DISTRICT COURT OF QUEENSLAND

CITATION:	*Brose v Baluskas & Ors (No 7)* [2020] QDC 64
PARTIES:	**TRACEY ANN BROSE** (Plaintiff) **v** **DONNA JOY BALUSKAS** (First Defendant) and **MIGUEL BALUSKAS** (Second Defendant) and **TRUDIE ARNOLD** (Third Defendant) and **IAN MARTIN** (Fourth Defendant) and **KERRI ERVIN** (Fifth Defendant) and **LAURA LAWSON** (Sixth Defendant) and **CHARMAINE PROUDLOCK** (Seventh Defendant)
FILE NO/S:	D148 of 2016
DIVISION:	Civil
PROCEEDING:	Application for costs
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	25 March 2020 (ex tempore)
DELIVERED AT:	Southport
HEARING DATES:	On the papers
JUDGE:	Muir DCJ
ORDER:	**1.** As between the plaintiff and the first, second and sixth defendants: that each party bear their own costs. **2.** As between the plaintiff and the third defendant: that the

plaintiff pay the third defendant's costs of the proceeding to be assessed if not agreed.

CATCHWORDS: DEFAMATION – ACTIONS FOR DEFAMATION – COSTS – GENERAL RULE - COSTS FOLLOW THE EVENT – COSTS OF ACTION – where plaintiff brought an action for defamation against multiple defendants – where plaintiff was only successful in part against first and second defendants –where both plaintiff and first and second defendants partially successful - whether appropriate order as to costs is that each party bear their own costs.

DEFAMATION – ACTIONS FOR DEFAMATION – COSTS – OFFERS TO SETTLE – INDEMNITY COSTS-STANDARD COSTS - where a formal offer was made prior to trial – whether the third defendant entitled to costs on the indemnity basis- whether plaintiff unreasonably rejected the offer – whether conduct of the plaintiff warrants an award of indemnity costs against her - whether interests of justice warrant parties to bear their own costs despite plaintiff being unsuccessful in her claim against the third defendant at trial.

LEGISLATION: *Defamation Act 2005* (Qld) ss 38, 40.

Uniform Civil Procedure Rules 1999 (Qld) rr 361, 681

CASES: *Nationwide News Proprietary Limited v Weatherup* [2017] QCA 70.

COUNSEL: H Blattman for the plaintiff

First and Second Defendants are self-represented

M DeWaard for the third defendant.

SOLICITORS: Bennett & Philp Lawyers for the plaintiff

First, Second and sixth defendants are self-represented

Mills Oakley for the third defendant.

Background

[1] On the 28th of February 2020, I delivered my written judgment in this proceeding. In that judgment, I stated that my preliminary view as to costs was that each party should bear their own costs, but I allowed the parties until 4 pm Monday, 16 March 2020 to provide short written submissions if other orders were sought.

[2] On 9 March 2020, the plaintiff advised in writing that she did not intend to make any further costs submissions, accepting that the appropriate order was that each party ought to bear their own costs. She quite properly, in my view, reserved her rights should another party seek any other order. She requested, through her solicitors, 21 days after receipt of such submissions to do so.

[3] Despite the proceeding being dismissed against her, the sixth defendant has not filed any submissions in relation to costs. This is not surprising, given she was unrepresented apart from some pro bono assistance. It follows from my substantive judgment that the appropriate order as between the plaintiff and the sixth defendant is that each party bears their own costs.

[4] On 10 March 2020, notice was received from the former solicitors of the third defendant that they had instructions to now act for her and would be filing costs submissions. The third defendant objected (as did the unrepresented first and second defendants), to the plaintiff having the opportunity to respond to these submissions. On 11 March 2020, through my Associate, I advised the parties that I would afford the plaintiff the opportunity to respond, but only until 4 pm Friday, 20 March 2020.

[5] On 16 March 2020, the first and second defendants filed a document entitled Costs Submissions. By this document, they made three requests. First, that the award of damages I made against them in the substantive judgment be dismissed. Secondly, that the plaintiff and her legal counsel jointly pay all of their costs from the date of the filing of the proceeding on the indemnity basis. And thirdly, that all of the interlocutory costs orders awarded against them be set aside.

[6] For the purposes of this application, I have ignored request 1 and 3. The only issue for my determination is the issue of costs. I have proceeded on the basis that the costs award sought by the first and second defendants against the plaintiff following my substantive judgment is that the plaintiff pays the first and second defendants' costs on the indemnity basis.

[7] On 16 March 2020, submissions were filed on behalf of the third defendant seeking orders that the plaintiff pay the third defendant's costs of the proceeding on an indemnity basis, or alternatively on the standard basis up to the date of an offer made on 9 February 2018, and following that offer on an indemnity basis.

[8] The plaintiff has filed submissions in response to both of these submissions. Through my Associate, I have also requested that the plaintiff and third defendant clarify a factual dispute that appeared to have arisen in relation to the amount of

costs paid by the third defendant to date. A letter was received from the plaintiff's solicitors on 24 March, and submissions were filed by the third defendant's counsel on 25 March 2010, and there is now no disagreement.

[9] Having carefully considered all of the written submissions in relation to costs, and having heard the parties in relation to costs, I am now in a position to make orders.

Costs as between the first and second defendants

[10] I will deal firstly with the issue of costs as between the plaintiff and the first and second defendants.

[11] The first and second defendants claim the plaintiff and her lawyers should pay their costs on the indemnity basis. While the first and second defendants were not legally represented during the trial, they were represented on occasion during the course of the proceeding. Leaving aside the costs orders made against them along the way, I do not understand it to be controversial that they have incurred considerable legal costs along the way, and that the reality was they could not afford to be legally represented at trial because of these matters.

[12] The first and second defendants' submissions are almost entirely devoid of any matters relevant to the issue of costs. They do not advance in any sensible way the second and third defendants' case for costs on the indemnity basis. Their submissions seek to re-agitate and reopen matters that I have made determinations about. The submissions also contain scandalous and unsubstantiated allegations. Apart from submitting that I was wrong and requesting me overturn previous costs orders made by me and indeed another judge of this Court, the first and second defendants do not deal with the fact that the plaintiff obtained some success in her claim against them, which resulted in an award of damages against them and a permanent injunction being ordered.

[13] In response to these submissions, the plaintiff submits that the appropriate order is, as I had foreshadowed in my judgment, that each party bear their own costs. In doing so, she submits there is no utility in seeking costs against the first and second defendants even if the Court might have been minded to make such an order had she requested. The plaintiff's approach in not seeking costs against the first and second one is a sensible and reasonable one. In a short page one submission filed on behalf of the plaintiff, the plaintiff makes a number of points about why each party ought to bear their own costs, and opposing the orders sought by the first and second defendants.

[14] First, the plaintiff submits that she succeeded against the first and second defendants at trial, and she was successful in obtaining injunctions to protect her from further defamatory attack by the first and second defendants. This is true, but it could equally be said that the first and second defendants succeeded in some way against the plaintiff. This is because I found some of the posts of the first and second

defendants were not defamatory, and, further, to the extent the posts were, the quantum of damages of $3,000 was an appropriate and rational award to compensate the plaintiff for the harm to her reputation. This award was considerably less than the amount sought by the plaintiff.

[15] The second submission by the plaintiff is that while damages were small, this was in large part because the plaintiff had already received compensation from other defendants. I do not accept this submission for two main reasons. First, it is correct that at paragraph 490 of my substantive judgment, I found that a considerable portion, and, doing my best, around $100,000 of the total amount received from the plaintiff from other defendants ought to be taken into account for the purposes of section 38 of the *Defamation Act* (Qld) 2005. It is not correct to say that the damages award was small in a large part because of this finding.

[16] The fact that the plaintiff had already received compensation from other defendants was but one aspect of my assessment of the damages. As I have stated in my substantive judgment, there was, at law, presumed damage to the reputation of the plaintiff as a result of the posts of the first and second defendants, but I was not satisfied there was any substantial further harm to her reputation as a result of these posts. I also found that it was not possible to isolate the harm caused to the plaintiff's reputation and to hurt and distress by the myriad of factors going on in the plaintiff's life, which I summarised at paragraph 454 of my judgment. There is no need to repeat these reasons here. The second reason I reject the plaintiff's submission is that it overlooks my finding that, given the context in which the posts appeared, the defamatory quality of the imputations was at the lower end of the scale of seriousness.

[17] The plaintiff also submits that the trial was significantly elongated because of the second defendant's contextual truth defence, which ultimately rested on a contextual imputation that was found not to be defamatory. In my view, it is difficult in this case to apportion blame, for want of a better word, for the elongation of the case. There were a number of issues that were ventilated at trial by the plaintiff that caused the trial to go longer: for example, aspects of her aggravated damages case, and issues surrounding two posts that she only conceded at the end of the trial were statute-barred.

Conclusion re appropriate costs order as between the plaintiff and the first and second defendants

[18] Under s 40 (1) of the Defamation Act, in awarding costs in defamation proceedings, the court must have regard to the way in which the parties conducted their case and any other matters that the court considers relevant. One of the relevant factors in this case in my view, is that the plaintiff and the first and second defendants all enjoyed some success at trial. But more crucially in this case is the fact that in my view the conduct by all of the parties left little to be desired. They became entrenched in their

respective positions which meant there was little if any prospect of a mediated resolution.

[19] In the exercise of my broad discretion to order costs, it follows that the interests of justice warrant and I order, that each of the plaintiff and first and second defendants bear their own costs.

Costs as between the plaintiff and third defendant

[20] Turning to the third defendant, the plaintiff submits, quite correctly, that this court has a very broad discretion on the issue of costs. And that, despite the fact that her claim against the third defendant was dismissed, the interests of justice require that she and the third defendant should bear their own costs.

[21] This submission is premised on the fact that whilst the third defendant's defence denied that the posts were defamatory, it was on a bases different to those that were ultimately successful. The plaintiff referred to the court's finding that the third defendant's post was unpleasant, insulting, abusive and offensive but was not defamatory in that, in the context in which it was made, it would not have caused an ordinary reasonable person to think less of the plaintiff.

[22] At first blush, there is some force to the plaintiff's submission, but it does overlook, in my view, that the plaintiff did not contemplate or address, as she ought to have done in my view, in either the conduct of her trial, her pleadings, or her trial submissions, that the authorities clearly establish that context and circumstances of the publication are material facts which must be taken into account in determining whether a defamatory imputation is both, as a matter of fact and law, likely to cause an ordinary reasonable person to think less of the plaintiff. Whilst it is certainly true that the impact of forum and context insofar as posts made on social media are concerned is an emerging and a vexed question, the issue of context and its importance as a relevant consideration is well-established.

[23] In support of her submission that the parties should bear their own costs, the plaintiff submits that she has incurred considerable costs in dealing with the third defendant's multiple defences. This is true, but the evidence established that the plaintiff obtained costs orders against the third defendant on these applications, some on the indemnity basis.

[24] A series of costs orders were made in favour of the Plaintiff which are set out in the Third Defendant's Supplementary Outline of Argument as follows:-

(a) On 8th December 2017 – where costs were assessed at $15,891.06 as against the first, second, third, fifth and seventh defendants.

(b) On 24 May 2018 – where costs were assessed at $39,234.30 as against the third, fifth and seventh defendants.

(c) On 7 September 2018 - where costs were agreed at $10,597.95 as against the third defendant alone; and

(d) On 16 November 2018 – where costs were ordered against the third, fifth and seventh defendant. It is uncertain whether these costs have yet been assessed, but it seems that the third defendant's liability in respect of that order is in the vicinity of $2,000.

[25] It is accepted that the order of 8 December 2017 was satisfied and that the orders of the 24 May 2018 and 7 September 2018 have also been satisfied.

[26] Ultimately, the issue of costs that I must determine today is a separate one to the previous issues of costs. Those have been determined, and the plaintiff was entitled to enforce those orders as she saw fit. The submission – and all of the plaintiff's submissions as to costs, in my view, must be seen in the context that, even if the posts had been found to be defamatory, I have determined that in the context in which they were made, they fell at the lower end of the scale of defamatory quality, and the award of damages against the third defendant would have been modest, assessed by me in the substantive judgment in the sum of $2,000.

[27] The third defendant submits that costs should be awarded on the indemnity basis for essentially two reasons: first because of an offer she made on 9 February 2018, and secondly, because of the conduct of the plaintiff in this case. In making these submissions, the third defendant submits that s40 of the Defamation Act ought to be taken into account. I accept this. Given the proceeding was brought pursuant to the Act, in my view, it is appropriate that the court take into account the matters set out in this section.

[28] As Justice Applegarth observed in *Nationwide News Proprietary Limited v Weatherup,*[1] s40 co-exists with other provisions of the Uniform Civil Procedure Rules governing costs, including the power to order costs on an indemnity basis in appropriate circumstances. But if s40(2)(a) or (b) is engaged, then unless the interests of justice require otherwise, a court must order costs of and incidental to a proceeding be assessed on an indemnity basis. I have considered the full provisions of section 40 of the Defamation Act, which I will not repeat for the purpose of these ex tempore reasons.

[29] I will now deal firstly with the offer. The offer was a formal offer made under the Uniform Civil Procedure Rules and was for the third defendant to pay the plaintiff the sum of $20,000 within 30 days of acceptance, and that once payment was made, the proceeding was to be discontinued by consent with no order as to costs. This offer lapsed. The plaintiff submits that in the context and in the manner in which the claim was defended on the pleadings, the offer was not unreasonably rejected by the plaintiff such that s 40(2)(b) of the Defamation Act is not engaged.

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[1] [2017] QCA 70 at [73].

[30] The plaintiff submits that it was not unreasonable for her to have rejected this offer because at the time, the proceedings had been on foot for some 18 months and the offer was inclusive of costs. She points to the fact that at the time too, the plaintiff had issued a costs statement in the sum of $13,421.32, which was subsequently assessed at over $15,000.

[31] I will return to the issue of the offer being inclusive of costs shortly, but in my view, the latter point about having an outstanding costs order at the time is not relevant, because the order stands alone and the plaintiff could enforce it as she liked, and indeed, as I understand, she did.

[32] The plaintiff also points to the fact that the third defendant's offer was accompanied by a further amended defence pleading proof and contextual truth, and that the offer did not include an undertaking nor a formal apology. The fact that the offer came at the same time as the further pleading is of little moment, in my view. The fact of there being no apology is also in my view of little moment, given that the third defendant had already apologised on Facebook. As to the undertaking, there was no evidence that this defendant was republishing her comments, and the evidence at trial was that Facebook page had been shut down by that time.

[33] It is instructive that on 28 March 2017, the then-solicitors for the third defendant set out in a letter (contained in the affidavit filed on behalf of the plaintiff on this costs argument) that the third defendant had publicly apologised for making comments, had attempted to retract the comments and deeply regretted making the comment and that it was not appropriate to do so.

[34] At that point, the third defendant's then-solicitors pointed out that they reserved their rights to challenge the fact that the comments were defamatory at common law. On this date, the solicitors also referred to cases about such a dispute being long and consuming too much time, emotional energy and costs, and that common sense ought to prevail. It is also relevant that at that point, an offer was made that the plaintiff discontinue the proceedings against each of the first, second, third, fifth and seventh defendants.

[35] The plaintiff also refers to the third defendant electing trial by jury, which was not abandoned until May 2019, and that the plaintiff had not elected trial by jury at any time. I should pause briefly to deal with that point, because my judgment incorrectly states that the plaintiff elected trial by jury. This will be revised on the court judgment shortly. Otherwise, in my view, in terms of costs, the election by the third defendant of trial by jury is not a relevant feature in this case.

[36] What is relevant under the Defamation Act is, in my view, that at the time of the offer on 9 February 2018, the plaintiff had settled with the fourth defendant in May 2017 for the sum of $20,000 inclusive of costs and interests with no evidence of a written apology or any undertaking by the fourth defendant not to publish defamatory comments. She also settled with the eighth defendant on 19 February

(during the period of the third defendant's offer) for the sum of $92,500, which included an amount for a previous costs order of nearly $14,000, and otherwise with no order as to costs. On any objective view, the eighth defendant's publication was the most serious. The fourth defendant's post was a scathing one of the plaintiff and struck at the core of her role as principal. I will not repeat the fourth defendant's post for the purpose of this judgment.

[37] Ultimately, it is a very difficult question, in my view, to determine whether an offer of $20,000 inclusive of costs, even taking into account that the plaintiff had a separate order of over $13,000 at the time against the third defendant, was unreasonably rejected by the plaintiff. But in my view, given that the proceeding had been on foot for nearly 18 months at the time of the offer, and given the state of the pleadings at the time was that the third defendant's defence did not specifically raise that the posts were not defamatory for the reasons I ultimately found in my judgment (although I accept that the question of whether the posts were defamatory in nature had been flagged in earlier correspondence as I have referred at [33] above), it cannot be said and I am not satisfied that the offer was unreasonably rejected by the plaintiff at the time.

[38] It follows that I find that the offer of 9 February 2018 does not form the basis of an award of indemnity costs under section 40 of the Defamation Act or rule 361 or rule 681 of the Uniform Civil Procedure Rules.

[39] Otherwise, the third defendant submits in support of her submission that I ought to award indemnity costs that the Court ought to look unfavourably upon the way in which the plaintiff has conducted her case. The third defendant was largely legally represented throughout the proceeding, up until about 8 October 2018 when she entered bankruptcy. She was subsequently discharged from bankruptcy on 8 October 2019. She was unrepresented at the trial.

[40] The third defendant submits that the plaintiff ought never to have pursued her to begin with because the post was not defamatory. Given the way that the third defendant ran her case when she was legally represented, this is not, in my view, her strongest point. The third defendant submits that the plaintiff ought not to have pursued her because she gave an apology, offered an amount of money at an earlier stage of the proceeding, and had published an apology on Facebook on 19 June 2016.

[41] I have rejected in my primary judgment that an apology alone was ever going to appease the plaintiff. It is my view it is clear from the correspondence, and as I have found in my judgment, that the plaintiff's insistence that all she wanted was an apology does not bear scrutiny. For example, correspondence dated 31 July 2019 to each of the first, second, third and sixth defendants (which was exhibited to the affidavit filed from the plaintiff's solicitors on the issue of costs) stated that the plaintiff was looking to recover her considerable costs. The letter is most instructive. In that correspondence (sent just prior to trial), the plaintiff maintained that any

award in her favour would be significant and would also involve a significant amount of aggravated damages.

[42] As discussed in my judgment, the plaintiff's expectations about the quantum of her claim were unrealistically inflated. In that correspondence, the plaintiff pointed out that she had already expended a very significant sum in pursuing her claim, and that she had the ability to continue with the action through to trial. It is not clear whether the letter was sent to the third defendant, who by that time was bankrupt and had expressed that she would not be participating in the trial, but the letter expressly referred to an offer of settlement relating to the third defendant. I will come to this in a moment. The letter stated that putting aside all of these issues:

> *All that our client has wanted to achieve is, so far as possible, to restore her personal and professional reputation, and in doing so recover the costs that she has incurred in prosecuting the matter.*

[43] At that point, the offer was made to settle the claim against the first, second, third, sixth and seventh defendants for the lump sum of $120,000, inclusive of costs, plus the provision of letters of apology and retraction in certain forms. This offer was open for acceptance by any or some or all of the defendants in any combination. This offer did not include any rights or remedies the plaintiff had in terms of the costs order made on 19 July 2019. It was also stated in this correspondence that on the basis of the limited knowledge of the plaintiff's solicitors in respect of the financial position of each of the defendants:

[44] It seems to us that they are potentially facing financial ruin. However, there remains the opportunity to avoid this harsh potentiality.

[45] It is unsurprising, given both the tone and contents of this letter, that the proceeding did not settle. At the time, it is uncontroversial that the plaintiff knew that the third defendant was a bankrupt, and it is true that the plaintiff chose to persist in pursuing her. This is not necessarily unusual in defamation cases given that the claim is not provable in bankruptcy and the cause of action is about vindication.

[46] But given the context in which the third defendant's post was made and that she had already received an apology from the third defendant and there was very little evidence of actual damage to reputation of the plaintiff – and of the plaintiff's hurt and distress in the context of the myriad of matters I ultimately found were going on in the plaintiff's life, there is a basis to the third defendant's submission that the plaintiff's motivation for conducting the proceeding in the way she did against the third defendant was unreasonable. In my view, the plaintiff ought to have been aware from a relatively early stage that any award of damages against the third defendant would have been a modest one.

[47] The issue of whether the plaintiff's conduct in this case warrants an award of indemnity costs is a finely balanced one, and I have given very careful consideration to the issue. In the resolve, whilst the plaintiff's conduct was less than to be desired,

I am not satisfied that it was so unreasonable towards the third defendant to justify an award of indemnity costs being made against her.

Conclusion re appropriate cost order between plaintiff and third defendant

[48] Overall, in the circumstances of this case, I have reached the view that the interests of justice do not warrant an order for costs being made on an indemnity basis, but I reject the plaintiff's submission that in the circumstances of the case, the appropriate order is that the third defendant ought to bear her own costs. Under s 40(1) of the Defamation Act, in awarding costs in defamation proceedings, the court must have regard to the way in which the parties conducted their case and any other matters that the court considers relevant.

[49] For all of the reasons I have just identified, the order sought by the plaintiff that the third defendant bear her own costs is not an appropriate one. In my view it would be one contrary to the interests of justice. The claim against the third defendant was dismissed in its entirety. In my view, costs ought to follow that event.

[50] It follows, and I order that the plaintiff pay the third defendant's costs of the proceeding to be assessed if not agreed.