# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Flegg v Hallett* [2015] QSC 315 |
| PARTIES: | **BRUCE STEPHEN FLEGG**<br>(plaintiff)<br>**v**<br>**GRAEME NORMAN HALLETT**<br>(defendant) |
| FILE NO/S: | BS No 11629 of 2012 |
| DIVISION: | Trial Division |
| PROCEEDING: | Trial |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 6 November 2015 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 15, 16, 17, 20, and 22 October, 20, 25, and 26 November 2015 |
| JUDGE: | Peter Lyons J |
| ORDER: | **The defendant pay the plaintiff's costs of and incidental to the action, including reserved costs, on the indemnity basis.** |
| CATCHWORDS: | DEFAMATION – ACTIONS FOR DEFAMATION – COSTS – INDEMNITY COSTS – where, on three occasions, the defendant made statements that were defamatory of the plaintiff – where general damages, including aggravated damages, were assessed at $275,000, and special damages at $500,000, against the defendant – where the allegations extended beyond those which were the subject of the proceedings – where, on 18 December 2012, the plaintiff offered to settle proceedings on the basis that, amongst other things, the defendant publish an apology by similar methods to those used for the publication of the defamatory statements, and pay the defendant $125,000 as compensation and reimbursement of the plaintiff's legal costs – where the apology was to extend to those allegations not the subject of the proceedings – where, on 24 December 2012, following the defendant's counter-offer, the plaintiff offered to settle the proceedings on similar terms, but reducing the amount payable to $20,000, and including a non-disparagement clause – where the defendant submitted that the inclusion of a non-disparagement clause could "never be an obligatory condition in a settlement agreement because no person can be expected to give away their right of free speech in the future" – where |

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| | the defendant submitted that there were "extreme aspects" to the apology which required him to "humiliate himself"– whether the defendant unreasonably failed to agree to the settlement offers proposed by the plaintiff |
| | *ACN 074 971 109 Pty Ltd (as Trustee for Argot Unit Trust) v National Mutual Life Association of Australasia (No 2)* [2012] VSC 177, cited.<br>*Alves v Patel* [2005] NSWSC 841, cited.<br>*Davis v Nationwide News Pty Ltd* [2008] NSWSC 946, cited.<br>*Love v State of Victoria (No 2)* [2009] VSC 531, cited.<br>*Orleans Investments Pty Ltd v MindShare Communications* [2009] NSWCA 40; (2009) 254 ALR 81, cited. |
| | *Defamation Act* 2005 (Qld), s 13, s 14, s 15, s 40 |
| COUNSEL: | N Ferrett with M May for the plaintiff<br>S Keim SC with R Gordon for the defendant |
| SOLICITORS: | Cooper Grace Ward for the plaintiff<br>Guest Lawyers for the defendant |

[1] I gave judgment in this proceeding on 18 June 2015, determining that the defendant had defamed the plaintiff, and assessing general damages (including aggravated damages) at $275,000 and special damages at $500,000.

[2] The plaintiff has now applied for his costs on the indemnity basis.

**Background**

[3] On 12 November 2012, the defendant announced to journalists that he would be holding a media conference (*conference announcement*). On 13 November 2012, he held a media conference, and later that day participated in a radio interview. I held that statements made by the defendant on each of these three occasions were defamatory of the plaintiff. The general damages related to the effect of the publications taken together. The special damages related to financial loss suffered by the plaintiff as a consequence of his resignation from his position as the Minister for Housing and Public Works on 14 November 2012.

[4] It is relevant to note that the publications extended beyond those which were the subject of the proceedings, and included allegations relating to the plaintiff continuing to practise medicine while a Minister of the Crown (*medical practice allegations*). It should also be noted that the plaintiff commenced these proceedings on 4 December 2012, his statement of claim of that date claiming the sum of $339,000 for general damages, $500,000 for aggravated compensatory damages, and unspecified special damages (relating to his resignation as a Minister).

**Statutory provision for costs**

[5] Section 40 of the *Defamation Act* 2005 (Qld) is as follows:-

"**40 Costs in defamation proceedings**

(1) In awarding costs in defamation proceedings, the court may have regard to—

(a) the way in which the parties to the proceedings conducted their cases (including any misuse of a party's superior financial position to hinder the early resolution of the proceedings); and

(b) any other matters that the court considers relevant.

(2) Without limiting subsection (1), a court must (unless the interests of justice require otherwise)—

(a) if defamation proceedings are successfully brought by a plaintiff and costs in the proceedings are to be awarded to the plaintiff—order costs of and incidental to the proceedings to be assessed on an indemnity basis if the court is satisfied that the defendant unreasonably failed to make a settlement offer or agree to a settlement offer proposed by the plaintiff; or

(b) if defamation proceedings are unsuccessfully brought by a plaintiff and costs in the proceedings are to be awarded to the defendant—order costs of and incidental to the proceedings to be assessed on an indemnity basis if the court is satisfied that the plaintiff unreasonably failed to accept a settlement offer made by the defendant.

(3) In this section—

*settlement offer* means any offer to settle the proceedings made before the proceedings are determined, and includes an offer to make amends (whether made before or after the proceedings are commenced), that was a reasonable offer at the time it was made."

[6] It will be apparent from s 40(2)(a) that the making of a settlement offer is a relevant consideration for an order for costs under s 40. The expression extends to "an offer to make amends", a matter referred to earlier in the Act. It is convenient to set out the relevant provisions:-

"**13 Publisher may make offer to make amends**

(1) The publisher may make an offer to make amends to the aggrieved person.

(2) The offer may be—

(a) in relation to the matter in question generally; or

(b) limited to any particular defamatory imputations that the publisher accepts that the matter in question carries.

(3) If 2 or more persons published the matter in question, an offer to make amends by 1 or more of them does not affect the liability of the other or others.

(4) An offer to make amends is taken to have been made without prejudice, unless the offer provides otherwise.

**14 When offer to make amends may be made**

(1) An offer to make amends can not be made if —

(a) 28 days have elapsed since the publisher was given a concerns notice by the aggrieved person; or

(b) a defence has been served in an action brought by the aggrieved person against the publisher in relation to the matter in question.

(2) A notice is a ***concerns notice*** for the purposes of this section if the notice—

(a) is in writing; and

(b) informs the publisher of the defamatory imputations that the aggrieved person considers are or may be carried about the aggrieved person by the matter in question (the ***imputations of concern***).

(3) If an aggrieved person gives the publisher a concerns notice, but fails to particularise the imputations of concern adequately, the publisher may give the aggrieved person a written notice (a ***further particulars notice***) requesting the aggrieved person to provide reasonable further particulars about the imputations of concern as specified in the further particulars notice.

(4) An aggrieved person to whom a further particulars notice is given must provide the reasonable further particulars specified in the notice within 14 days (or any further period agreed by the publisher and aggrieved person) after being given the notice.

(5) An aggrieved person who fails to provide the reasonable further particulars specified in a further particulars notice within the applicable period is taken not to have given the publisher a concerns notice for the purposes of this section."

**15 Content of offer to make amends**

(1) An offer to make amends—

(a) must be in writing; and

(b) must be readily identifiable as an offer to make amends under this division

(c) if the offer is limited to any particular defamatory imputations— must state that the offer is so limited and particularise the imputations to which the offer is limited; and

(d) must include an offer to publish, or join in publishing, a reasonable correction of the matter in question or, if the offer is limited to any particular defamatory imputations, the imputations to which the offer is limited; and

(e) if material containing the matters has been given to someone else by the publisher or with the publisher's knowledge — must include an offer to take, or join in taking, reasonable steps to tell the other person that the matter is or may be defamatory of the aggrieved person; and

(f) must include an offer to pay the expenses reasonably incurred by the aggrieved person before the offer was made and the expenses reasonably incurred by the aggrieved person in considering the offer; and

(g) may include any other kind of offer, or particulars of any other action taken by the publisher, to redress the harm sustained by the aggrieved person because of the matter in question, including (but not limited to) —

(i) an offer to publish, or join in publishing, an apology in relation to the matter in question or, if the offer is limited to any particular defamatory imputations, the imputations to which the offer is limited; or

(ii) an offer to pay compensation for any economic or non-economic loss of the aggrieved person; or

(iii) the particulars of any correction or apology made, or action taken, before the date of the offer.

(2) Without limiting subsection (1)(g)(ii), an offer to pay compensation may comprise or include any 1 or more of the following—

(a) an offer to pay a stated amount;

(b) an offer to pay an amount to be agreed between the publisher and the aggrieved person;

(c) an offer to pay an amount determined by an arbitrator appointed, or agreed on, by the publisher and the aggrieved person;

(d) an offer to pay an amount determined by a court.

(3) If an offer to make amends is accepted, a court may, on the application of the aggrieved person or publisher, determine—

(a) if the offer provides for a court to determine the amount of compensation payable under the offer—the amount of compensation to be paid under the offer; and

(b) any other question that arises about what must be done to carry out the terms of the offer.

(4) The powers conferred on a court by subsection (3) are exercisable—

(a) if the aggrieved person has brought proceedings against the publisher in any court for defamation in relation to the matter in question, by that court in those proceedings; and

(b) except as provided in paragraph (a), by the Supreme Court."

**Settlement offers**

[7] As the Reasons for Judgment of 18 June 2015 (*earlier reasons*) record[1], on 12 and 13 November 2012 the plaintiff's solicitors sent to the defendant documents each identified as a "concerns notice" under the Act. The second concerns notice extended to the medical practice allegations. They resulted in the solicitors for the defendant sending to the solicitors for the plaintiff a letter dated 10 December 2012 which was an Offer to Make Amends pursuant to the Act[2]. The defendant then offered to publish a reasonable correction and full apology, and to take reasonable steps to provide the correction and apology and any other statement to media outlets, to pay the plaintiff's expenses in an amount to be agreed, and to pay $10,000 by way of compensation[3].

[8] The solicitors for the plaintiff responded by letter dated 18 December 2012[4]. The letter asserted the gravity of the defendant's defamatory publications. It proposed a settlement on the basis that the defendant published an apology (including a retraction), the terms of which were attached to the letter (and made reference to the medical practice allegations). The method of publication was specified. It had some similarity to the first two occasions on which the defamatory publications were made, that is to say, by an announcement analogous to the conference announcement, to be published to a number of journalists, and then by holding a media conference the following day, at which the defendant would read the apology without further comment and without answering questions. However the announcement differed from the defamatory announcement in that it was to say no more than that the media conference would relate to the plaintiff. There was also to be the publication of an apology in the Courier Mail. The plaintiff would have the right to publish the apology in any manner he saw fit. The defendant would reimburse the plaintiff for actual legal costs to the date of settlement; and the defendant would pay $75,000 compensation. Ultimately, the terms (as well as the manner) of the publication of the apology were, for a time, agreed and I do not propose to recite them. A little later that day, the plaintiff's solicitors advised the defendant's solicitors that the actual legal costs to that time were approximately $50,000[5].

[9] The defendant responded on the following day[6]. In addition to the publication of an apology and retraction, the defendant offered to pay $20,000, being $10,000 as a contribution to legal costs, and $10,000 as damages.

[10] The solicitors for the plaintiffs responded on 20 December 2012[7]. The response proposed the amount of $50,000 by way of damages, and $20,000 for costs. It also offered to allow an extension of time for the payment of some of the money. It enclosed proposed terms of settlement.

[11] In their response of 21 December 2012[8], the solicitors for the defendant stated

> "Our client maintains he will be able to successfully defend the proceedings. He considers that your client:

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1 Earlier reasons at [25], [28].
2 Earlier reasons at [34].
3 Exhibit 1 to the affidavit of Lisa Catherine Valentine sworn 18 June 2015 (*LCV-1*), at p 1
4 LCV-1, at p 3.
5 LCV-1, at p 7.
6 LCV-1, at p 9.
7 LCV-1, at p 11.
8 LCV-1, at p 15.

> 1. failed in his obligations to make and keep records of contacts between lobbyists and your client and his offices;
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> 2. tabled, at best recklessly, in a committee of the Assembly, a document that was misleading in that it omitted contacts between your client and his son, then a lobbyist;
>
> 3. in so doing, failed to meet the standards required of a Minister of the Crown."

[12] The letter went on to make assertions to the effect that the defendant could successfully defend the action by the plaintiff. The letter then stated that nevertheless, to avoid cost and risk, the defendant was prepared to agree with the plaintiff's most recent proposal, save that the amounts payable would be reduced to $10,000 for damages, and $10,000 as a contribution to the plaintiff's legal costs. This is the basis for my saying earlier that there was a time at which the parties agreed on the terms of the retraction and apology.

[13] On 24 December 2012, the solicitors for the plaintiff responded[9], agreeing with the proposals made by the solicitors for the defendant, save that the plaintiff also required inclusion of an additional cause (*non-disparagement clause*) in the proposed written terms of settlement, as follows

> "6. The Defendant agrees that the Defendant must not defame, disparage or otherwise bring into disrepute the Plaintiff at any time after the execution of these terms of settlement."

[14] The defendant did not accept this offer[10]. He then made an offer to settle, effectively on the basis that the action be discontinued with mutual releases and discharges, the terms to be kept confidential and each party to pay his own costs.

[15] On 11 March 2013, the solicitors for the plaintiffs, having considered the defendant's Defence and Counterclaim and his response to the plaintiff's Reply and Answer, proposed a settlement in terms somewhat similar to their earlier proposals, with the amount of damages being $20,000 and the amount for costs being $55,000[11]. This was rejected by the defendant's solicitors by letter of 10 April 2013[12]. That letter proposed a settlement without admission of liability, the publication of a statement by the defendant retracting the statements about the plaintiff and expressing regret for injury to the plaintiff's feelings, and reciting that the defendant had undertaken to make a donation of $5,000 to Sisters Inside as an expression of that regret. The solicitors for the plaintiff responded by asserting that this was "outside the bounds of a bona fide negotiating position"[13].

**Submissions**

[16] The plaintiff submitted that the conditions established by s 40(2)(a) were established. In particular, he submitted that the defendant had unreasonably failed to agree to settlement offers proposed by the plaintiff. Reliance was placed on the plaintiff's offers of 18 and 24 December 2012. He submitted that the "interests of justice" did not require some order

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9 LCV-1, at p 17.
10 LCV-1, at p 23.
11 LCV-1, at p 25.
12 LCV-1, at p 37.
13 LCV-1, at p 41.

other than an order for indemnity costs. He referred to the decision of McClellan CJ in *Davis v Nationwide News Pty Ltd*[14] to the effect that the costs provisions in New South Wales analogous to s 40 were to ensure that a plaintiff would not be out of pocket to such an extent that the risk of bringing proceedings would be unacceptable; and to avoid protracted litigation wherever possible.

[17] For the defendant it was submitted that his lack of means was a factor which should be taken into account in deciding whether he had unreasonably failed to agree to a settlement offer. It was submitted that the method proposed by the plaintiff for the publication of the apology and retraction had "extreme aspects", requiring the defendant "to humiliate himself by advertising and then conducting a press conference outside the Parliamentary Annexe … without any other comment or answering of questions". It also required a positive affirmation of the plaintiff's fitness to be a Member of Parliament or Minister of the Crown, and an endorsement of the way in which he carried out his ministerial duties. It also required an endorsement of the "team" carrying out "excellent public policy work under the leadership of" the plaintiff. It went beyond the matters the subject of the defamatory publications (by extending to the medial practice allegations). The non-disparagement clause was said to be one which "can never be an obligatory condition in a settlement agreement because no person can be expected to give away their right of free speech in the future". It was submitted that in the circumstances, the defendant had not unreasonably failed to agree to the plaintiff's settlement offer. It was also submitted that the interests of justice required that costs not be ordered on an indemnity basis, but no further submissions were made in support of that submission. The defendant accepted that he should pay the plaintiff's costs on the standard basis.

[18] The plaintiff's submissions in reply pointed out that there was no evidence as to the defendant's means. They took issue with the criticisms of the proposed means of publication of the apology and retraction, pointing out their relationship to the way in which the defamatory publications (other than the radio interview) were made, so as to achieve the same publicity as those publications. Moreover, the defendant had been prepared to agree both to the method of publication and the terms of the apology. It was submitted that the non-disparagement clause was enforceable, by reference to *Orleans Investments Pty Ltd v MindShare Communications Ltd*[15]; and that contracts routinely restrict the rights of parties to speak on particular topics. The defendant had given no evidence to explain his refusal to accept the plaintiff's offers. The defendant's approach to early resolution of the dispute was unreasonable.

**Consideration**

[19] I accept that there was some element of humiliation involved in compliance by the defendant with the settlement proposals made by the plaintiff. It seems to me there is frequently an element of humiliation associated with a public apology. That is because an apology will usually involve an expression of regret for the publication, an unqualified acknowledgment of the falsity of the defamatory imputations, and a withdrawal of them[16]. A defendant's failure to accept a settlement offer may well be unreasonable, notwithstanding that performance of its terms may result in some humiliation.

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[14] [2008] NSWSC 946 at [26].
[15] (2009) 254 ALR 81.
[16] See Tobin and Sexton, *Australian Defamation Law and Practice*, LexisNexis Butterworths, [22,130].

[20] The humiliation would have been increased by the constraints proposed by the plaintiff, and by the fact that the proposed method of publication of the apology reflected the manner in which the defamatory publications were initially made. The defendant may well have considered that there was an element of "eating crow" involved in the plaintiff's proposal. On the other hand, the proposal could also be regarded as a means of securing a similar level of media attention for the apology as the defendant secured for the defamatory publications in the conference announcement and the media conference. I accept that any humiliation associated with a public apology is to be considered in determining whether a defendant unreasonably refused to agree to a settlement offer. However, it seems to me that this factor will often attract little weight, when the public apology seeks to redress the effects of a defamation which has done significant damage to a plaintiff's reputation, and has caused substantial hurt to a plaintiff's feelings.

[21] It seems to me that the manner of publication of the retraction and apology which the plaintiff proposed, and the limitations on what the defendant might say, were designed to ensure that the apology attracted substantial publicity broadly commensurate with the publicity which the defamatory statements were given; and to avoid dilution of the effect of the apology. In the circumstances, they do not seem to me to have extreme aspects. It is difficult to accept that they would make it reasonable for the defendant to refuse an otherwise reasonable offer.

[22] To the extent the apology spoke of the work of the "team" in relation to public policy, it went beyond the defamatory imputations. It seems to me that that is a factor to be taken into account in determining whether the defendant unreasonably failed to accept the plaintiff's settlement offers. However, given that the defendant was the plaintiff's media adviser until very shortly before he made the defamatory publications, these features hardly added to the burden of the apology.

[23] Further support for these conclusions is to be found in the fact that, for a time, the defendant was prepared to make the apology, both in the terms and in the manner proposed by the plaintiff.

[24] There was a very substantial disproportion between the damages awarded in the action, and the amount proposed by the plaintiff in his offer of 18 December 2012[17]. This was not a matter about which submissions were made on behalf of the defendant. No doubt an apology and retraction at about that time would, to some extent, have reduced the effects of the original defamatory publications. Nevertheless, those publications had attracted extensive media attention, and by then a great deal of harm had been done to the plaintiff's reputation, and he had undoubtedly suffered considerable injury to his feelings. It would require a degree of speculation to say that a retraction and apology at about this time would have had a substantial effect on the plaintiff's economic loss. When the offer was made, it should have been reasonably foreseeable to the defendant that the plaintiff's action could result in an award where the total amount of damages substantially exceeded the amount proposed by the plaintiff. If one were to consider what it would have been reasonable for the defendant to pay, in addition to making the apology and retraction at

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[17] A matter of some significance: see *Alves v Patel* [2005] NSWSC 841 at [75]; *Love v State of Victoria (No 2)* [2009] VSC 531 at [3]; *ACN 074 971 109 Pty Ltd (as Trustee for Argot Unit Trust) v National Mutual Life Association of Australasia (No 2)* [2012] VSC 177 at [36]; all cited in *Law of Costs*, 2013, G.E. dal Pont at [13.75].

that time, it was very much in his interest to have accepted the offer. That is so, even allowing for some discounting for the risks of litigation.

[25] I have already indicated that the matters relied upon in the defendant's submissions are of little weight; and do not offset the risk that the defendant might have to pay a substantially greater amount after trial than if he had accepted the plaintiff's offer. It was not submitted that the defendant's prospects of successfully defending the action were such as to make his refusal reasonable; and his Offer to Make Amends indicates that he recognised that the plaintiff had good prospects of success. I therefore conclude that the defendant unreasonably failed to agree to the settlement offer proposed by the plaintiff on 18 December 2012.

[26] The plaintiff's submissions sought to support the inclusion of the non-disparagement clause by reference to the assertions quoted earlier in the letter from the defendant's solicitors of 21 December 2012. Those assertions do not seem to me to be of any real significance. They were made in the course of confidential communications between solicitors. They asserted the basis on which the defendant maintained he had prospects of successfully defending the proceedings, no doubt with a view to supporting his negotiating position. They were similar in character to assertions made in the letter from the plaintiff's solicitors of 18 December 2012. It seems to me that these assertions did not provide a firm foundation for a concern that the defendant might repeat the assertions publicly. That he would do so seems unlikely, given that he was prepared to make an apology and retraction for his earlier statements, and was undoubtedly conscious of the prospect that he would be sued if he made a defamatory statement in the future.

[27] The question remains whether the defendant's failure to agree to the plaintiff's settlement offer of 24 December 2012 was unreasonable. The offer accorded with the defendant's most recent offer, save in respect of the non-disparagement clause. Thus it reflected a very substantial reduction in the amount of money which the plaintiff was prepared to accept by way of settlement. The non-disparagement clause would, if complied with, have prevented the defendant from making defamatory publications of the plaintiff. To that extent, there was no reason not to accept it. No attempt has been made to show that there was any real prospect that the defendant would have occasion to make any publication of the plaintiff which would otherwise be prohibited by this clause. It follows that the defendant's failure to agree to this settlement offer was also unreasonable.

[28] I have reached this conclusion, without reference to the defendant's means. As the plaintiff submitted, there is no evidence about that matter. In any event, it is difficult to see why a lack of means would make a defendant's failure to settle reasonable, if otherwise the failure would be unreasonable. In a case like the present one, acceptance of either offer would have resulted in a liability easier to meet than the prospective award of damages, and would have avoided the need for both parties to continue to incur costs. Any concern about an implied misrepresentation of the defendant's financial position could have been addressed by disclosing his means, before accepting either offer.

[29] The defendant's submissions did not identify any matter of substance to show that the interests of justice require some order other than that provided for in s 40(2)(a).

**Conclusion**

[30] I propose to order that the defendant pay the plaintiff's costs of and incidental to the action, including reserved costs, on the indemnity basis.