IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV 2015-485-484
[2018] NZHC 1641

UNDER	the Defamation Act 1992
BETWEEN	KAREN FRANCES ARNOLD Plaintiff
AND	STUFF LIMITED First Defendant
	TIMOTHY RICHARD SHADBOLT Second Defendant

Hearing: 23 May 2018. Further memorandum received 25 May 2018.

Appearances: P A McKnight for Plaintiff
R K P Stewart for First Defendant
F E Geiringer for Second Defendant

Judgment: 4 July 2018

JUDGMENT OF MALLON J

Introduction

[1] Ms Arnold (an Invercargill City councillor) brought a defamation claim against Mr Shadbolt (the Invercargill Mayor) and Stuff (the publisher of *The Southland Times*). The claim relates to four columns written by Mr Shadbolt published in *The Southland Times*. After a three week trial, the jury found some of the pleaded meanings to have been proven but none of them to be defamatory of Ms Arnold.

[2] Ms Arnold now applies for an order for a retrial. She does so on two bases. The first concerns counsel's submissions and my directions to the jury on whether the proven meanings were defamatory. The second, and the one on which more emphasis

was placed at the hearing on this application, is that the jury's verdicts are perverse or irrational.

[3] Ms Arnold also disputes the costs and disbursements claimed by Stuff and Mr Shadbolt.

Jury's verdict

[4] The jury were asked to give a special verdict. They were provided with a question trail for this purpose. The aspects of their verdict which are at issue are as follows:

> **PUBLICATION 1**
>
> **Question 1: Meaning**
>
> Has Karen Arnold proven that, in the context in which it was published, an ordinary and reasonable reader of Publication 1 would understand it to mean that:
>
> a) Karen Arnold told a series of sensational half-truths and/or outright lies to undermine Holdco director and Invercargill City Councillor Graham Sycamore.
>
> **Jury verdict:** Yes
>
> **Question 2: Defamatory**
>
> Has Karen Arnold proven that, for each meaning, that meaning lowers Karen Arnold in the estimation of right-thinking members of society generally?
>
> a) Karen Arnold has told a series of sensational half-truths and/or outright lies to undermine Holdco director and Invercargill City Councillor Graham Sycamore.
>
> **Jury verdict:** No
>
> **PUBLICATION 2**
>
> **Question 1: Meaning**
>
> Has Karen Arnold proven that, in the context in which it was published, an ordinary and reasonable reader of Publication 2 would understand it to mean that:
>
> Karen Arnold colluded with the Invercargill Ratepayers' Association to be a destructive influence on Council.
>
> **Jury verdict:** Yes

Question 2: Defamatory

Has Karen Arnold proven that this meaning lowers her in the estimation of right-thinking members of society generally?

Karen Arnold colluded with the Invercargill Ratepayers' Association to be a destructive influence on Council.

Jury verdict: No

PUBLICATION 3

Question 1: Meaning

Has Karen Arnold proven that, in the context in which it was published, an ordinary and reasonable reader of Publication 3 would understand it to mean that:

c) Karen Arnold has leaked on one or more occasions confidential and/or commercially sensitive information relating to Holdco, which was unprofessional, and conduct unbecoming of a City Councillor.

Jury verdict: Yes

Question 2: Defamatory

Has Karen Arnold proven that, for each meaning, that meaning lowers Karen Arnold in the estimation of right-thinking members of society generally?

c) Karen Arnold has leaked on one or more occasions confidential and/or commercially sensitive information relating to Holdco, which was unprofessional, and conduct unbecoming of a City Councillor.

Jury verdict: No

[5] The other pleaded meanings for publications 1-3 and both of the pleaded meanings for publication 4 were found not proven. The jury's verdict meant that it did not have to consider the pleaded defences of honest opinion and qualified privilege for any of the publications.

Guidance provided to the jury

Submissions for Ms Arnold

[6] Ms Arnold submits:

(a) The jury were misdirected on how to determine whether proven meanings were defamatory because inappropriate emphasis was placed on Ms Arnold's status as a politician.

(b) Counsel's closing addresses wrongly suggested Ms Arnold's view of the publications were relevant to whether the words were defamatory and my directions did not correct this adequately.

(c) The jury were misled about whether Ms Arnold needed to prove reputational harm.

(d) The question trail provided to the jury placed incorrect and undue emphasis on the plaintiff's status as a city councillor and/or the second defendant's status as a mayor.

Ms Arnold's status as a politician

[7] Ms Arnold accepts it was relevant that the meanings at issue were conveyed by one local body politician about another.[1] Her submission is simply that my directions gave inappropriate emphasis to this.

[8] I do not accept this submission. My directions on meaning covered the following topics:

(a) The test is objective.

(b) The test is not what Ms Arnold, Stuff, Mr Shadbolt, witnesses or others who made comments on blogs or Facebook pages thought they meant.

(c) It is for the jury to decide what the ordinary reasonable person would understand the words to mean and whether they are defamatory.

---

[1] She refers to *New Zealand Magazines v Hadley (No 2)* [2005] NZAR 621 at 625 per Blanchard J on how defamatory meaning is determined: "[t]he words complained of must be read in context. They must therefore be construed as a whole with *appropriate regard* to the mode of publication and surrounding circumstances in which they appeared." (Emphasis added.)

(d) The jury should consider the meaning in the way an ordinary, reasonable person would when reading it in the ordinary course of affairs (rather than studying the words to the degree and for the period that they had been studied in the course of the three week trial).

(e) The natural and ordinary meaning of the words includes what the ordinary reasonable person would infer or imply from the words used in the publication.

(f) The natural and ordinary meaning is not a strained or forced interpretation, nor one that involves groundless speculation, or reading in nasty meanings which are not stated or implied.

(g) The tone in which the words were used can be relevant, for example if they are conveyed in a style which makes it clear they are not to be taken literally or seriously.

(h) Whether something is defamatory does not depend on whether Ms Arnold disliked what was said about her or thought it was wrong or unfair.

(i) Insults, abuse and attacks on a person's self-esteem or pride that do not diminish a person's standing are not defamatory.

(j) A statement is defamatory if a fair-minded, reasonable person in the community would think less of Ms Arnold in light of the statement that was made.

(k) A trivial matter is not defamatory.

(l) The context is relevant.

[9] As to that last point, my directions were:[2]

---

2 *Arnold v Stuff Ltd* HC Wellington CIV 2015-485-484 (15 March 2018) (Summing up of Mallon J) at [40] and [56].

> Words take their meaning from their context. The context includes the forum in which the words are expressed, for example a page in the newspaper in which it appears and the heading under which it appears. The context also includes the rest of the words in the column. It is also always dangerous to read one part of a column in isolation from the rest. You should look at the whole of the context in deciding the meaning of the words complained of. A passage which by itself appears innocent may take on other connotations when the whole column is read. The converse is also true.
>
> …
>
> The context in which a statement is made may also be relevant in ascertaining whether it conveys a defamatory meaning. Right-thinking members of society, for example, may understand attacks by politicians on one another, not imputing some dishonourable or dishonest motive, to be fair game in the context of the modern political struggle. Even offensive, appalling, and outrageous statements may have no capacity to affect the attitude of others towards a claimant if those to whom they were published, here the readers of the *Southland Times*, would have shrugged their shoulders and dismissed them as part of the rough and tumble of the context in which they were made.

[10] The last of those quoted paragraphs was one of 17 paragraphs of my typed directions discussing how the jury were to go about determining whether the words had any of the pleaded meanings (not including the further 11 paragraphs summarising counsel's submissions on these topics). The direction was based on *Collins on Defamation*.[3] To similar effect is the following passage from *Gatley on Libel and Slander*:[4]

> … At common law it may not be easy to distinguish, in discussions of political affairs, between words which are not, in that context, to be taken in a defamatory sense and words which are honest comment; but either way:
>
> "the utmost freedom in the discussion of the conduct and motives of those who take part in its public business, whether in the higher plain of statesmanship or in the conduct of local affairs. In such criticism, ridicule is just as legitimate as any other rhetorical artifice. If … this should take the form of rough language and unmannerly jests, the person aggrieved must put up with it."

[11] As Ms Arnold accepts, the words complained of must be read in their context. As she also accepts, it was relevant context that the meanings at issue were conveyed by one local body politician about another and concerned local body affairs. That context was conveyed to the jury as part and parcel of all the directions about the

---

3 Matthew Collins *Collins on Defamation* (Oxford University Press, Oxford, 2014) at [6.29].

4 A Mullis, R Parkes, G Busuttil *Gatley on Libel and Slander* (12th ed, Sweet and Maxwell, London, 2014) at [2.42] *McLaughlan v Orr Polloch & Co* (1894) 22 R. 38 at 42 per Lord McLaren and other decisions to similar effect.

meaning of the words and whether they were defamatory of Ms Arnold. The local body context of the publications was materially relevant and it was appropriate that the jury understand that.

Ms Arnold's own views

[12] Ms Arnold submits it was inappropriate for the jury to consider the issue of defamatory meaning with reference to how she regarded the statements at issue.[5] This arises out of Ms Arnold's position at the trial, as conveyed in her counsel's opening statement to the jury and confirmed in her evidence, that she viewed the first two publications as part of "the rough and tumble of local body politics" but she had commenced this proceeding because the third and fourth publications went too far.

[13] In his closing address, counsel for Stuff said:

> So what's defamatory? To be defamatory the meaning must lower Councillor Arnold in the estimation of right-thinking members of society generally. Just pausing briefly there in relation to publications 1 and 2. *Remember that these were publications that Councillor Arnold viewed as simply the rough and tumble of local body politics. I suggest to you that this acknowledgement is extremely relevant to your assessment of whether the meanings she now claims exist and, indeed, are defamatory.* (Emphasis added.)

[14] Ms Arnold submits this was an incorrect submission to the jury because the test is an objective one. She submits my directions to the jury should not have repeated this when I summarised the submissions that counsel had made.

[15] The submission from counsel for Stuff to which Ms Arnold takes exception must be read in context. The closing address for Stuff had earlier made the point that the question was what meaning a reasonable person would take from the publications. Counsel also went immediately on to say the following:

> The newspaper says that when the meanings are considered in the context in which they arose, that is, in the mayor's fortnightly column, a column that is written in a colourful and sometimes satirical style on the comment and opinion page of the newspaper and similarly identified on line the question of whether meanings are defamatory must be assessed in that context. Those in public office must put up with a certain amount of laughing, caricaturing and

---

5 The written submissions for Ms Arnold on this application also said it was inappropriate for the jury to consider the issue of defamatory meaning with reference to the evidence of her criticisms of others. This submission was not developed and is of no substance.

> sneering otherwise to quote a case from almost 150 years ago, every public newspaper would be perpetually subject to having a defamation action brought against it.
>
> So it's not a case of asking how would you feel but it's more a case if you were an Invercargill City Councillor who as Councillor Arnold suggested was used to the theatre of the debate in the Council chamber how would you feel? If you find that none of Councillor Arnold's meanings are defamatory of her then that is also the end of the case and you're not required to make any further decisions as Councillor Arnold's claim must be dismissed.

[16] The submission was therefore directly tied to the point that the local body context was relevant. The submission was that the jury needed to put themselves into that context in order to decide if the meanings were defamatory.

[17] The submission was also responding directly to the submission for Ms Arnold in opening which was as follows:[6]

> In the end it will be for you as good ordinary New Zealanders to bring to this proceeding your everyday values and judgement. You will be the decision-makers. It will be for you to decide as to, first, whether or not Karen Arnold has been defamed and then as to whether or not any of the defences apply. You are what in defamation law is called the "right-thinking members of the community". That is why you are chosen, the way you are. It is for you to judge whether or not the comments that were made about Karen Arnold would lower her in the eyes of right-thinking – right-thinking people and an important point that I will be asking you time and time again, to put yourselves in the position of Karen Arnold. How would you feel to have these sorts of things said about you?

[18] This was also touched on by her counsel in closing when he said:

> As I said in my opening, which seems to have had some criticism about it, it helps if you put yourself in the position of Karen Arnold. In saying that, you are the right-thinking people and are the Judge of what those columns and the words that were used meant.

[19] My directions on the meaning of the words and whether they were defamatory were detailed (as outlined above). They emphasised, as had counsel, that the test was objective and what the words meant and whether they were defamatory was a matter for them. I therefore do not accept Ms Arnold's submissions on this point.

---

[6] The submission was repeated in closing although it was noted there had been criticism of this and it was emphasised that the jury were the right-thinking people who were the judges of the meanings conveyed.

Presumption of harm

[20] Ms Arnold submits the jury could have only reached their verdict, that some of the pleading meanings arose but they were not defamatory, by concluding that the plaintiff did not suffer reputational harm. She submits the jury were misled on this issue by the following submission from counsel for Mr Shadbolt in his closing address:

> … I understand that my learned friend is going to ask you in total to award over $400,000 to Councillor Arnold for the damage that she has suffered. What damage? What damage? *What damage has been proven by Councillor Arnold that she has suffered as a consequence of this alleged defamation. Even if there is an alleged defamation where is the harm?* Councillor Arnold called her own mother. Her mother's evidence was that Councillor Arnold, using my words, put a brave face on it. Her mother said, this is her mother's words, that Councillor Arnold wouldn't tell her how horrible it was because she didn't want me to worry. Well that's nice *but what evidence does that give us about the harm? It leaves us with no evidence about the harm whatsoever. We've got no evidence in front of this Court that there was harm.*
>
> Now you might properly ask what is it? Is she unable to sell food because people now think it's unhygienic? No. That's just going back to my example in opening. There's no pecuniary loss here. She's not saying to you because of this defamation I have lost some business and I have not been able to earn money that I would have earned otherwise. There's no evidence of that. There was a blog site, remember there was a blog site that repeated in part this question about leaking, it said "Has the Mayor accused her of leaking?" and there were, I think, five comments in response to the blog site, some of which were praising Councillor Arnold and criticising the Mayor. There were two Facebook comments that have been put before the Court. Two Facebook comments criticising Councillor Arnold. Frankly, if Councillor Arnold gets only two Facebook comments criticising her as a Councillor I would suggest maybe she's doing quite well as a Councillor because, you know, you're in the public limelight. You've got to expect the public to talk about you. And in relation to both those Facebook comments …, Councillor Arnold went onto Facebook and responded to them. Anyone who criticised her on Facebook she, in the evidence you've got before her, gave her side of the story. So what you get on Facebook is not just some criticism of Councillor Arnold with no response. You get somebody suggesting something about Councillor Arnold and Councillor Arnold's response to it and that's all we've got. *That is the sum total of the evidence about how much harm Councillor Arnold has suffered in this case and so what part of that warrants an award of $400,000.* (Emphasis added.)

[21] Ms Arnold submits these submissions were very likely to have led he jury to consider the meanings could only be defamatory if the plaintiff could establish reputational harm. She submits this was compounded by comments made by Clifford J in an interlocutory judgment in this proceeding which were as follows:[7]

---

7 *Arnold v Fairfax New Zealand Ltd* [2016] NZHC 207 at [32] per Clifford J.

> I make some final comments. These are proceedings between local body politicians. By my assessment, much of the material complained of reflects the regular rough and tumble of local body politics. In that context, freedom of speech issues arise. The one complained of comment that may go further is Mr Shadbolt's reference to "outright lies that are being hurled in his [Mr Sycamore's] and council's direction", impliedly by the "combined forces of the blatantly ambitious Councillor Pottinger, the award-winning former Southland Times journalist Councillor Arnold, the Southland Times and the remnants of the Invercargill Ratepayers Association". But again, *in context, I think it is fair to ask "Where is the harm"*. I invite Counsel to reflect on these matters. (Emphasis added)

[22] Ms Arnold submits my directions to the jury did not sufficiently disabuse the jury that counsel's submission and these comments from the Judge were misconceived and were an incorrect articulation of the onus on the plaintiff because the plaintiff has the presumption of harm as a matter of law.

[23] I do not accept these submissions. The passage relied on by Ms Arnold from the closing address for Mr Shadbolt was in the context of the jury assessing damages if they got to that point. My directions to the jury on damages instructed the jury that they would only be at the point of considering damages if they had decided a pleaded meaning arose, it was defamatory and none of the defences applied. My directions on damages immediately went on to explain that a successful plaintiff is entitled to recover compensatory damages and I explained such damages were to compensate for damage to reputation, to vindicate, and to take account of the distress, hurt and humiliation the defamatory publication caused. I then said:

> Ms Arnold is not required to prove that her reputation was in fact damaged. The law presumes this because her reputation has been attacked.

[24] The comments of Clifford J, and how they should be treated, were the subject of in chambers discussions at the beginning of the trial. Their only relevance was because Ms Arnold wished to rely on Mr Shadbolt having brought a counterclaim against her as a point of aggravation relevant to damages. She considered Mr Shadbolt's counterclaim was unmeritorious and his discontinuance was evidence of this. In response Mr Shadbolt wished to say he had reflected on and heeded the advice of Clifford J. On that basis, Mr Shadbolt wished to include the interlocutory judgment in the agreed bundle of documents before the jury. It was open to Ms Arnold to abandon this point of aggravation. She did not wish to do so.

[25] My bench minute records this issue as follows:[8]

> Whether the concluding comments of Clifford J made in a judgment on interlocutory matters were admissible. This arises because the plaintiff contends the counterclaim and its discontinuance were aggravating. The plaintiff is concerned the jury will give those comments undue weight without appreciating the circumstance in which they were made. After discussion it was accepted by the plaintiff that the second defendant could quote the comment as the reason the counterclaim was discontinued. The plaintiff will be relying only on the bringing of the counterclaim as aggravating, and not the circumstances of its dismissal. The second defendant can quote the comments of Clifford J but the judgment in which those comments appeared would not be included in the bundle. I will also direct the jury about this.

[26] My summing up to the jury on this topic was as follows:[9]

> There also may be some factors which have increased the harm. They are only relevant to extent that they have increased the harm, the distress that she has suffered as a result of the original publication. For Ms Arnold it is said that the conduct of the defence aggravated the harm to her.
>
> There are three topics I will discuss, hopefully quickly, on those matters of the conduct of the defence.
>
> The first is counterclaim. In this context you heard about Mr Shadbolt's counterclaim and the circumstances in which he discontinued that. It was for that reason you heard of comments another Judge, Justice Clifford, had made about the claim. It is, however, important that you do not rely on Justice Clifford's comments when you are making your decisions in this case, including on whether Councillor Arnold has suffered harm. They are decisions for you to make and Justice Clifford's comments were expressed at a preliminary stage of the case, without having heard all the evidence, without having heard submissions from counsel.

[27] In these circumstances it cannot be said that the jury was misled about whether it was necessary to suffer reputational harm in order for words to be defamatory. My directions on meaning and whether they were defamatory covered the matters relevant to those topics. Quite separately, in the context of damages if the jury got to that point, the jury were told that Ms Arnold did not need to prove she had suffered harm because it was presumed. They were also instructed on the limited relevance of Clifford J's comments.

---

8 *Arnold v Stuff Ltd* HC Wellington CIV 2015-485-484 (26 March 2018) (Bench minute of Mallon J) at [12](c).

9 *Arnold v Stuff Ltd* HC Wellington CIV 2015-485-484 (15 March 2018) (Summing up of Mallon J) at [119]-[121].

The question trail

[28] Ms Arnold submits that the question trail placed incorrect and undue emphasis on the plaintiff's status as a city councillor and/or the second defendant's status as a mayor and insufficient emphasis on the objective nature of the jury's enquiry. I do not accept this submission. The question was whether the publications defamed her. The question trial accurately framed the objective test for the jury in deciding that and accurately recorded who the plaintiff and the defendants were. Their positions as a city councillor and a mayor respectively were part of the relevant context. All four publications related to Council matters about which Ms Arnold and Mr Shadbolt had differing views. The draft question trail reviewed by Ms Arnold's counsel had referred to her as "Cr Arnold". Her counsel wanted this changed to "Karen Arnold". That change was made as were all the other comments made by her counsel on the final draft of the question trail.

Rational verdict

[29] Ms Arnold submits the jury's verdicts are not capable of a rational explanation. Her counsel submits this is the reason for her application: she cannot understand how the jury could find the pleaded meanings arose but that they were not defamatory. Her counsel refers to the direction I gave (see above) that:

> Right-thinking members of society, for example, may understand attacks by politicians on one another, not imputing some dishonourable or dishonest motive, to be fair game in the context of the modern political struggle.

[30] Her counsel submits that to say someone has leaked confidential documents which is unprofessional and conduct unbecoming a councillor (a meaning accepted as proven in relation to publication three) is to impute conduct that is base, dishonourable or dishonest. The same submission is made in relation to the proven meanings for publication one and publication two. Having found these meanings, the submission is that a rational jury could not do otherwise than to find them defamatory.

[31] Added to this is a general submission that the jury considered their verdicts for a long time. It is said that this time might have been expected if the jury had

determined whether the defences applied but they did not get that far. It is said that this raises questions about the jury's decision making.

[32] I do not accept this submission. The trial lasted three weeks. There was an array of evidence before them and a large number of documents. The jury had four publications to consider and several meanings for each of them. They also had a thick bundle of questions to work through to determine their verdicts. They began their deliberations at 1.30 pm on Thursday of the third week of the trial, adjourned for the evening at 5 pm, returned the next day at 9.30 am and delivered their verdicts at 3.26 pm. They asked a question at 4.31 pm on the Thursday about how they should proceed if they were having difficulty in reaching a consensus on a particular question in the question trail. They were directed on this. All of this is consistent with nothing other than a conscientious jury going about their task carefully and in the manner they were directed to do.

[33] Nor do I accept that on the proven meanings the only verdicts properly open to the jury were that they were defamatory. Ms Arnold's case was that Mr Shadbolt was well known for his rhetorical use of language, especially exaggeration and hyperbole. Other examples of his *Southland Times* columns were put before the jury. It would have been open to the jury to have decided that the pleaded meanings did not arise because an ordinary reasonable person would not consider that Mr Shadbolt intended his words to be taken literally. However it was equally open to the jury to find that some of the pleaded meanings arose, but to also conclude that right thinking members of the public would not have thought worse of Ms Arnold because Mr Shadbolt's words were not to be taken seriously.

[34] Quite apart from Mr Shadbolt's particular and well-known style, the proven ordinary meanings were not necessarily defamatory in their context. The proven meaning for publication one was the telling of "sensational half-truths and/or outright lies". The "and/or" meant it was open to the jury to have decided that the words meant Ms Arnold had told "half-truths" even if she had not told outright lies. This may have been regarded by the jury as fair game in the rough and tumble of political debate and as such not defamatory of her. The proven meaning for publication two was also not necessarily defamatory in its context. Ms Arnold and the Invercargill Ratepayers

Association intended to undermine the Council because they were very concerned about the manner in which a significant decision was being made. Other ratepayers supported Ms Arnold's approach as evidenced by her re-election to Council. As to the proven meaning for publication three, there was evidence that, when she had worked as a journalist, Ms Arnold had received leaked confidential Council information and that this was regarded to be in the public interest. As a councillor Ms Arnold was very concerned about the Council's decision involving Holdco and was seeking greater transparency in relation to it. In this context, accusing Ms Arnold of leaking confidential information could be regarded as conduct unbecoming a Councillor because it is a breach of the Council's code of conduct, but at the same time it is not irrational to also consider that right thinking people would not think less of her because she was acting in what she considered to be in the public interest.

[35] There were therefore a number of ways open to the jury to reach the verdicts they did. Moreover, had they decided any of the proven meanings were defamatory, they would then have had to consider the defences of honest opinion and qualified privilege. My assessment is that these defences were strong. Indeed the defence of qualified privilege was accepted by Ms Arnold subject only to whether it was defeated by ill-will or improperly taking advantage of the occasion. In my view the evidence fell well short of establishing that.

[36] In summary, the jury's verdicts were plainly open to them. The verdicts should have been accepted rather than pursuing this unmeritorious application for a retrial.

Costs

[37] The defendants have claimed scale costs against Ms Arnold. These costs have been calculated on a category 3 basis with time allocations for items at bands A, B or C, depending on their nature.

[38] Ms Arnold contested the category 3 basis of the claimed costs. However this category had been proposed by Ms Arnold before the first case management conference and was agreed to by the defendants. It is possible for an agreed category to be varied later, but only if there is some special reason to do so. Absent some special reason, it is too late to be suggesting a recategorisation after the result of the

substantive hearing is known.[10] Ms Arnold's counsel accepts no special reason arises here.

[39] Next Ms Arnold submits that some of the items claimed under band C should have been claimed under band A. In my view the defendants have, in the main, fairly allocated bands A, B and C to the relevant items. However I consider band B, rather than band C, should apply to the preparation of the statement of defence and the subsequent amendments, for the interrogatories and for all discovery related items.

[40] Ms Arnold also submits that there should be no allowance for second counsel. I do not agree. The assistance of second counsel was appropriate for this trial. It was evident they provided valuable assistance to senior counsel and helped to ensure the trial ran efficiently.

[41] Ms Arnold further submits there should be a reduction of scale costs by 60 per cent for Mr Shadbolt and by 45 per cent for Stuff. This reduction is sought on the basis that the defendants caused much delay in this proceeding. This is strongly contested by the defendants and a full response to each alleged delay has been provided. I have reviewed what each side says about this. There were delays on both sides and some of the delays on the defendants' side were caused by Ms Arnold's actions. I consider Ms Arnold has not established a proper basis for any reduction.

[42] Lastly Ms Arnold objects to the disbursements claimed by counsel for travel, accommodation and meals. However the amount claimed for these items equates to a daily rate of $228.75 for the second defendant's counsel's and a daily rate of $261.30 for each of the first defendant's counsel. The daily rate provides a convenient check on the reasonableness of the disbursements claimed. I consider the appropriate amount to allow for each out-of-town counsel is $228.75, as the lower of the two rates.

[43] It is unfortunate that Ms Arnold will now be subject to a large order for costs. However she elected to continue her proceeding despite the comments of Clifford J at an interlocutory stage querying the point of them, and despite the warning she was given (in the context of the application for security for costs) about the size of the costs

---

[10] *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] NZCA 544 at [29]-[30].

order she would potentially face if she was unsuccessful. The defendants are entitled to costs in accordance with the High Court Rules and there is no proper basis on which I could order otherwise.

Result

[44] The application for a retrial is dismissed.

[45] Ms Arnold is to pay the revised costs claimed by the defendants, adjusted as indicated at [39] above, together with the disbursements. The disbursements for travel, accommodation and meals are to be paid for each out-of-town counsel for the defendants on the basis of a daily rate of $228.75.

Mallon J