IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2021-404-1761
[2024] NZHC 3853

BETWEEN	KHIENG CHIV Plaintiff
AND	SANDY ZHUJUN DAI Defendant

Hearing:	On the papers
Appearances:	Plaintiff in person Defendant in person
Judgment:	18 December 2024

COSTS JUDGMENT OF MOORE J

This judgment was delivered by me on 18 December 2024 at 10.00 am,
Pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date: ……..

Solicitors:
Maude & Millar, Wellington

Introduction

[1] Mr Chiv sued Ms Dai in defamation. In a judgment issued on 30 September 2024, I found Mr Chiv's causes of action made out. I awarded him $50,000 in damages.[1] This judgment now deals with the outstanding question of costs.

[2] Given Mr Chiv's success and the way in which Ms Dai conducted herself, it is unsurprising that he now seeks an award of indemnity costs against her. However, one may be forgiven for being more than a little surprised that Ms Dai seeks the same award against Mr Chiv.

Background

[3] The background to this dispute is set out in my substantive judgment and need not be repeated in detail.

[4] In essence, Ms Dai was an accountant to a bakery. The bakery owners decided to change accountants, engaging Mr Chiv. Ms Dai tried to dissuade them from this course. She sent the bakery owners an email advising that Mr Chiv had been banned from trading as an accountant, and that he had had inappropriate sexual relationships with his female clients. When Mr Chiv responded that this was defamatory, Ms Dai doubled down on the claims in another email to the bakery owners and suggested that Mr Chiv should also seek psychiatric treatment.

[5] I found that Ms Dai's emails were defamatory. I rejected her defences of truth and honest opinion and an essentially unpleaded defence of qualified privilege. However, I also noted that Mr Chiv's reputation was not unblemished. This was because prior to Ms Dai's emails, his membership of the New Zealand Institute of Chartered Accountants ("NZICA") had been suspended for two years after he pleaded guilty to, among other things, misconduct in a professional capacity and negligence or incompetence. I also noted that it was only the bakery owners who read the emails.

[6] As such, I concluded that $50,000 in damages struck the appropriate balance.

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1 *Chiv v Dai* [2024] NZHC 2825.

Is Ms Dai entitled to indemnity costs?

[7] It is convenient to start first with Ms Dai's claim for indemnity costs. Ms Dai seeks indemnity costs under s 43(2) of the Defamation Act 1992. That provision provides as follows:

> (2) In any proceedings for defamation, where —
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> (a) judgment is given in favour of the plaintiff; and
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> (b) the amount of damages awarded to the plaintiff is less than the amount claimed; and
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> (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 damages are payable the solicitor and client costs of the defendant in the proceedings.

[8] Accordingly, Ms Dai's claim is simple. Mr Chiv sought damages of $250,000 in his amended statement of claim but was awarded only $50,000. His claim for $250,000 was grossly excessive. And while his counsel, Mr Romanos, submitted that an award of $50,000 would be appropriate at the hearing, this was not what Mr Chiv "claimed". Furthermore, it was impermissible for Mr Chiv to effectively amend his prayer for relief in this way given that change of position was made after the close of pleading date.

[9] The simplicity of Ms Dai's argument is attractive but ultimately unpersuasive.

[10] I accept that the Court has no discretion to decline to award costs to a defendant where the conditions of s 43(2) are satisfied: namely, that a plaintiff succeeds in their cause of action but receives less damages than claimed, and where the damages claimed are grossly excessive.[2] Parliament's use of the word "shall" makes that clear. I accept too that Mr Chiv's original claim for $250,000 and his earlier claim of $200,000 were grossly excessive.

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2 *Deliu v Hong* [2013] NZHC 1119 at [11].

[11] However, the word "claimed" must be interpreted in light of the purpose and context of the provision and statute as a whole.[3] The purpose of s 43(2) is to disincentivise the use of defamation proceedings in an improper and oppressive way.[4] It would not – in my assessment – be consistent with that purpose if the word "claimed" were confined to what a plaintiff prays for in their pleadings to the exclusion of any reasonable concession they might make later on in their proceedings. Indeed, such an interpretation would offer no incentive to plaintiffs who, in the heat of the moment, commenced defamation proceedings and sought an excessive award of damages to settle their claims.

[12] The word "claimed" should, in my view, therefore be understood to mean what a plaintiff ultimately seeks in their proceedings by way of damages, whether in their prayer for relief or through submissions at the substantive hearing of their claim.

[13] In this case, Mr Chiv sought damages of $200,000 and then later $250,000 without legal representation and in an effort to place his proceedings in this Court rather than the District Court. He then sensibly retreated from that position when his counsel submitted – at his counsel's own initiative, in written submissions – that an award of $50,000 was appropriate given the circumstances of his case.

[14] For these reasons, I do not accept that Mr Chiv was awarded an amount of damages that was more than he "claimed". What he ultimately sought – and thus claimed – was $50,000 in damages. It follows that s 43(2) does not apply and therefore that Ms Dai's claim for indemnity costs must fail.

Is Mr Chiv entitled to indemnity costs?

[15] Mr Chiv was self-represented for much of the proceeding but engaged counsel for the hearing before me. He seeks indemnity costs both in respect of what he did as a self-represented party, and for his engagement of legal counsel. He seeks such costs because of Ms Dai's conduct, his efforts to resolve this dispute out of Court, and

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3 Legislation Act 2019, s 10.

4 David Bullock and Tim Mullins *The Law of Costs in New Zealand* (LexisNexis, Wellington, 2022) at [4.25].

because he apparently provided a *Calderbank* letter to Ms Dai offering to settle without seeking compensation or costs.

[16] I am satisfied that Mr Chiv is entitled to indemnity costs in respect of those steps in this proceeding for which he engaged legal counsel. Rule 14.6(4)(a) of the High Court Rules 2016 relevantly provides that the Court may order a party to pay indemnity costs if the party has acted "vexatiously, frivolously, improperly or unnecessarily" in defending a proceeding. That criterion is easily met in this case.

[17] The most serious allegation that Ms Dai made against Mr Chiv was that he had had inappropriate sexual relationships with his female clients. Ms Dai had no defence for this egregious claim. The genesis of the allegation was the fact that, in appealing against his two-year suspension as a member of the NZICA, he referred to a case where a nurse had been disciplined for forming an inappropriate sexual relationship with a patient. In the course of distinguishing that case, the NZICA's Appeals Council observed in its decision dismissing Mr Chiv's appeal that his case "[had] nothing to do with an inappropriate sexual relationship between [him] and his clients".

[18] Ms Dai sought to rely on that sentence – out of context – to support her claim that Mr Chiv had, in fact, had inappropriate sexual relationships with his clients, both to the bakery owners and before me at the hearing. In evidence, she implausibly suggested that he must have made an admission to this effect before the NZICA's Appeals Council. Ms Dai's defence against that allegation was as frivolous as it was disingenuous. And her misconduct did not stop there. As I record in my substantive judgment, Ms Dai adopted something of a retributive, if not revengeful, approach towards her opposition going so far as to attempt to debar Mr Chiv's counsel from representing him and attacking the proceedings on the basis that they were filed in the wrong registry.

[19] Consistent with this course, Ms Dai adopted a strategy of attacking Mr Chiv at every opportunity including in her evidence at trial. An example was when she proffered a Police Acknowledgment Form in an affidavit representing that it was proof that the Police had determined Mr Chiv's conduct against her to have amounted to

criminal harassment. The document said or proved no such thing. It simply recorded the fact that Ms Dai had made a complaint.

[20] However, although I am prepared to award Mr Chiv indemnity costs in respect of those steps in the proceeding undertaken by counsel, I am not prepared to award him indemnity costs (or indeed any costs) for steps in this proceeding that he took as a self-represented party.

[21] I acknowledge that the High Court Rules have recently been amended to allow for self-represented parties to recover "costs" at a daily rate of $500. This change came into effect from 1 September 2024. The consequence of this is that self-represented parties are able to claim costs for steps taken on or after 1 September 2024 at a daily recovery rate of $500. However, this change does not retrospectively apply to steps taken before that date. Unfortunately for Mr Chiv, this means that the previous position applies in respect of his claim for costs as a litigant in person as all such steps for which he seeks costs were taken before this change of the Rules came into effect. That position provided that a litigant in person could recover disbursements but that a litigant in person could only recover "costs" in "exceptional circumstances", if at all.[5] I do not consider that to have been the case here.

[22] Finally, and for completeness, I acknowledge Ms Dai's argument that Mr Chiv failed to serve a notice of change of representation informing her that he is now acting in person in this proceeding and thus that he failed to correctly file his memorandum seeking costs in accordance with the direction in my substantive judgment.

[23] The argument is – as with her reliance on s 43 of the Defamation Act – a novel but ultimately futile one. The objective of the High Court Rules is to secure the just, speedy, and inexpensive determination of any proceeding or interlocutory application.[6] The requirement to serve a notice of change of representation is so that the Court and other party/parties are informed as to who they, in turn, should be serving documents on and liaising with in a proceeding. In this case, Mr Chiv served his memorandum as to costs first. It follows that there was no prejudice to Ms Dai in his

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5 At [2.27], referring to *McGuire v Secretary of Justice* [2018] NZSC 116, [2019] 1 NZLR 335.
6 High Court Rules 2016, r 1.2.

failure to make a notice of change of representation. Indeed, she was able to serve her own memorandum as to costs notwithstanding this minor procedural failure. It would be entirely contrary to the objective of the High Court Rules if a procedural rule like r 5.40 could be called in aid to stifle Mr Chiv's legitimate pursuit of costs.

[24] Mr Chiv claims for legal fees of $36,455.00 and disbursements of $6,275.16. His disbursements include costs associated with his legal counsel travelling to Auckland from Wellington, and staying in accommodation for the one-day hearing that took place. While Auckland-based counsel could no doubt have been engaged in this case, I am satisfied that these disbursements are reasonable. This Court has frequently recognised that parties should be afforded a degree of latitude to engage counsel of their choice.

Result

[25] I make an award of costs to Mr Chiv, and against Ms Dai, for $36,455.00 together with disbursements of $6,275.16.

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Moore J