SUPREME COURT OF QUEENSLAND

CITATION:	*Weatherup v Nationwide News Pty Ltd (No 2)* [2016] QSC 301
PARTIES:	**MALCOLM DONALD WEATHERUP** (plaintiff) **v** **NATIONWIDE NEWS PTY LTD** (defendant)
FILE NO/S:	No S482 of 2014
DIVISION:	Trial Division
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court of Queensland at Townsville
DELIVERED ON:	12 December 2016
DELIVERED AT:	Townsville
HEARING DATE:	Written Submissions
JUDGE:	North J
ORDER:	**1. Judgment for the Plaintiff against the Defendant for $107, 479.88.** **2. Order the Defendant pay the Plaintiff's costs of and incidental to the proceedings, including reserved costs, such costs to be assessed on an indemnity basis.**
CATCHWORDS:	DEFAMATION – COSTS - INTEREST
COUNSEL:	G Humphries (solicitor) for the plaintiff J Quill (solicitor) for the defendant
SOLICITORS:	Connolly Suthers for the plaintiff Macpherson Kelley for the defendant

[1] On 16 November I published reasons for my assessment of the damages recoverable by the plaintiff at $100,000. Orders were made for the exchange of submissions upon interest and costs.

Interest

[2] It was common ground that interest should be recoverable at three per cent per annum from 16 June 2014 (the date of publication). This is consistent with the approach of the Court of Appeal in *Cerutti & Ors v Crestside Pty Ltd & Ors* [2014] QCA 33 at [92]. Accordingly, I assess interest to this date at $7,479.88.

Costs

[3] The parties made divergent submissions about costs, however. For the plaintiff I was referred to an offer to settle dated 28 October 2015, expressly made pursuant to the UCPR, and to what arguably may have been privileged communications proposing offers from the defendant's solicitors, including one of 13 April 2016 in the form of a "Calderbank Offer".

[4] In the offer of 28 October 2015 the plaintiff offered to settle for $60,000 and costs of the action on the standard basis. For the plaintiff, it was submitted that he should recover costs on an indemnity basis, under section 40 (2)(a) of the Defamation Act 2005 on the basis that the defendant had unreasonably failed to make a settlement offer or agree to a settlement offer proposed by the plaintiff.

[5] The parties also debated whether the assessment of costs should be on the basis of the scales provided by schedule 1 (Supreme Court) or schedule 3 (Magistrates Court), with reference being made to UCPR 697 (2) and UCPR 691 (4).

[6] Further, the plaintiff submitted that the court "must order the defendant to pay the plaintiff's costs, calculated on an indemnity basis" in circumstances of the offer of 28 October 2015, relying upon UCPR 360 (1).

[7] Before addressing the issues raised by section 40 (2)(a) of the Defamation Act, I will address the question of costs as if the UCPR had application and section 40 of the Act did not have any application.

[8] It was common ground that costs should follow the event, under UCPR 681 (1), but the debate concerned whether they should be assessed under which one of the scales and whether on an indemnity or a standard basis.

[9] I do not accept the plaintiff's explanation for not commencing proceedings in either the District Court or the Magistrates Court. The damages awarded is for an amount comfortably within the jurisdiction of the Magistrates Court. Notwithstanding the long history of trials in defamation, to do justice a trial before a judge with a jury was not a requirement. A trial could well have been held in the Magistrates Court. While section 21 of the Defamation Act 2005 preserves, in a sense, a trial before a judge with a jury as an option to either party, section 22 significantly limits the role of the jury. The trend of legislation is to limit the role of juries in defamation trials. It cannot thus be said that electing to have a trial before a judge and a jury in either the Supreme Court or the District Court cannot have a consequence that costs will be recoverable in accordance with the Magistrates Court, where the damages recoverable are within that court's jurisdiction. Almost as conveniently, the claim could have been brought in the District Court. While it may be that both resident judges of that court were known to the plaintiff, judges of the District Court from Brisbane regularly sit in Townsville. It would have taken no great management to list the trial to be presided at by a judge from Brisbane.

[10] Thus far, the circumstances, informed as they are by the provisions of the UCPR I have referred to, favour an order for costs in favour of the plaintiff but limited to an assessment in accordance with the costs recoverable in the Magistrates Court.

[11] Continuing with the consideration of issues arising under the UCPR without considering the effect of section 40 of the Defamation Act 2005, I am not persuaded that UCPR 360 (1) is engaged. Granted that the amount of $60,000 the plaintiff offered to settle for is "less favourable" than the damages I assessed, but the offer for costs was for "costs to be assessed". Inferentially, the offer, being made in proceedings in this court, was one to settle for an amount to be assessed in accordance with recoverable costs in the Supreme Court.

[12] In this context, the reasons of Byrne SJA in *Balnaves v Smith & Ors* (2012) QSC 408, at paragraphs [19] to [22], are instructive.

[13] The offer was dated 28 October 2015. By that time, a cursory examination of the Court's file shows that pleadings had closed following amendments, there had been several interlocutory applications, notices for non-party disclosure had issued and a request for trial date had issued. While I suspect that the assessment of the plaintiff's costs to that date in accordance with the Magistrates Court practice would not have exceeded $40,000, a reliable opinion upon that cannot be made without a fairly detailed examination of the facts and circumstances, including the file of the solicitors for the plaintiff.

[14] This is an example of the circumstances Byrne SJA spoke of in *Balnaves v Smith*. It is not possible for me to make a fairly ready comparison between the nature and extent of the advantages and disadvantages of the offer compared with the recovery of $100,000 and an assessment of Magistrates Court costs. The offer is not to adopt the phraseology of Byrne SJA, "effective for the purpose of part 5 of the UCPR".

[15] Section 40 of the Defamation Act 2005 specifically concerns costs in defamation proceedings. Thus, the discretion conferred is to be exercised in accordance with its terms, not, prima face, constrained by provisions of the UCPR, which have a more general application. Further, that section 40 has an operation in conjunction with any offer to make amends made under Part 3 of the Act supports this approach.

[16] Section 40 (2) must be considered in light of the whole of section 40, but it has been said that it obliges parties to make a reasonable approach to negotiations for the settlement of proceedings (see *Davis v Nationwide News Proprietary Limited* (2008) NSWSC 946 at [27], and see also *Flegg v Hallett* (2015) QSC 315 at [16]). While there may not be the degree of disproportion between the damages awarded and those offered by the plaintiff as applied in *Flegg v Hallett* (2015) QSC 315 at [24], the plaintiff offered to settle for a sum substantially less than he was awarded and well in advance of trial. The defence of the plaintiff's claim was, as I have held, unjustified. The fact that the plaintiff failed upon two of the four pleaded imputations contended for at trial is not, in my opinion, a reason in the interests of justice to warrant not giving effect to section 40 (2) (see *Davis v Nationwide News Pty Ltd* (2008) NSWSC 946 at [32]). The defendant's failure to accept the settlement offer of 28 October 2015 was, in the circumstances, unreasonable.

[17] Earlier, I referred to the possibly privileged settlement communications by the defendant's solicitors to the plaintiff's. The scope of the inquiry posed by section 40 and

the related provisions concerning offers to make amends arguably makes the communications admissible, notwithstanding any privilege attaching.

[18] The plaintiff submitted the defendant had not made a reasonable offer; presumably, this was a submission that the defendant had "unreasonably failed to make a settlement offer" within section 40 (2)(a).

[19] Consistent with the approach obliging parties to take a reasonable approach to the settlement of proceedings to the negotiations for the settlements of proceedings (*Davis v Nationwide News Pty Ltd* (2008) NSWSC 946 at 27) there is authority suggesting that an unreasonable offer by a defendant may be an unreasonable failure to make a settlement offer within section 40 subsection (2)(a) (*Cornes v Ten Group Pty Ltd* (No 2) [2011] SASC 141 at paragraphs [25] to [30]). Viewed in light of the award of damages, the defendant's offers or settlement proposals were so disproportionate as to be capable of being regarded as unreasonable, but I expressly do not propose to exercise my discretion with respect to costs on this ground and do not hold that an unreasonable offer is a failure to make an offer within section 40 (2)(a), though, I note that some support for that approach might be found in section 40 (3) and the use of "reasonable offer" within that context.

[20] The holding that the defendant unreasonably failed to accept the plaintiff's offer within section 40 (2)(a) obliges me to order costs of an incidental to the action on an indemnity basis, unless the interests of justice require otherwise (see the word "must" in section 40 (2)). I can detect no reason in the interests of justice for not giving effect to section 40 (2)(a). Accordingly, the order I shall pronounce will be for an assessment on an indemnity basis. I can see no compelling reason why, even if the provisions of the UCPR have some residual application to the exercise of my discretion (a matter that I doubt), the plaintiff's indemnity provided by section 40 of the Act should be limited to an assessment in accordance with either the District Court or the Magistrates Court scales. The action was commenced and litigated in the Supreme Court. I can see no reason consistent with section 40 of the Act why the costs should not be assessed in accordance with the practice and procedure of this court.

[21] The orders that I shall make are:

[22] (1) Judgment for the plaintiff against the defendant for $107,479.88.

[23] (2) Order the defendant pay the plaintiff's costs of and incidental to the proceedings, including reserved costs, such costs to be assessed on an indemnity basis.