IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2021-485-663
[2024] NZHC 1556

UNDER	Section 24 of the District Court Act 2016
IN THE MATTER	of an appeal against a decision of the District Court [2021] NZDC 20011
BETWEEN	GRACE HADEN Appellant
	TRANSPARENCY NEW ZEALAND LIMITED Second Appellant
AND	VIVIENNE KAREN HOLM Respondent

Hearing: 23 May 2023

Appearances: Appellant in person
Respondent in person

Judgment: 13 June 2024

JUDGMENT OF PETERS J

This judgment was delivered by Justice Peters on 13 June 2024 at 3 pm
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date: .....

Copy for: Appellant
Respondent

Introduction

[1] The appellant, Ms Haden, appeals against a decision of Judge D G Smith of the District Court, delivered in October 2021 in proceedings commenced by the respondent, Ms Holm, for defamation.[1]

[2] The appeal proceeds as a general appeal. Accordingly, the Court is required to come to its own view on the merits. The appellant bears the onus of satisfying the Court that it should differ from the decision under appeal.[2] It is only if the appellate court considers that the appealed decision is wrong that it is justified in interfering with it.[3]

Background

[3] In 2006, Ms Haden was involved in a dispute with a Mr Wells regarding an organisation he had established called Animal Welfare Institute of New Zealand ("AWINZ"). Ms Haden questioned the legitimacy of Mr Wells' AWINZ and, with others, incorporated a charitable trust under the same name.

[4] Mr Wells approached Ms Holm, a lawyer, for assistance. Ms Holm agreed to assist Mr Wells on a pro bono basis. Ms Holm's then husband was a partner in a law firm, and that firm was instructed to take action to prevent Ms Haden trading on the reputation of Mr Wells' AWINZ.

[5] Ms Holm's involvement in the dispute was short-lived. She telephoned the number on Ms Haden's website at 9.45pm on 2 June 2006. Ms Holm had assumed it was a business number and had intended to leave a message. As it happened, this was Ms Haden's home telephone and they spoke, with some emails exchanged between them subsequently.

[6] The gist of Ms Holm's evidence at the trial before Judge Smith was that during the telephone call she conveyed to Ms Haden the allegation of passing-off, and put it

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1 *Holm v Haden* [2021] NZDC 20011.
2 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.
3 At [4].

to Ms Haden that she should change the name of her AWINZ and cease interfering with Mr Wells' AWINZ.

[7] Ms Holm separated from her husband in August 2006, so about two months later. Ms Holm had no further involvement in the dispute between Mr Wells and Ms Haden.

[8] From Ms Haden's perspective, Ms Holm's telephone call and subsequent emails amounted to intimidation, or an attempt to intimidate her.

Wells v Haden

[9] Mr Wells' AWINZ commenced proceedings against Ms Haden and others for passing-off. Mr Wells also claimed against Ms Haden and her company ("Verisure") for defamation.

[10] Judge R Joyce QC issued his decision in July 2008 ("*Wells v Haden*")[4] Ms Haden's statement of defence had been struck out on account of a failure to comply with an order for costs. However, it seems from the judgment that she was able to give a full account of her position to Judge Joyce.

[11] The Judge found in favour of Mr Wells and awarded him damages of $57,500, including exemplary damages of $7,500, against Ms Haden and Verisure on the defamation claim. The Judge also granted injunctions restraining Ms Haden and the other defendants from using the AWINZ name and from publishing defamatory statements about Mr Wells.

[12] On 20 November 2009, Rodney Hansen J dismissed Ms Haden's appeal against *Wells v Haden*, both as to liability and quantum.[5] The Judge subsequently declined Ms Haden leave to appeal to the Court of Appeal.[6]

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4 *Wells v Haden* [2008] DCR 859.
5 *Haden v Wells* HC Auckland CIV-2008-404-5500, 20 November 2009.
6 *Haden v Wells* HC Auckland CIV-2008-404-5500, 23 June 2010.

Defamation proceedings

[13] Coming to the judgment under appeal, on 4 April 2018 Ms Holm issued proceedings against Ms Haden under the Defamation Act 1992 ("Act"). The proceedings concerned statements that Ms Haden had posted on several websites under her control ("websites").

[14] Ms Holm's proceedings followed an approach by her to NetSafe in December 2016. Ms Holm sought NetSafe's assistance to have the posts, or at least some of them, taken down. This proved to be ineffective, hence Ms Holm's proceedings.

Statements of claim

[15] In her statement of claim of 4 April 2018, Ms Holm alleged that Ms Haden had defamed her in 17 statements published on the websites between 29 January 2010 and 16 March 2018. Ms Holm pleaded each of the 17 statements as a separate cause of action.

[16] On 30 November 2020, Ms Holm filed an amended statement of claim in which she retained her first 17 causes of action but added a further six in respect of statements published between 19 March 2018 and December 2019. This brought the number of statements/causes of action to 23. The first 22 causes of action concerned statements published on the websites, and the twenty-third was in respect of statements that Ms Haden had made in an email to a third party.

[17] Ms Holm's case was that the statements bore a variety of meanings. Some meant or implied that she had behaved in an intimidating manner towards Ms Haden. Others meant or implied that she had harassed or bullied Ms Haden, or that she had not held a practising certificate when required to do so, or that she had misled the Court and was corrupt, and so on. Thus, Ms Holm alleged the statements were defamatory of her.

[18] Ms Haden had filed a statement of defence to Ms Holm's first statement of claim, and she filed another statement of defence in response to the amended statement of claim. Both contained a considerable quantity of evidence which they should not

have, but the gist of Ms Haden's position as it appears from the two pleadings was as follows. First, some of the posts had been taken down or any reference to Ms Holm removed. Secondly, the statements were not defamatory. Thirdly, the statements were true or Ms Haden's honest opinion. These defences required Ms Haden to establish that what she had said was true or materially so, or that the facts underlying her opinion were true.

[19] Both Ms Holm and Ms Haden gave evidence at trial, and each was cross-examined by the other.

[20] In his decision, the Judge said he was satisfied that the statements had the meanings or carried the implications that Ms Holm alleged, and that they were defamatory of her. The Judge also found that Ms Haden had not proved her defences of truth or honest opinion and, indeed, that some of what she had said was untrue.

[21] The Judge awarded Ms Holm the following relief:

(a) general and aggravated damages of $75,000;

(b) punitive damages of $25,000; and

(c) a permanent injunction prohibiting Ms Haden from publishing any further material, on any site or by any media, which relates or refers to Ms Holm, directly or indirectly.

[22] Ms Haden appeals against liability and the relief ordered.

Grounds of appeal

Ground 1

[23] Ms Haden's first ground of appeal is:

> The judge erred in failing to limit liability and damage assessments in the first 17 claims to publications proved to have been accessed after 4 April 2016 in accordance with sections 11 and 15 of the Limitation Act 2010.

[24] The combined effect of ss 11 and 15 of the Limitation Act 2010 is to confer a defence to a defamation claim brought more than two years after the making of the statement in issue. The gist of Ms Haden's first ground of appeal is that she had a defence in respect of any of the first 17 posts in the absence of evidence that the particular post had been viewed after 4 April 2016.

[25] In her submissions on appeal, Ms Holm referred me to an acknowledgement by Ms Haden that all of the posts in issue were still published on the websites when she (Ms Holm) filed her statement of claim in April 2018.

[26] Ms Holm also referred me to *Sellman v Slater* which she submits supports her submission that ss 11 and 15 did not apply.[7] In *Sellman*, Palmer J discussed the issue of multiple publication as it pertains to posts on a website. Palmer J's view, which seems to be widely accepted, was that a statement on a website continues to be published for the duration it remains on the website. This general proposition is subject to the defendant, Ms Haden in this case, establishing to the satisfaction of the Court that the post has not been read within the preceding two-year period.

[27] Accordingly, to defend a particular cause of action within the first 17, Ms Haden needed to establish the post had not been viewed since 4 April 2016. This was not done, and so the Limitation Act provisions did not, and do not, assist her.

Ground 2

[28] Ms Haden's second ground of appeal is:

> The judge repeatedly relied on evidence of the judgment in *Wells v Haden* [2008] DCR 859 and/or findings of fact in that judgment in breach of section 50 of the Evidence Act 2006 (see in particular, paragraphs [35], [36], [39], [41], [42], [60], [100], [110], [116], [121], [127],[156], [174], [213], [236] and [242]). He also repeatedly relied on evidence of the NZ Law Society's ruling in the first appellant's complaint and/or findings of fact in that decision in breach of section 50 of the Evidence Act (see in particular, paras]106], [107], [108], [110], [116], [156], [168], [213], and [242]).

[29] I have already referred to *Wells v Haden*.

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7 *Sellman v Slater* [2017] NZHC 2392, [2018] 2 NZLR 218.

[30] The New Zealand Law Society ("NZLS") ruling is recorded in a letter from the NZLS to Ms Haden and Ms Holm dated 4 July 2011. The letter conveyed a decision by Standards Committee 3 to take no further action on a complaint by Ms Haden against Ms Holm. One complaint was that Ms Holm had provided regulated (legal) services when she did not hold a practising certificate.

[31] The Standards Committee's view of the matter was that the nature of the work Ms Holm was carrying out at the relevant time did not require a practising certificate.[8]

[32] At trial, Ms Holm gave evidence that she had always held a practising certificate when she was required to do so and that, if she had not held one at a particular point in time, it was because the work she was engaged in did not require her to do so. The NZLS letter was one of several documents from the NZLS produced at trial but the critical point was the evidence of Ms Holm to which I have just referred.

[33] Section 50 of the Evidence Act 2006 provides:

> **50 Civil judgment as evidence in civil or criminal proceedings**
>
> (1) Evidence of a judgment or a finding of fact in a civil proceeding is not admissible in a criminal proceeding or another civil proceeding to prove the existence of a fact that was in issue in the proceeding in which the judgment was given.
>
> (1A) Evidence of a decision or a finding of fact by a tribunal is not admissible in any proceeding to prove the existence of a fact that was in issue in the matter before the tribunal.
>
> (2) This section does not affect the operation of–
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> (a) a judgment *in rem*; or
>
> (b) the law relating to *res judicata* or issue estoppel; or
>
> (c) the law relating to an action on, or the enforcement of, a judgment.

[34] Subject to s 50(2), s 50(1) renders evidence of a judgment or finding of fact in a civil proceeding (for instance, in *Wells v Haden*) inadmissible in another proceeding

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8 The New Zealand Law Society dismissed all of Ms Haden's other complaints.

(the *Holm v Haden* defamation proceeding) to prove the existence of a fact in issue in the earlier proceeding, that is *Wells v Haden*.

[35] Section 50(1A) is to the same effect in respect of a decision or a finding of fact by a Tribunal. It is not entirely clear to me that the decision of the Standards Committee falls within s 50 but I shall assume for present purposes that it would fall within s 50(1A).

[36] Regardless, I am not persuaded that *Wells v Haden* or the Standards Committee decision was admitted into evidence or relied on for the purpose prohibited by ss 50(1) and (1A).

[37] It is correct that the Judge said frequently that Ms Haden's statements regarding the legality or otherwise of Mr Wells' AWINZ ignored Judge Joyce's decision. However, as Ms Haden herself acknowledges in her submissions on appeal, the legality or otherwise of Mr Wells' AWINZ was at best of peripheral relevance to the issues before Judge Smith. Ms Holm's complaint was that Ms Haden's statements were defamatory of her, not of AWINZ. Ms Holm wished Ms Haden to stop referring to her, Ms Holm, in defamatory terms. Accordingly, nothing turns on the references to *Wells v Haden*.

[38] As to the Standards Committee decision, the Judge also said on a number of occasions that Ms Haden's posts were at odds with the decision of the Standards Committee on the issue of whether, and when, Ms Holm was required to hold a practising certificate. As I read the evidence at trial, there was some confusion about whether the Standards Committee might have misconstrued Ms Holm's account to their investigator about the capacity in which she was employed. However, that again is beside the point. Ms Holm's evidence was that she had held a practising certificate when she was required to do so but not on occasions when she was undertaking work that did not require a practising certificate. Ms Holm's own evidence on this point was sufficient for the Judge to make the finding he did. If Ms Haden contested the point, it was for her to establish otherwise which she did not do.

[39] It follows that I consider the references to *Wells v Haden* were unnecessary but were not in breach of s 50 of the Evidence Act. Likewise the NZLS ruling.

Ground 3

[40] Ms Haden's third ground of appeal is:

> The Judge failed to apply the correct, or indeed any, test for meaning in relation to all of the claims. He failed to make any explicit finding on meanings.

[41] Section 37 of the Act requires the plaintiff to give particulars of every statement alleged to be defamatory and, amongst other things, the meaning the statement is alleged to bear, unless that meaning is evident from the matter itself. Ms Holm gave the required particulars in her pleadings.

[42] In respect of each cause of action, the Judge found the statement bore the alleged meaning and was defamatory. This finding was unexceptional. The defamatory nature of the statements was obvious and did not require elaboration.

Grounds 4 and 5

[43] Ms Haden's fourth and fifth grounds of appeal are:

> The judge acknowledged that the appellants had pleaded defences of honest opinion in relation to all of the claims. However, he failed to assess those defences in any of the claims, including those that were explicitly expressed as opinions.
>
> In relation to the defences of truth, the judge failed to cite or apply the correct test of whether the statements are true or materially different from the truth, in terms of section 8 of the Defamation Act 1990 and therefore reached wrong conclusions on the defences of truth.

[44] A defendant relying on a defence of truth must establish the matters identified in s 8(3) of the Act. Section 8 provides:

> **8 Truth**
>
> (1) In proceedings for defamation, the defence known before the commencement of this Act as the defence of justification shall, after the commencement of this Act, be known as the defence of truth.

> (2) In proceedings for defamation based on only some of the matter contained in a publication, the defendant may allege and prove any facts contained in the whole of the publication.
>
> (3) In proceedings for defamation, a defence of truth shall succeed if—
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> (a) the defendant proves that the imputations contained in the matter that is the subject of the proceedings were true, or not materially different from the truth; or
>
> (b) where the proceedings are based on all or any of the matter contained in a publication, the defendant proves that the publication taken as a whole was in substance true, or was in substance not materially different from the truth.

[45] A defendant relying on the defence of honest opinion must establish that the opinion is genuinely held, and is based on a fact or facts proved to be true.[9]

[46] It is not correct that the Judge failed to assess Ms Haden's defence of honest opinion. As I have said, the starting point was for Ms Haden to prove the necessary factual basis for her opinion. The Judge held that she had not done so or, worse, the untruthfulness of what had been said was established. The defence could not succeed in those circumstances.

[47] As to the defence of truth or material truth, again it is not correct that the Judge failed to cite or apply the correct test. The test is not complicated. It is for the defendant to prove that the statement is true or materially true. Again, this was not done.

Ground 6

[48] Ms Haden's sixth ground of appeal is:

> The judge wrongly concluded that the appellants had not proved that the respondent had "behaved in an intimidating manner" toward the first appellant (claims 1, 2, 3, 4, 6, 7, 9, 10, 11, 13, 14, 17). The Judge wrongly considered the different question of whether the first appellant was intimidated. His conclusion was also against the weight of evidence.

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[9] Defamation Act 1992, s 38 and *APN New Zealand Ltd v Simunovich Fisheries Ltd* [2009] NZSC 93, [2010] 1 NZLR 315.

[49] To put this ground in context, in 12 of the first 17 statements in issue, Ms Haden said "I was intimidated by [Ms Holm]"; or that Ms Holm had made "intimidating phone calls"; or that Ms Holm had been appointed to "commence the intimidation"; or that Ms Holm had been "bullying"; and suchlike.

[50] In each case, Ms Holm pleaded that the statements meant or implied that she had behaved in an intimidating manner towards Ms Haden and that such was defamatory.

[51] The Judge found as a fact that Ms Holm had not behaved in such a manner in the course of the telephone call referred to in [5] above, or in the subsequent emails. It is correct that the Judge doubted whether Ms Haden had been intimidated in fact. However, the Judge's conclusion that Ms Holm had not behaved in an intimidating manner was based on Ms Holm's evidence as to the telephone call and the subsequent emails.

[52] It follows that I do not consider there is any merit in this ground of appeal.

Ground 7

[53] Ms Haden's seventh ground of appeal is:

> The judge also [repeatedly] held that there is "no evidence" for the appellants' statements and concerns about the AWINZ trust, failing to refer to the evidence provided.

[54] It follows from what I have said above that the prior dispute regarding AWINZ was of no real consequence to the present proceeding. References to it were superfluous other than as explaining background. Given that, it is unnecessary for me to address this ground of appeal.

Ground 8

[55] Ms Haden's eighth ground of appeal is:

> The judge wrongly concluded that the respondent was identified in claims 9 and 10, relying on identification by hyperlink but failing to conduct a proper

> assessment of the factors relevant to a determination of whether readers were likely to follow any such links.

[56] The ninth cause of action concerned a post on 5 May 2012, entitled "Do Brookfield's lawyers support corruption? – a formal complaint".

[57] Ms Holm alleged the following paragraph was defamatory of her:[10]

> First to barristers make a complaint to a law clerk, the dedicated law clerk springs into action after hours and attempts to secure a result through intimidation. (hyperlinks reveal each segment of the story)

[58] The underlined words in the paragraph appear to be one of the hyperlinks to which Ms Haden referred at the end of that paragraph.

[59] The statement could only be defamatory of Ms Holm if a reader understood that she was the law clerk referred to, because there is no reference to Ms Holm by name either in this paragraph or in the post as a whole.

[60] As I understand it, Ms Holm relied on the hyperlinks in the post as the means by which she was identified as the law clerk concerned. However, the Judge did not address the question of how Ms Holm was identified in fact. Accordingly, it necessary for me to do so.

[61] On the documents before me, it is unclear what the reader would be taken to if they clicked on the link "complaint to a law clerk". Accordingly, that can be put to one side as the means of identification.

[62] However, the next paragraph in the post identified the law clerk as having been married to Ms Holm's former husband at the relevant time:

> When this fails The law clerk gets her husband [name] involved he happens to be a partner at Brookfields ...

[63] Accordingly, this paragraph would identify Ms Holm as the law clerk concerned to anyone who knew that she had been married to the lawyer mentioned.

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[10] Presumably "to" should be "two".

[64] Also, two paragraphs later, the post continued as follows:

> Brookfields were clever they managed to win a defamation case without the need to produce those awkward documents which really don't say what they have claimed the say. Read the blog How to win with no evidence.

[65] The hyperlink at the end of this paragraph was to the post of 28 April 2011 that was the subject of Ms Holm's third cause of action. The final paragraph of the 28 April 2011 post identified Ms Holm by name, and was as follows:

> Never fear Brookfields is here they are so efficient that they can do anything and on this occasion they used [Ms Holm] a partners wife [name] who did not hold a practicing certificate to commence the intimidation.

[66] Accordingly, it is reasonable to expect that anyone who read the May 2012 post, and who clicked on the links to which I have referred, would have understood that Ms Holm was the law clerk referred to in the paragraph Ms Holm alleged was defamatory of her.

[67] The question then becomes whether a reader can be expected to click on a hyperlink. In particular, Palmer J discussed this issue in *Sellman v Slater*, saying:[11]

> First, the mode of publishing a statement on a blog on the internet is part of the context in which the statement complained of must be read, according to point (f) of Blanchard J's principles. That mode of publishing is relevant to determining the meaning conveyed by the words chosen by the publisher. Hyperlinked statements in the relevant posts are only a click away, having been effectively highlighted by the author as relevant context. As the Court of Appeal has found, hyperlinking can closely connect statements, and may even involve promotion of the hyperlinked material for the purposes of publication. As such they are part of the context in which they must be read, as Woolford J in *Wu v Moncur* found ...

[68] Returning to the present case, Ms Haden included the hyperlinks so that they would be clicked on and that the material to which they were linked would be read. The effect of those hyperlinks, and particularly the hyperlink to the April 2011 post, was to identify Ms Holm as the law clerk concerned. It follows that I do not accept Ms Haden's submission that Ms Holm was not identified in the May 2012 post.

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[11] *Sellman v Slater*, above n 7, at [82] (footnotes omitted). The reference to "Blanchard J's principles" in this paragraph is a reference to the Court of Appeal's decision in *New Zealand Magazines v Hadlee (No 2)* [2005] NZAR 621 (CA) at 625.

[69] The tenth cause of action concerned a post on 20 August 2012, entitled "Do Brookfield's Lawyers take their obligation to the law seriously?". The post included the following statement:[12]

> It appears odd to me that a law firm such as Brookfields should use late night initiating phone calls through a legal secretary to kick off proceedings.

[70] Clicking on the hyperlink took the reader to the post which was the subject of the fourth cause of action. This post referred to Ms Holm by name. Accordingly, anyone who clicked on the hyperlink would have understood that Ms Holm was the maker of the late-night telephone calls to which the post referred. For the reasons just given, this was a sufficient identification of Ms Holm.

Ground 9

[71] Ms Haden's ninth ground of appeal is:

> The permanent injunctions granted by the judge requiring the first appellant to remove "all her current blogs and publications" and preventing the appellants from ever publishing anything about the respondent again are unlawfully broad and in breach of the New Zealand Bill of Rights Act 1990.

[72] The Judge granted a permanent injunction:[13]

> ... preventing Ms Haden publishing any material on any site or by any media which relates to, or has reference to, Ms Holm directly or indirectly.

[73] The Judge went on to say:[14]

> The effect of the injunction is Ms Haden will need to remove all her current blogs and publications as she has made plain, she is incapable of removing not only Ms Holm's name but also links, references and other means of identifying Ms Holm.

[74] The Judge did not order Ms Haden to remove "all her current blogs and publications" as she suggests in this ground of appeal. Rather, the Judge recorded that would be the *effect* of the order because of what Ms Haden had "made plain".

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12 Presumably "initiating" should be "intimidating".
13 *Haden v Holm*, above n 1, at [243].
14 At [244].

[75] Accordingly, to the extent that Ms Haden's only means of complying with the Judge's order, which she was and is required to do, was to remove all posts et cetera, that was a reflection of the manner in which the websites had been administered. It was not, and is not, a matter for the Court to take into account in making the order it did.

[76] However, Ms Haden is correct that the injunction requires that she never publish any further material relating or referring to Ms Holm again, and that the injunction is permanent.

[77] A permanent injunction in the terms granted in a case of this nature is not too broad or in breach of the New Zealand Bill of Rights Act 1990 ("NZBORA"). The Court of Appeal addressed the interface between the law of defamation and NZBORA in *Low Volume Vehicle Technical Association Inc v Brett*.[15] Rights protected by NZBORA are not absolute and the law of defamation represents a permissible limitation on those rights. Accordingly, as a matter of principle, it is open to a Judge to grant an injunction, and on a permanent basis, if circumstances require that be done. This was such a case. Ms Haden had been blogging about Ms Holm for the best part of 10 years. In doing so, Ms Haden had injured Ms Holm's reputation and career, and the injunction granted was necessary to preclude further injury.

Grounds 10 and 11

[78] Ms Haden's tenth and eleventh grounds of appeal are:

> The award of punitive damages of $25,000 is unjustified or excessive. In particular:
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> a. The judge failed to cite or correctly apply the statutory test for punitive damages in section 28 of the Defamation Act 1992.
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> b. The award was not moderate.
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> c. The judge improperly failed to consider the appellants' financial circumstances.
>
> d. He unlawfully relied on the judgment in *Wells v Haden* and the NZLS decision.

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15 *Low Volume Vehicle Technical Association Inc v Brett* [2019] NZCA 67, [2019] 2 NZLR 808.

e. The judge improperly placed weight on the fact that the appellants disagreed with those decisions.

f. He failed to consider the appellants' actions in removing the respondent's name from their posts.

g. The award is out of proportion to other awards of punitive damages.

h. The judge regarded the first appellant's conduct as malicious when the weight of evidence is that she genuinely believed her statements.

1. The award is inconsistent with the NZ Bill of Rights Act.

j. The matters referred to in para 11 below.

The award of damages of $75,000 is unjustified or excessive. In particular:

a. The judge failed to assess whether there has been any publication in the Limitation period, or, if so, how limited that publication was likely to be.

b. The judge failed to consider the delay in bringing proceedings, a statutory factor in section 29 of the Defamation Act 1992 which should have reduced damages.

c. The judge failed to give appropriate weight to the evidence that the appellants removed reference to the respondent in all their posts shortly after proceedings were brought.

d. The judge failed to have regard to the evidence that the first appellant repeatedly tried to resolve the respondents' concerns.

e. The judge placed undue weight on the evidence that identification was still possible on a very small number of posts for readers who followed other links or had special knowledge about the respondent.

f. The judge unlawfully relied on the judgment in *Wells v Haden* and the NZLS decision.

g. The judge failed to have regard to the fact that claim 23 related to an email that was sent to a person who did not believe in it, nor that the first appellant genuinely believed that the recipient had an interest in hearing the information.

[79] At trial, Ms Holm sought an award of general damages of $114,000 and punitive damages of $30,000. It appears from the judgment that Ms Holm had taken these amounts from the awards in *Wells v Haden*, increasing them to reflect inflation.

[80] Dealing with the general damages first, the Judge considered there were material differences between Ms Holm's position and Mr Wells'. In arriving at his award of $75,000, the Judge took account of Ms Holm's evidence as to how the posts

had affected applications she had made for employment. Sometimes Ms Haden named Ms Holm's employers. Ms Haden also corresponded directly with some employers. Ms Holm also found that applications for employment she had made were not progressed, apparently after the prospective employer had seen the posts. Moreover, Ms Holm's evidence was that the posts had referred to her former husband and to her father.

[81] The Judge then noted that he would have to take account of Ms Haden's actions in removing some (but not all) of the references to Ms Holm in the posts, after proceedings were commenced, and also that an injunction had been granted to ensure there was no repeat, and all defamatory material would be removed.

[82] Ultimately, the Judge settled on the $75,000 as what he described as "General (and aggravated) damages".

[83] In awarding punitive damages of $25,000, the Judge referred to Ms Haden's continuous publishing, and her failure to heed the substance of the decisions of the District and High Court in *Wells v Haden* and the NZLS ruling.

[84] I do not propose to interfere with the Judge's award of $75,000. Over the best part of 10 years, Ms Haden made allegations that were bound to affect Ms Holm's reputation — dishonesty, misleading the Court, bullying, "behaving like a thug", and so on. Ultimately, Ms Holm was required to commence legal proceedings and then to appear in Court. Ms Haden's statements of defence are to the effect that she was willing to resolve matters. It may be that she was. However, in the circumstances that prevailed, it is unsurprising that Ms Holm pressed on to obtain a judgment from the Court that she could produce to a third party if necessary.

[85] Turning to the Judge's award of punitive damages, s 28 of the Act provides:

> **28 Punitive damages**
>
> In any proceedings for defamation, punitive damages may be awarded against a defendant only where that defendant has acted in flagrant disregard of the rights of the plaintiff.

[86] Ms Haden's conduct, being malicious and intended to injure, was in flagrant disregard of Ms Holm's rights. Moreover, Ms Haden persisted in publication despite Ms Holm's requests that she desist and her efforts to set Ms Haden straight on matters of factual inaccuracy. That said, Ms Haden's statements regarding the legitimacy or otherwise of AWINZ were beside the point. It was Ms Haden's conduct towards Ms Holm which rendered her susceptible to an award of punitive damages. Accordingly, as a matter of principle, it was open to the Judge to make an award of punitive damages.

[87] Despite that, I propose to set aside the award of punitive damages for these reasons.

[88] First, the Court of Appeal has observed:[16]

> … if general damages are awarded which somehow shade into aggravated damages which in turn somehow shade into exemplary damages, there is a distinct possibility that there will be double or even triple compensation. The problem is not unlike the conceptual problems in the criminal law in sentencing: it is the totality of the award which matters at the end of the day, not how the individual component parts are made up.

[89] Given the Judge's award of compensatory damages include an amount for aggravated damages, I cannot be sure there has not been the double-counting that must be avoided.

[90] Secondly, Courts have tended to show restraint in making awards of punitive damages under s 28 of the Act. Awards are not made in every case where the threshold is met and, when they are made, they tend to be modest.[17]

[91] I therefore set the award aside.

Ground 12

[92] Ms Haden's twelfth ground of appeal is:

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16 *Siemer v Stiassny* [2011] NZCA 106, [2011] 2 NZLR 361 at [56].

17 *Karam v Parker* [2014] NZHC 737; and *Hallett v Williams* HC Auckland CIV-2010-404-7064, 26 July 2011. The awards of punitive damages in these cases were $10,000 and $15,000 respectively.

> The decision on liability and damages is inconsistent with the right to freedom of expression in section 14 of the New Zealand Bill of Rights Act 1990.

[93] I have already addressed the circumstances in which the right to freedom of expression, and other rights protected by NZBORA, must yield to the laws of defamation. It is unnecessary to say more.

Result

[94] I quash the award of $25,000 for punitive damages made against the appellant.

[95] Subject to that, I dismiss this appeal in all other respects.

Costs

[96] The parties may file memoranda on costs if any issue arises. Such memoranda are not to exceed 10 pages, in 1.5 line spacing.

Peters J