Supreme Court
New South Wales
Common Law Division

Case Title:	Ahmed v Harbour Radio Pty Ltd
Hearing Date(s):	14 March 2014
Decision Date:	14 March 2014
Jurisdiction:	Common Law – Defamation
Before:	Nicholas AJ
Decision:	See para 19.
Category:	Costs
File number(s):	2009/297870

JUDGMENT – EX TEMPORE

1 Before me are the outstanding questions of interest and costs. I have come to a firm view as to the ruling to be made in each case and do not propose to reserve my decision. In saying that, I acknowledge that I have had the benefit before coming into court of detailed written submissions from the parties, and of detailed and helpful submissions presented orally before me this morning. Had it not been for the completeness of the submissions put to me this morning, I would not have been able to deliver the reasons that I propose to deliver ex tempore. I have taken into careful account the matters raised in the competing submissions and, importantly, the matters to which Mr Burke has sworn in his affidavit of 6 March 2014.

2 I turn first to the issue of interest. The plaintiff claims prejudgment interest at the rate of 3 per cent per annum on the damages awarded in the first matter complained of from 21 May 2008 to 19 December 2013, in the amount of $40,221.31, and an order that prejudgment interest be

assessed at the same rate on the damages awarded in the second matter complained of from 1 October 2009 to 19 December 2013, in the amount of $5,066.19. On the other hand, the defendant claims that interest should be awarded at an appropriately reduced rate of 0.5 per cent over the whole period for each publication resulting in respect of the first publication in the amount of $6,703.56, and in relation to the second publication in the amount of $884.38.

3 The approach which I, as a judge at first instance, should take has been clearly the matter of authoritative statement on many occasions. The start point is the statement in the joint judgment of the High Court of Australia in *MBP (SA) Pty Limited v Gocic* (1990-91) 171 CLR 657 at 666, namely:

> "In the circumstances, the use of the 4 per cent figure seems to us to be more likely to achieve fair and reasonable compensation for plaintiffs than the use of the real rate of interest figure - which may result at times in a plaintiff obtaining no or little interest and at other times an amount of interest greater than the return which could be achieved by real-life investors on a comparable sum after the incidence of income tax."

4 With regard to that statement there has developed in cases of this kind a long established practice that the figure of 4 per cent referred to in *Gocic* should be regarded as the start point. That seems to be clear from, for example, the statement of Justice Simpson in *Megna v Marshall (No 2)* [2011] NSWSC 52 at para 15 where she says:

> "In Gocic, in respect of damages for non-economic loss (not confined to defamation cases), an interest rate of 4 per cent per annum was fixed. Interest is awarded from the date on which the damage is sustained."

5 Another example is in *Davis v Nationwide News Pty Limited* [2008] NSWSC 946 Justice McClellan, then Chief Judge at Common Law, at para 12 stated:

> "It is generally accepted that the appropriate rate of interest for cases of non-economic loss is 4% per annum: *MBP (SA) Pty Ltd v Gogic* (1991) 171 CLR 657; *McGaw v Channel Seven Sydney Pty Ltd* [2006] NSWSC 1270 at [2]. However, the defendant submitted that I should be guided in the present case by the remarks of McHugh JA in *John Fairfax & Sons Ltd v Kelly* (1987) 8 NSWLR 131. In that case in which the plaintiff recovered damages for defamation, his Honour determined that it was appropriate to

> assess the damage as having occurred over the entire period from the date of publication to the date of judgment which vindicated the plaintiff's reputation. Accordingly, his Honour concluded that it was reasonable to discount the ordinary rate by 50%. In that case his Honour applied the discount to the prevailing commercial rate of 15% and awarded interest at the rate of 7.5% per annum. The approach of McHugh JA has not been followed in some cases: *Amalgamated Television Services Pty Ltd v Marsden* [2002] NSWCA 419 at [1551]."

6 As I have said, that approach is consistent with long established practice. I am bound to say that I am presently unpersuaded that at first instance I should depart from that practice in the circumstances of this case. The approach that I should take has been identified in many cases which are often cited in dealing with interest issues. The statement of Justice McClellan, then Chief Judge at Common Law in *Grieg v WIN Television NSW Pty Limited* [2009] NSWSC 877 at [5] is as follows:

> "It is commonly accepted that the primary damage to a plaintiff's reputation and injury to feelings is occasioned at the time of publication and shortly thereafter with both elements diminishing over time. For that reason, it is common to award interest at a rate which allows for the diminishing impact of the published libel. This, of course, is different to the circumstances where a plaintiff is pt (sic) out of money or damages with constant injury occurring by reason of the harm occasioned by the defendant's actions or a failure in a defendant to meet a monetary obligation which existed in the plaintiff."

7 It is also important to keep in mind some early decisions in which the Court of Appeal dealt with these issues. It is sufficient to refer firstly to the judgment of Justice McHugh in *John Fairfax & Sons v Kelly* (1987) 8 NSWLR 131, particularly at page 143:

> "But if, as I think is the case, the plaintiff is entitled to at least part of his damages from the date of publication, the choice is between awarding no interest at all or attempting to calculate interest on a basis which, although not mathematically perfect, achieves a measure of justice. Since it is unfair to plaintiffs to deprive them of interest for the period in which they have been deprived of their money, interest ought to be awarded to the extent that it is fair and proper.
>
> Unless a claim is made for special damages or for the future, I think that it is best not to leave any questions to the jury in relation to the interest issue. Speaking generally, the best approach is to treat the award as though the damages represent a loss spread over the period from the date of publication to trial. It is a process which does not achieve perfect justice for the plaintiff since he may

> have ceased to suffer actual injury well before the trial. But it seems to me to be the most practical approach to a difficult problem. In Victoria interest is awarded on defamation awards: see, eg, *David Syme Ltd v A Maher* [1977] VLR 516. In *O'Sullivan v Komesaroff* (Supreme Court of Victoria, 22 April 1983, unreported), Brooking J said that the assessment of interest "comes close to being an instinctive synthesis based on various rough calculations and broad assessments".

8 With regard to the submissions on the question of delay in these proceedings as being a factor which should reduce in the overall assessment the rate of applicable interest, the observations in *Bennett v Jones* [1977] 2 NSWLR 355 are in point. Moffitt P (p 367, 368) said:

> "These observations appear to be directed principally to the conduct of the defendant, namely, when he ought to have paid the relevant sum.

...And at p 369:

> ... the lapse of time caused between accrual of the cause of action and payment or verdict has the consequence that the defendant has not had to pay moneys and the plaintiff has not received moneys in that period."

...And at p 370:

> "I see no reason why the simple fact that a defendant does not have to pay money when his liability arises, and has the benefit of non-payment for a period, should not provide a basis to make a discretionary order for payment of interest for the whole period. One has the money and the other not. If it is not a commercial setting, the gain and the loss may not be measured by a commercial rate of interest.
> ...
>
> If a defendant did not make such payments because he contested liability, but was found liable, then the reason for non-payment would be the defendant's wish, perhaps quite legitimate, to have liability litigated. In the event of a verdict against the defendant, I see nothing unfair between the parties in making an appropriate order for interest, if necessary, back to the accident."

9 Hutley JA (p 375-376) said:

> "I am by no means convinced that the conduct of the parties should ordinarily affect the award of interest. If the fault is that of the defendant, the plaintiff is adequately compensated by the award of interest in respect of that part of the award which is not apportioned to pain and suffering, and gains the benefit of inflation in the assessment of damages for pain and suffering. If inflation is brought under control, the same considerations will apply, as the interest in the whole award of damages will then fall to the traditional rate which was the rate appropriate to the cost of

> retention of money alone. If the plaintiff is at fault, as in this case, and the defendant is an insurance company equipped to use funds in the various money markets, it gains from the plaintiff's delay. If the plaintiff does not comply with the rules, it can move to force the expedition of the proceedings or to have them struck out for want of prosecution. If an insurer, with its resources and professional knowledge, neglects to take steps to force the plaintiff to the barrier, I do not see why the court should not assume that it was considered by it to be the course most advantageous to itself. Where no notice of claim is given promptly, or the commencement of proceedings is delayed, so that the defendant has no knowledge of its possible liability, or the means to force a determination of it, for a considerable period after the accident, different considerations should apply, and it may be proper not only to allow interest only from the date of claim, or later, but to refuse it altogether, on the basis that the delay has given the plaintiff an improper advantage. The position of uninsured defendants may well be entirely different, in that they may not have the technical resources to invest moneys advantageously or may be encouraged to dissipate their resources by the delay".

10 As indicated during the course of argument, I find little guidance is to be gained by reference to other cases. It is trite to observe that the circumstances vary with each case and that is why, in my view, it is necessary to keep in mind the principles for finding a solution to the particular case under consideration. In my opinion, in all of the circumstances of this case, and particularly with regard to the history of its conduct, the award of interest which is fair to both parties should be interest at the rate of 2% per annum.

11 With regard to the award for the publication of 21 May 2008 in the amount of $240,000, the calculation produces the sum of $26,814.25. With regard to the award for the publication of 1 October 2009 in the amount of $40,000, the calculation produces the sum of $3,377.53. Accordingly, there will be an award of damages in the total sum of $310,191.78. Accordingly, there will be judgment for the plaintiff against the defendants in the total sum of $310,191.78, of which amount the second defendant is jointly and severally liable for the amount of $43,377.53.

12 I turn now to the issue of costs. The plaintiff seeks orders that the defendants pay the plaintiff's costs of the proceedings up to and including

30 August 2013, to be assessed on the ordinary basis, and an order that the defendants pay the plaintiff's costs of the proceedings on and from 31 August 2013, to be assessed on the indemnity basis. Also sought is an order that the defendants pay the plaintiff's costs of today's application.

13 The defendants accept that the plaintiff should have her costs of the proceedings on an ordinary basis up to 31 August 2013 and on an indemnity basis from 31 August 2013, subject to an exception in respect of what is claimed to be a discrete matter. In respect of that matter, the defendants seek an order for costs against the plaintiff in the following terms:

> "That the plaintiff pay the defendant's costs of and incidental to obtaining the expert report of Andrea Devlin, such costs to include the costs of any argument during the trial which occurred after 12 November 2013 concerning the obscured diary entry set out in exhibit 19."

14 The evidence in support of the defendant's claim is in the affidavit of Bruce Norman Burke, sworn 6 March 2014, to which detailed reference was made both in written and oral submissions. In essence, it appears to me that the defendants' claim is in respect of costs attributable to the failure of the plaintiff to give discovery of some of her diaries, the existence of which was not disclosed until 4 November 2013, the first day of the trial.

15 In that respect, the defendants submitted that the relevant entry then in contest ultimately became Exhibit 19 but, as pointed out in the defendant's submissions, not before considerable opposition and objection was raised by the plaintiff - a position later entirely abandoned. Mr Burke's evidence establishes, as the submission correctly illustrates, that in the interim, having regard to the late production of the diary, the plaintiff's position caused the defendants to obtain expert forensic evidence to render the text of the entry admissible. This issue, of course, was a debate in itself during the course of the trial. It was further put that the defendants incurred the expense of obtaining a forensic expert report to prove the extent of the obscured entry in circumstances where eventually it

developed that there was no issue regarding what the obscured words said.

16 In the course of submissions I was taken to Dal Pont "The Law of Costs", (second edition, para 8.55) which deals with the circumstances in which, in the exercise of discretion, a Court may deprive a successful party of costs, and to the circumstances in which a Court may order a successful party to pay costs, rather than being merely deprived of costs, on an issue during the case.

17 Reference was also made to the judgment of Brereton J in *Hexiva Pty Limited v Lederer* [2006] NSWSC 1259 (para 9):

> Although the starting point is that the plaintiffs, having been successful, are entitled to their costs, and that it is for the defendants to establish a basis for departing from that rule, a successful plaintiff who has failed on certain issues may be deprived of costs on those issues, or even ordered to pay the defendant's costs on them [*Hughes v Western Australia Cricket Assn Inc* (1986) ATPR 40-748, 48,136]. This course, while open, is one on which the court embarks with hesitancy [*Mobile Innovations Ltd v Vodaphone Pacific Ltd* [2003] NSWSC 423, [4]; *Cretazzo v Lombardi* (1975) 13 SASR 4 at 16; *Dodds Family Investments Pty Ltd v Lane Industries Pty Ltd* (1993) 26 IPR 261; *Trade Practices Commission v Nicholas Enterprises Pty Ltd (No 3)* (1979) 28 ALR 201; *Walters v PC Henderson (Aust) Pty Ltd* (NSWCA, 6 July 1994 unreported); *NRMA Ltd v Morgan (No 3)* [1999] NSWSC 768]. From these cases emerge consistent themes that justice may not be served if parties are dissuaded by the risk of costs from canvassing all issues which might be material to the decision in the case; but that it may be appropriate to award costs of a separate issue where a clearly definable and severable issue, on which the otherwise successful party failed, has occupied a significant part of the trial [*Waterman v Gerling Australia Insurance Co Pty Ltd* [2005] NSWSC 1111, [10]].

18 In my view, it is appropriate that the issues complained of by the defendants should be treated as part and parcel of the overall litigation. In a piece of litigation such as the present, which was conducted over a long period of time, and necessarily embraced many issues, on some of which each of the parties had varying degrees of success, a Court would not usually make orders with regard to a party's success or failure on a separate issue. In any event, the matters in respect of which a costs order is sought against the plaintiff in this case appear to be the product of a

forensic decision to meet the situation arising from the late disclosure of the diaries, and to enable, quite properly, the cross-examination of the plaintiff on the entries. Whatever else may be said about this aspect of the plaintiff's conduct of the trial, in my view it cannot be said that in any real sense it resulted in the prolongation of the trial. Thus, I do not think that the matter raised by the defendants is of the exceptional kind which would justify the making of a separate order.

19 Accordingly, I make the following costs orders:

(1) That the defendants pay the plaintiff's costs of the proceedings up to and including 30 August 2013, to be assessed on the ordinary basis.

(2) That the defendants pay the plaintiff's costs of the proceedings on and from 31 August 2013, to be assessed on the indemnity basis.

(3) That the defendants pay the plaintiff's costs of today's application.

(4) I direct that judgment and these orders be entered forthwith.

(5) The exhibits be returned.

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I Certify that this and the .....7..... preceding pages are a true copy of the reasons for judgment herein of the Honourable Acting Justice

.....Nicholas.....

Associate.....Date.18/8/14.