resisted on the basis of the modern defence of responsible publication on matters of public interest is far from settled. I consider that it was reasonable for counsel for all parties to put questions of the publications' accuracy to witnesses, at least until such time as the admissibility of their answers was resolved by way of formal ruling.[10]

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[10] See *Lange v Atkinson and Australian Consolidated Press NZ Ltd* [1998] 3 NZLR 424 (CA).

[29] Similarly, I find the defendants' claims for disbursements owing to the travel and accommodation costs of two counsel not to be unreasonable.

Orders

[30] Ms Cao and Mr Oulton are to pay the costs of Stuff Limited and Mr Farrow for steps taken after 31 August 2023, assessed under costs category 2B with two counsel certified as $54,970.00, plus $15,868.74 in disbursements comprised of travel and accommodation costs of counsel, and jury fees.

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Johnstone J