IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2015-404-1923
[2019] NZHC 1269

IN THE MATTER	of the Defamation Act 1992
BETWEEN	COLIN GRAEME CRAIG Plaintiff
AND	CAMERON JOHN SLATER First Defendant
AND	SOCIAL MEDIA CONSULTANTS LIMITED Second Defendant

On the papers

Appearances:	CG Craig, representing himself, support by TF Cleary as McKenzie Friend BP Henry and CSL Foster for the Defendant
Judgment:	6 June 2019

COSTS JUDGMENT OF TOOGOOD J

This judgment was delivered by me on 6 June 2019 at 3.45 pm
Pursuant to Rule 11.5 High Court Rules

Registrar/Deputy Registrar

Introduction

[1] Mr Colin Craig brought a defamation claim against Mr Cameron Slater and his company, Social Media Consultants Limited (SMCL); Mr Slater then counterclaimed.

[2] On 19 October 2018, I delivered a judgment determining Mr Craig's claims and Mr Slater's counterclaim.[1] The parties have been unable to agree about costs and each has applied for orders in their favour.

[3] The defendants approach the costs issue without making any distinction between their positions. SMCL is a closely held private company that was the corporate vehicle for Mr Slater's journalistic endeavours. Prominently for the purposes of this case, it was the publisher of the internet blog site "Whale Oil Beef Hooked" (Whaleoil) on which the majority of Mr Slater's statements giving rise to the proceeding were posted. It was the sole defendant on one of the causes of action brought by Mr Craig. The other causes of action were against Mr Slater alone or jointly with the SMCL. Only Mr Slater counterclaimed. The company and Mr Slater were represented jointly by Mr Henry and Ms Foster throughout. It is convenient, therefore, to refer to Mr Slater's position as representing the interests and submissions of both defendants.

Summary of the pleadings

[4] The proceeding concerned the publication in June and July 2015 of allegations about the conduct of Mr Craig, the then Leader of the Conservative Party, and his relationship with his then press secretary, Rachel MacGregor, through radio broadcasting and internet websites. Mr Craig alleged that he suffered serious damage to his reputation as a consequence of allegedly untrue statements published by Mr Slater and SMCL, primarily on Whaleoil.

[5] Mr Craig stepped down as Conservative Party leader on 19 June 2015. On 29 July 2015, in response to the allegedly defamatory statements, Mr Craig published a booklet entitled *Dirty Politics and Hidden Agendas* which he distributed to

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1 *Craig v Slater* [2018] NZHC 2712.

1.6 million New Zealand homes. Mr Slater counterclaimed for allegedly defamatory statements made in the booklet.

[6] Because none of the parties was wholly successful in proving or defending the various claims and counterclaims alleged, it is necessary to summarise the allegations and the findings related to them

Mr Craig's claims

[7] Mr Craig pleaded that the allegations published on different occasions over a six-week period carried the meanings or imputations that he:

(a) sexually harassed Ms MacGregor;

(b) sent her numerous "dirty" sexually explicit text messages which were unsolicited and a form of sexual harassment;

(c) begged Ms MacGregor for an affair and then (when she resisted) put her under financial pressure to sleep with him;

(d) engaged in behaviour with Ms MacGregor which was so morally reprehensible that the board of the Conservative Party had to put chaperones in place to protect her;

(e) sexually harassed Ms MacGregor so seriously that he settled her sexual harassment claim by paying her a large sum of money running into six figures;

(f) lied to the board of the Conservative Party by claiming that he had paid Ms MacGregor substantially less than six figures to settle her employment claims when in fact he paid her a six-figure sum to settle her sexual harassment claim;

(g) seriously sexually harassed a woman other than Ms MacGregor;

(h) is a danger to women; and

(i) tricked, misled and deceived the Conservative Party board in relation to loans and GST rebates.

[8] Mr Craig alleged also that the defendants published untrue statements that meant:

(a) there were reasonable grounds to suspect Mr Craig of being dishonest in filing his electoral returns and lying about the amounts spent on his electoral campaign and that Mr Craig's spending exceeded the legal limits;

(b) Mr Craig pursued a relentless and driven witch-hunt against Larry Baldock who was sacked as a Conservative Party candidate and board member, and suspended from the party without any reasonable cause;

(c) Mr Craig lied to the media about why Larry Baldock and Leighton Baker left the Conservative Party and its board;

(d) Mr Craig initiated and arranged a loan to the Conservative Party at eight per cent interest as a personal money-making venture and manipulated support for it by seeking telephone support for it from carefully selected board members; and

(e) Mr Craig abused his position of power as leader of the Conservative Party for personal financial gain.

[9] Mr Craig sought declarations under s 24 of the Defamation Act 1992 that the defendants were liable to him in defamation. He also sought general, aggravated and punitive damages of unspecified amounts and costs.

Mr Slater's and SMCL's defences to Mr Craig's claims

[10] In defence of these claims, Mr Slater and SMCL pleaded that the allegations did not bear the defamatory meanings alleged or, alternatively, that they were either true statements of fact or expressions of honest opinion. They pleaded initially that, in any event, they were protected from Mr Craig's claims by the *Lange v Atkinson* qualified privilege available to news media who published public interest matters about politicians.[2]

[11] Following the hearing and before the delivery of the judgment, the Court of Appeal held in *Durie v Gardiner* that *Lange v Atkinson* qualified privilege no longer applies and that a new public interest defence of responsible communication on a matter of public interest was to be applied retrospectively.[3] After hearing from the parties, I was satisfied that it was just that the pleadings should be amended to delete the defendants' reliance on *Lange v Atkinson* qualified privilege and that it be substituted by the new defence. The judgment addressed that pleading.

Mr Slater's counterclaim

[12] Mr Slater counterclaimed for statements published by Mr Craig in the *Dirty Politics and Hidden Agendas* booklet. He pleaded that the contents of the booklet defamed him by containing the imputations that he:

(a) developed or coordinated the strategy to defame and spread lies about Mr Craig;

(b) made up allegations relating to Mr Craig, including the creation of a second alleged victim of Mr Craig's sexual harassment;

(c) made up material he published on his blog;

(d) acted with ill will towards Mr Craig by gathering material Mr Slater knew was fake, or untrue, and publishing the same on his blog;

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2 *Lange v Atkinson* [1998] 3 NZLR 424 (CA) and *Lange v Atkinson* [2000] 3 NZLR 385 (CA).
3 *Durie v Gardiner* [2018] NZCA 278, [2018] 3 NZLR 131.

(e) published material on his blog knowing it not to be true; and

(f) is a compulsive liar.

[13] Mr Slater sought general damages of $8,117,010 on a proposed basis of $5.00 for each of the 1,623,402 New Zealand homes to which the booklet was delivered.

Mr Craig's defences to Mr Slater's counterclaim

[14] In defence of Mr Slater's counterclaim, Mr Craig pleaded that the allegedly defamatory meanings are either true statements of fact or expressions of honest opinion, and also that he was entitled to make the statements under the protection of the reply to attack qualified privilege.

Summary of the essential findings

[15] In making my assessment of the relevant factors to determine what costs orders are appropriate, I have relied on the findings set out in the judgment. A summary will suffice for present purposes.

Findings of fact on Mr Craig's claims

[16] The essential findings of fact related to Mr Craig's claims, each of which was made on the balance of probabilities, as summarised in the judgment, were these:[4]

(a) It was not established that Mr Craig was guilty of sexual harassment of Ms MacGregor up to and including an incident on election night 2011, when there was intimacy between them, because I was not satisfied that Mr Craig's behaviour was unwanted by Ms MacGregor at that time.

(b) It is true that Mr Craig was guilty of moderately serious sexual harassment of Ms MacGregor, on multiple occasions from early 2012 to 2014 by telling her that he remained romantically inclined and sexually attracted to her, and that those expressions of his views were

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4 *Craig v Slater* [2018] NZHC 2712 at [17].

not welcomed by Ms MacGregor at the time they were communicated to her. Ms MacGregor chose not to complain about the harassment because of her concern about the effect of a complaint on her employment.

(c) The imputation that Mr Craig sent "dirty text messages" to Ms MacGregor is not strictly true, but it was held that it is materially true in substance in that he sexually harassed Ms MacGregor by communicating to her sexually oriented written messages between early 2012 and 2014 that were unwelcome.

(d) The imputation that Mr Craig sexually harassed Ms MacGregor so seriously that he settled the sexual harassment claim by paying her a six-figure sum of money is not strictly true, but it was held that it is materially true in substance in that he provided Ms MacGregor with a substantial financial benefit in exchange for her agreeing she would not pursue a justifiable claim that Mr Craig had been guilty of moderately serious sexual harassment.

(e) The imputation that Mr Craig lied to the board of the Conservative Party by claiming he had paid Ms MacGregor substantially less than six figures to settle the employment matters when in fact he paid her a six-figure sum to settle her sexual harassment claim is not strictly true. It was held that is materially true in substance, however, in that Mr Craig misled the board intentionally about the true nature of his behaviour with and towards Ms MacGregor, the foundation and merits of Ms MacGregor's allegations against him, and the true nature of the settlement with her.

(f) Although it is not true that Mr Craig "begged" Ms MacGregor for an affair, the imputation that he did that was held to be materially true in substance in that he indicated to her that they could have an intimate physical relationship.

(g) Mr Craig did not put Ms MacGregor under financial pressure to sleep with him.

(h) The board of the Conservative Party did not put chaperones in place to protect Ms MacGregor because Mr Craig engaged in behaviour with her that was morally reprehensible.

(i) It is not true, nor substantially true, that Mr Craig sexually harassed a woman other than Ms MacGregor.

(j) Mr Craig did not use his resources to conduct a witch-hunt against Mr Larry Baldock and then unfairly sack him as a candidate and board member and suspend him from the Conservative Party.

(k) The imputation that Mr Craig, in his capacity as the leader of a political party, had misled the news media on an internal disciplinary issue about Mr Baldock was not defamatory.

(l) There was no evidence that there are reasonable grounds to suspect Mr Craig of being dishonest in filing his electoral returns and lying about the amounts spent on his electoral campaign, or that Mr Craig's spending exceeded the legal limits.

(m) There was no evidence that Mr Craig initiated and arranged a loan to the Conservative Party at eight per cent interest as a personal money-making venture and manipulated support for it by seeking telephone support for it from carefully selected board members.

(n) There was no evidence that Mr Craig abused his position of power as leader of the Conservative Party for personal financial gain.

The remedies awarded to Mr Craig

[17] I held that Mr Slater and SMCL had no defence to only two of Mr Craig's claims. At the conclusion of the judgment,[5] I made a declaration under s 24 of the Defamation Act 1992 that the defendants were liable to Mr Craig in defamation for the untrue statements that Mr Craig:

(a) had placed Ms Rachel MacGregor under financial pressure to sleep with him; and

(b) sexually harassed at least one victim other than Ms MacGregor.

[18] In the judgment, I made the following findings and observations about Mr Craig's claims for damages which are relevant to the assessment of costs:

> [648] The principal focus of Mr Craig's causes of action was on Publication 1, Mr Slater's interview on Newstalk ZB on 19 June 2015, two hours after Mr Craig announced that he was standing down as Leader of the Conservative Party. For completeness, I repeat the imputations alleged by Mr Craig. They were that he had:
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> (a) sexually harassed Ms MacGregor;
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> (b) sent her numerous "dirty" sexually explicit text messages which were unsolicited and a form of sexual harassment;
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> (c) sexually harassed Ms MacGregor so seriously that he settled her sexual harassment claim by paying her a large sum of money running into six figures; and
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> (d) lied to the board of the Conservative Party by claiming that he had paid Ms MacGregor substantially less than six figures to settle her employment claims when in fact he paid her a six-figure sum to settle her sexual harassment claim.
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> [649] Mr Craig pleaded that those statements would cause damage to his reputation as a prominent businessman and leader of a political party with serious parliamentary aspirations. I accept that allegations that he had acted in the manner alleged would inevitably damage his reputation, particularly since the Conservative Party's 2011 and 2014 electoral campaigns were founded, in part, upon policies said to be consistent with Christian and family values. But because I have held the allegations about that behaviour to be true, the reputational damage suffered by Mr Craig leading to his political

[5] At [654](a).

demise resulted not from any untrue statement by Mr Slater about those matters but from the fact that Mr Craig acted as he did. It is against that background that I must consider the effect on Mr Craig's reputation of the untrue statements that he had placed Ms MacGregor under financial pressure to sleep with him, and that he had sexually harassed at least one victim other than Ms MacGregor.

[650] I find that those allegations, while untrue and justifying an award of a remedy in defamation to Mr Craig, were largely subsumed so far as reputational impact is concerned by the damage caused by public awareness of:

(a) Mr Craig's sexual harassment of Ms MacGregor;

(b) his inferred acknowledgement of the merits of her allegations by making a financial settlement; and

(c) his misleading the board and members of the public to avoid public disapproval and the disapproval of the Conservative Party in an attempt to salvage his political career.

[651] Moreover, I have held that the findings of the Human Rights Review Tribunal in December 2015 are relevant to an assessment of Mr Craig's reputation and the extent to which he is entitled to damages for defamation. The Tribunal held that Mr Craig had breached the settlement agreement with Ms MacGregor in a deliberate, systematic, egregious and repeated manner. It held that he released carefully selected information to paint himself as a person who had been falsely accused by a woman who was clearly incapable of managing her money and to make an inference that she was seeking money through the sexual harassment complaint. Those actions were found to be deliberate, sustained and calculated.

[652] It scarcely needs to be said, therefore, that the reputational damage which Mr Craig suffered throughout the events traversed at length in this judgment resulted almost entirely from his own actions. To the extent, if any, that his reputation suffered further damage as a result of the two statements for which I have held the defendants to be liable, I am more than satisfied that the declarations that he was defamed in that way provide adequate vindication.

[653] I conclude, therefore, that Mr Craig is not entitled to an award of general damages to compensate him further for such damage. It follows that his claims for aggravated and pecuniary damages fail and must be dismissed.

Findings of fact on Mr Slater's counterclaim

[17] On Mr Slater's counterclaim, I held that I did not accept that:[6]

(a) Mr Slater spread lies about Mr Craig; or

(b) made up allegations about him; or

(c) gathered information that he knew was fake or untrue; or

(d) published material on Whaleoil knowing it not to be true.

[18] I said I was satisfied Mr Slater is neither a compulsive nor a calculated liar.

[19] Mr Craig's defence of truth to Mr Slater's counterclaim failed. I found, however, that although Mr Craig countered the Whaleoil publications which he considered to have defamed him by asserting in the *Dirty Politics and Hidden Agendas* booklet that there was a conspiracy between Mr Slater and others to spread deliberate lies about him, his primary motive was to correct what he had maintained throughout were untrue statements. Because the core allegations about Mr Craig's relationship with Ms MacGregor and related matters had received widespread publication throughout New Zealand, I found that Mr Craig's decision to distribute the booklet to every New Zealand household was a justifiable response. I found that the untrue statements in the *Dirty Politics and Hidden Agendas* booklet were made on an occasion of qualified privilege in reply to an attack on him by Mr Slater and that the privilege was not lost. On that basis, Mr Slater's counterclaim in defamation was dismissed.

Relevant general costs principles

[20] Costs orders are made in accordance with Part 14 of the High Court Rules 2016. They are at the discretion of the Court.[7] An award of costs should reflect the complexity and significance of the proceeding[8] and should not exceed the costs

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6 At [20].
7 High Court Rules, r 14.1.
8 Rule 14.2(1)(b).

actually incurred.[9] The Rules also provide the Court expressly with a discretion to refuse or reduce an award of costs to the overall successful party if that party "has failed in relation to a cause of action or issue which significantly increased the costs of the party opposing costs".[10] I will return to this point.

[21] Rule 14.2(1)(a) provides, as a general principle, that the party who fails with respect to a proceeding should pay the costs to the party who succeeds.

Who succeeded in the proceeding?

[22] The parties disagree about which of them succeeded in the proceeding. The Court's conclusion about that is fundamentally important to the costs outcome in this case. Addressing costs in the judgment, I said:

> [655] …Bearing in mind that each of the parties has both succeeded and failed in the proceeding in varying degrees, and having regard to the complexity and significance of the proceeding, it will be obvious that the determination of costs will require careful consideration by the parties and by the Court.

[23] It is necessary to explain briefly the basis for the success or otherwise of each of Mr Craig's causes of action and Mr Slater's counterclaim.

The determinations on Mr Craig's individual causes of action

[24] Mr Craig originally brought 18 causes of action, each based on distinct publications by the defendants. Five of these were abandoned in the course of the proceeding. I now summarise the determinations on the remaining 13 causes of action, based on the factual findings summarised above and the reasoning set out in the judgment.

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9 Rule 14.2(1)(f).

10 Rule 14.7(d); see also *Weaver v Auckland Council* [2017] NZCA 330, (2017) 24 PRNZ 379 at [19]-[21].

First cause of action (against Mr Slater only) — Publication 1 (Newstalk ZB interview, 19 June 2015)

[25] The published statements on which the first cause of action was based are set out in the judgment at [382] and my findings about the pleaded meanings are at [384]-[386].

[26] Publication 1 was the core publication; most of the subsequent publications relied upon by Mr Craig as the basis for the other causes of action either repeated some or all of the statements made in it or referred to them. Mr Craig's cause of action in respect of that publication failed because I was satisfied that each of the pleaded imputations was true or materially true in substance.[11] In the alternative, I was satisfied that Mr Slater had acted responsibly in publishing the statements and that the defence of responsible communication on a matter of public importance would have succeeded if it had been necessary for Mr Slater to rely on it.[12]

Third cause of action — Publication 4 (Whaleoil post, 20 June 2015)

[27] The published statements on which the third cause of action was based appear in the judgment at [495]. Mr Craig pleaded that the statements meant that he:[13]

(a) tricked, misled and deceived the Conservative Party board in relation to loans and GST rebates;

(b) sexually harassed Ms MacGregor by begging her for an affair and then (when she resisted) by putting her under financial pressure to sleep with him; and

(c) sent Ms MacGregor numerous lewd and sexually explicit text messages which were unsolicited and unwanted.

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11 At [468]-[469].
12 At [490]-[494], applying *Durie v Gardiner*.
13 At [496].

[28] I was satisfied that the statement bore the pleaded meanings at (b) and (c) but not the meaning at (a).[14] I was further satisfied that the imputation contained in (b), that Mr Craig had put Ms MacGregor under financial pressure to sleep with him, was neither true nor materially true in substance,[15] and that Mr Slater and SMCL did not act responsibly in publishing it.[16] Mr Craig succeeded on the third cause of action, therefore, in that limited respect only.

Fifth cause of action — Publication 6 (Whaleoil post, 20 June 2015)

[29] The published statements on which the fifth cause of action was based are at [515] to [516] of the judgment. I was satisfied that Publication 6 bore the same pleaded meanings as Publication 1, with the addition of the imputation that Mr Craig engaged in behaviour with Ms MacGregor which was so morally reprehensible that the board of the Conservative Party had to put chaperones in place to protect her.[17]

[30] I was satisfied that the imputation about chaperones was neither true nor materially true in substance.[18] I held, however, that the defendants acted responsibly in publishing it, because Mr Slater was re-publishing an allegation made by member of the Conservative Party board on a breakfast television programme that had been quoted in the New Zealand Herald.[19] I was satisfied that the other pleaded meanings contained in Publication 6 were true or materially true in substance.[20] Mr Craig failed, therefore, on that cause of action.

Sixth cause of action – Publication 7 (Whaleoil post, 21 June 2015)

[31] Considering the sixth cause of action, I was satisfied that Publication 7[21] bore the same pleaded meanings as Publication 1, with the addition of the imputation that Mr Craig had committed indiscretions with "women" other than his wife and that there was more than one victim of sexual harassment. I confirmed my views that the

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14 At [497]-[498].
15 At [511].
16 At [514]
17 At [518].
18 At [522].
19 At [524].
20 At [520].
21 At [525].

pleaded meanings were true or substantially true, except for the additional statement about victims other than Ms MacGregor.[22] But Mr Slater was protected by the defence of responsible communication.[23]

Seventh cause of action – Publication 9 (Whaleoil post, 23 June 2015)

[32] In support of the seventh cause of action, Mr Craig pleaded that the statements in Publication 9[24] repeated the allegations made in Publication 1. For the same reasons as Publication 1, the claim in respect of Publication 9 failed.[25]

Eighth cause of action – Publication 10 (Whaleoil post, 26 June 2015)

[33] The evidence related to the eighth cause of action focused on discussions between Mr Slater and a lawyer, Ms Flannagan, who was acting for Mr and Mrs Craig on a personal matter.[26] Mr Slater drew what I found to be unjustified inferences from those discussions. Mr Craig pleaded that Publication 10[27] contained the following meanings:

(a) He sexually harassed Ms MacGregor in a serious manner;

(b) He seriously sexually harassed another woman;

(c) He behaved in an extremely poor and sexually disgusting way towards women; and

(d) He is a danger to women.

[34] I was not satisfied that the imputation at (d) was made out.[28] I had held already that the imputation at (a) about sexual harassment of Ms MacGregor was true. But I was satisfied that the imputations at (b) and (c) were neither true, nor were they

22 At [528] and [529].
23 At [530]-[533].
24 At [536].
25 At [537]-[538].
26 See [539]-[548].
27 At [549].
28 At [551].

protected by the public interest defence. Mr Slater made no attempt to verify them and I held their publication was reckless. The public interest defence failed, therefore, and I held that Mr Craig succeeded in those aspects of the cause of action.[29]

Ninth cause of action – Publication 11 (Whaleoil post, 28 June 2015)

[35] Publication 11[30] carried the sole imputation that Mr Craig sent sexually explicit and unsolicited text messages to Ms MacGregor. The ninth cause of action failed because, as I had held in respect of the similar allegations in Publication 1, the imputed meaning was substantially true.[31]

Tenth cause of action – Publication 12 (Whaleoil post, 28 June 2015)

[36] The tenth cause of action essentially repeated the allegations made in the eighth cause of action, but relying on Publication 12.[32] I accepted, therefore, that the claim succeeded, but I held that the re-publication of the allegations only two days after the original did not add anything to the reputational damage suffered by Mr Craig.[33]

Eleventh cause of action – Publication 14 (Whaleoil post, 1 July 2015)

[37] Publication 14,[34] in the form of a post on the Whaleoil blog site, comprised a series of questions addressed to Mr Craig by Mr Slater. Mr Craig alleged the posts would be understood by an ordinary reader having relevant knowledge of the background to contain implied assertions or statements of fact which are defamatory of him. He pleaded that the publication contained the following defamatory meanings:

(a) There were reasonable grounds to suspect Mr Craig of being dishonest in filing his electoral returns and lying about the amounts spent on his electoral campaign and that Mr Craig's spending exceeded the legal limits.

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29 At [559]-[560].
30 At [561].
31 At [562].
32 At [563].
33 At [565].
34 At [568].

(b) There were reasonable grounds to suspect Mr Craig of facing a second sexual harassment case and of sexually harassing another woman, in addition to Ms MacGregor.

(c) Mr Craig lied to the media about why Larry Baldock and Leighton Baker left the Conservative Party and its board.

(d) Mr Craig initiated and arranged a loan to the Conservative Party at eight per cent interest as a personal money-making venture and manipulated support for it by seeking telephone support from carefully selected board members.

(e) Mr Craig abused his position of power as leader of the Conservative Party for personal financial gain.

(f) Mr Craig paid a large sum to Ms MacGregor to settle her sexual harassment claim.

(g) Mr Craig kept that large sum hidden from the board of the Conservative Party and misled the board about what it was for.

[38] I held that:

(a) The statement did not carry the imputation at (a);

(b) The imputation at (b) was untrue and defamatory but did not add to the overall damage to Mr Craig's reputation;

(c) The imputation at (c) was not defamatory in that it would not be regarded as lowering Mr Craig's reputation;

(d) The imputations at (d) and (e) were not made out; and

(e) The imputations at (f) and (g) were either true or materially true.

[39] The overall effect of the findings on the eleventh cause of action at [575] to [583] of the judgment, therefore, is that Mr Craig succeeded to a very modest degree.

Twelfth cause of action – Publication 15 (Whaleoil post, 8 July 2015)

[40] Publication 15[35] was a statement by Mr Slater on the Whaleoil blog site that neither Mr Slater nor Mr Stringer had withdrawn their allegations about Mr Craig's conduct. Mr Craig pleaded that the effect of this statement was to repeat each and all of the imputations arising from the previous defamatory statements. This presumed that a reader of the statement would have a compendious knowledge of the controversy between him and Mr Slater. I was not satisfied that it could found a separate cause of action in defamation, so the twelfth cause of action failed.[36]

Thirteenth cause of action – Publication 16 (Whaleoil post, 18 July 2015)

[41] The Whaleoil post pleaded as Publication 16 repeated public statements made by Mr Stringer. Mr Craig pleaded that this statement imputed that he used his resources to conduct a witch-hunt against a Conservative Party member, Mr Baldock and then unfairly sacked him as a parliamentary candidate and a board member and suspended him from the Conservative Party. I was not satisfied that the statement bore that imputation. The aspects of it with which Mr Craig took issue were quotes attributed to Mr Stringer that Mr Slater used as background to the opinions expressed by him that the leadership of the Conservative Party was riven by internal strife.[37] The thirteenth cause of action failed.

Fourteenth cause of action (against Mr Slater only) – Publication 17 (One News Now, 29 July 2015)

[42] In the fourteenth cause of action,[38] as in the twelfth cause of action, Mr Craig pleaded that the effect of a statement made by Mr Slater and quoted on a Television New Zealand programme was to repeat each and all of the imputations arising from the previous defamatory statements. As with my findings on the twelfth cause of

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35 At [584].
36 At [586].
37 At [589]-[590].
38 See Publication 17 at [592].

action, I was not satisfied that the fourteenth could found a separate cause of action in defamation but held that it may have been relevant to any award of damages.[39] I regard this cause of action as having failed.

Fifteenth cause of action (against SMCL only) – Publication 18 (Whaleoil email to Conservative Party board, 20 June 2015)

[43] The claim in the fifteenth cause of action was founded on an email sent by Mr Peter Belt, an employee of SMCL, to Conservative Party board members.[40] Mr Craig pleaded that this statement contained imputations that he had paid a large sum of money to Ms MacGregor, at least part of which was to silence her; and that he actively sought to have a sexual affair with her despite being married.

[44] I was not satisfied that the email could have been understood as communicating a statement of fact. If it could, then those statements of fact were true or substantially true, or were communicated responsibly. The cause of action failed.[41]

Overall conclusions as to the measure of Mr Craig's failure to prove his claims

[45] It is the final result that must be given primary weight when the Court is exercising its discretion to award costs.[42] By any objective assessment, the overall outcome of the proceeding is that Mr Craig's defamation claim against Mr Slater and his company failed, except to a minor extent. That is demonstrated by the findings at [648] to [652] of the judgment, which I repeat in their material respects:

> [648] The principal focus of Mr Craig's causes of action was on Publication 1, Mr Slater's interview on Newstalk ZB on 19 June 2015, two hours after Mr Craig announced that he was standing down as Leader of the Conservative Party…
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> [649] Mr Craig pleaded that those statements would cause damage to his reputation as a prominent businessman and leader of a political party with serious parliamentary aspirations. I accept that allegations that he had acted in the manner alleged would inevitably damage his reputation, particularly since the Conservative Party's 2011 and 2014 electoral campaigns were founded, in part, upon policies said to be consistent with Christian and family values. But because I have held the allegations about that behaviour to be true, the

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39 At [592]-[594].
40 See Publication 18 at [595]-[596].
41 At [598]-[599].
42 *Water Guard NZ Ltd v Midgen Enterprises Ltd* [2017] NZCA 36 at [13].

> reputational damage suffered by Mr Craig leading to his political demise resulted not from any untrue statement by Mr Slater about those matters but from the fact that Mr Craig acted as he did. It is against that background that I must consider the effect on Mr Craig's reputation of the untrue statements that he had placed Ms MacGregor under financial pressure to sleep with him, and that he had sexually harassed at least one victim other than Ms MacGregor.
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> [650] I find that those allegations, while untrue and justifying an award of a remedy in defamation to Mr Craig, were largely subsumed so far as reputational impact is concerned by the damage caused by public awareness of:
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> (a) Mr Craig's sexual harassment of Ms MacGregor;
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> (b) his inferred acknowledgement of the merits of her allegations by making a financial settlement; and
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> (c) his misleading the board and members of the public to avoid public disapproval and the disapproval of the Conservative Party in an attempt to salvage his political career.
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> [651] Moreover, I have held that the findings of the Human Rights Review Tribunal in December 2015 are relevant to an assessment of Mr Craig's reputation and the extent to which he is entitled to damages for defamation. The Tribunal held that Mr Craig had breached the settlement agreement with Ms MacGregor in a deliberate, systematic, egregious and repeated manner. It held that he released carefully selected information to paint himself as a person who had been falsely accused by a woman who was clearly incapable of managing her money and to make an inference that she was seeking money through the sexual harassment complaint. Those actions were found to be deliberate, sustained and calculated.
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> [652] It scarcely needs to be said, therefore, that the reputational damage which Mr Craig suffered throughout the events traversed at length in this judgment resulted almost entirely from his own actions. To the extent, if any, that his reputation suffered further damage as a result of the two statements for which I have held the defendants to be liable, I am more than satisfied that the declarations that he was defamed in that way provide adequate vindication.

[46] I do not underestimate the importance to Mr Craig of my finding, on the eighth cause of action, that the assertions by Mr Slater that he had sexually harassed a woman other than Ms MacGregor and that he behaved in an extremely poor and sexually disgusting way towards other women were not true.[43] Those assertions broadened the scope of the attack on Mr Craig's reputation from an allegation that he had behaved inappropriately in his relationship with a close advisor to one that went to his character generally regarding his relationship with women. That would have caused additional

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[43] Discussed at [33] and [34] above.

reputational harm to a politician who espoused Christian and family values. There was no evidence that those assertions were widely reported in other news media, however.

[47] It follows that I consider Mr Slater and SMCL to have been successful so far as Mr Craig's claim is concerned and I propose to award costs in their favour on the claim. But I intend to apply the discretion available to the Court to reduce an award of costs to the overall successful party if that party "has failed in relation to a cause of action or issue which significantly increased the costs of the party opposing costs".[44]

[48] The assertion that Mr Craig placed Ms MacGregor under financial pressure did not require evidence that would not otherwise have been given. The evidence of the financial dealings between Mr and Mrs Craig and Ms MacGregor, and the financial terms of the settlement under the Human Rights Act 1993, was relevant to the general background of the relationship and to Ms MacGregor's explanation for not rebuffing Mr Craig's overtures or complaining about them. Nevertheless, Mr Craig's success on that issue should be reflected in the costs outcome. The question of whether Mr Craig's sexual harassment of, or misconduct towards, women extended beyond Ms MacGregor, however, involved several interlocutory hearings and exchanges concerning Ms Flannagan's evidence and a session of the Court's hearing time at trial.

[49] I consider, therefore, that the defendants' entitlement to costs shall be reduced to reflect the overall result and the added cost to Mr Craig of addressing the second complainant issue on which Mr Slater failed. I make directions below about how that outcome shall be addressed in quantifying the sum payable.

The findings in regard to the counterclaim

[50] Mr Slater's counterclaim was based on two sources of allegedly defamatory statements by Mr Craig: the booklet he published and distributed to over 1.6 million New Zealand households, and the accompanying interview with a fictional "Mr X". Mr Craig did not dispute that the booklet and interview conveyed the defamatory imputations set out at [12] above.

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[44] Rule 14.7(d); see also *Weaver v Auckland Council* [2017] NZCA 330 at [19]-[21].

[51] I was satisfied not only that each of the imputations was defamatory, but also that Mr Craig had failed completely to prove that any of them was true.[45] I held, however, that Mr Craig was protected by qualified privilege because he was responding to an attack on his reputation and did not misuse the occasion of privilege that was afforded to him.[46] For that reason only, Mr Craig's defence succeeded. But it would not be fair to characterise Mr Craig's successful defence as purely technical. The right to amount a strong rebuttal to an attack on one's reputation is an acknowledgement of the importance of the freedom of expression in such circumstances.

[52] Nevertheless, it is my assessment that Mr Slater succeeded to a significant degree in the counterclaim. He established that there was no foundation for Mr Craig's strong attack on his conduct as a journalist, including assertions that he spread lies about Mr Craig, made up allegations about him, gathered information that he knew was fake or untrue, and published material on Whaleoil knowing it not to be true. He satisfied me, contrary to Mr Craig's claims, that he is neither a compulsive nor calculated liar.

[53] I conclude, therefore, that the parties both succeeded and failed on the counterclaim in more or less equal measure. The costs on interlocutory proceedings and identifiable pre-trial steps related to the counterclaim shall lie where they fall. It is not possible to make a precise assessment of the extent to which the costs of preparation for, and the conduct of, the trial should be apportioned between the evidence and the submissions related to the claim and the counterclaim respectively. A well-educated estimate will have to suffice. To reflect the conclusion that neither Mr Craig nor the defendants should be awarded costs on the counterclaim, I propose to apply a further discount to Mr Slater's overall costs entitlement for preparation and trial.

[54] As the orders will indicate, the discounts should be applied once the amount of the costs otherwise payable have been quantified. I address next, therefore, the basis on which the quantum shall be determined.

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45 At [629].
46 At [630]-[636].

Indemnity costs claim by Mr Slater

[55] Mr Slater says Mr Craig had "even less than a pyrrhic victory": he failed in all but a fraction of his pleaded causes of action and, to the limited extent to which he was successful, he received no award of damages. Mr Slater submits the amount of the costs Mr Craig is ordered to pay should reflect that outcome.

Claim for indemnity costs

[56] Mr Slater seeks indemnity costs of $564,730 or, in the alternative, scale costs of $356,400 on a category 3C basis. As to the former, Mr Slater says he is entitled to solicitor and client costs by virtue of s 43(2) of the Defamation Act. That section reads:

> **43 Claims for damages**
>
> (1) In any proceedings for defamation in which a news medium is the defendant, the plaintiff shall not specify in the plaintiff's statement of claim the amount of damages claimed by the plaintiff in the proceedings.
>
> (2) In any proceedings for defamation, where−
>
> (a) judgment is given in favour of the plaintiff; and
>
> (b) the amount of damages awarded to the plaintiff is less than the amount claimed; and
>
> (c) in the opinion of the Judge, the damages claimed are grossly excessive, −
>
> the court shall award the defendant by whom the damages are payable the solicitor and client costs of the defendant in the proceedings.

[57] As Mr Craig points out, however, s 43(2) must be read in conjunction with subs (1). Since the defendants were a journalist and a news media organisation, Mr Craig was barred from specifying the amount of damages claimed in the proceeding. This necessarily takes s 43(2) out of operation since, in a technical sense, no amount of damages was claimed for the purposes of s 43(2)(b). In this instance, Mr Craig must be correct. As John Hansen J noted in *Parris v TVNZ*, s 43(2) clearly deals with situations where there is not a news media defendant.[47]

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[47] *Parris v Television New Zealand Ltd* (1999) 13 PRNZ 327 (HC) at 329.

[58] But that is not the end of the matter. Mr Slater applies alternatively for indemnity costs in reliance on ordinary principles under the High Court Rules.

Indemnity costs principles under the High Court Rules

[59] The Court may order that indemnity costs be paid by a party that has acted vexatiously, frivolously, improperly or unnecessarily in commencing, continuing or defending a proceeding.[48] In *Bradbury v Westpac Banking Corp* the Court of Appeal set out the following circumstances in which indemnity costs had been awarded, while recognising that the categories are not closed:[49]

(a) The making of irrelevant allegations of fraud or those known to be false;

(b) Particular misconduct that causes loss of time to the Court and other parties;

(c) Commencing proceedings for an ulterior motive or doing so in wilful disregard of known facts or clearly established law;

(d) Making allegations which never ought to have been made or unduly prolonging a case by groundless contentions.

Mr Slater's arguments

[60] Applying those principles, Mr Slater argues that Mr Craig acted vexatiously and improperly in bringing the proceeding, despite being aware that he had sexually harassed Ms MacGregor and knowing that this was unacceptable to her. He also says that any damage to Mr Craig's reputation was a consequence of his own conduct, a fact reflected in the Court's refusal to award him damages.

[61] Mr Slater says that Mr Craig misappropriated the processes of the Court as part of an elaborate and fraudulent attempt to cover up his sexual harassment of

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48 Rule 14.6(4)(a).

49 *Bradbury v Westpac Banking Corp* [2009] NZCA 234, [2009] 3 NZLR 400 at [29].

Ms MacGregor and his related deception of the Conservative Party board. He says further that Mr Craig simply played the role of a victim of a great conspiracy in order to restore his public credibility. According to Mr Slater, Mr Craig's claims in his costs submissions that he succeeded in the proceeding are no more than a political posture.

[62] Much of Mr Slater's claim to indemnity costs relies on the submission that Mr Craig "always knew" he had sexually harassed Ms MacGregor and brought the proceeding regardless. He cites [443] of my judgment to demonstrate this. That paragraph reads:

> [443] In summary, I find that Mr Craig sexually harassed Ms MacGregor on multiple occasions from early 2012 to 2014 by telling her that he remained romantically inclined and sexually attracted to her, and that those expressions of his views were not welcomed by Ms MacGregor at the time they were communicated to her. Ms MacGregor chose not to complain about the harassment because of concern about the effect of a complaint on her employment.

[63] I will come back to this point, but I should say here that I do not accept that those findings bear the meaning Mr Slater advances. I did not say in the judgment that Mr Craig always knew he sexually harassed Ms MacGregor and such a conclusion could not reasonably be inferred from what I did say. To the contrary, I commented elsewhere in the judgment that Mr Craig was somewhat oblivious to the impact of his behaviour on Ms MacGregor.[50]

[64] Further, Mr Slater maintains that he is entitled to indemnity costs because of aspects of Mr Craig's conduct during the proceeding. He points to the one-page "Things I am Doing" note which I held had been fabricated by Mr Craig.[51] Mr Slater says that Mr Craig deliberately lied to the Court in that and other respects.

Mr Craig's response

[65] Mr Craig points to my finding that he published the booklet to "correct what he had maintained throughout were untrue statements".[52] He says that the defendants' claim for indemnity costs is built on false premises.

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50 At [432].
51 At [90]-[101].
52 At [633].

Did Mr Craig know that he had sexually harassed Ms MacGregor?

[66] The proceeding was complicated by both the fiercely contested factual dispute underpinning it and the numerous and complex legal issues the Court was required to resolve. The length of the hearing and the judgment bear testament to that assessment. If it could be established that Mr Craig always knew he had sexually harassed Ms MacGregor and issued the defamation proceeding regardless, there would be a strong argument that he had acted vexatiously in bringing and pursuing his claims. It is probable that Mr Slater would be awarded indemnity costs in such circumstances.

[67] In the Human Rights Act settlement and in evidence, Mr Craig conceded that aspects of his conduct over the period Ms MacGregor worked with him were inappropriate. But I am prepared to accept that it is probable that, up to the time of the delivery of the Court's judgment, Mr Craig did not believe that he was guilty of sexual harassment. I need to explain why.

[68] Mr Craig appeared in person to argue a number of pre-trial issues before me and he addressed me at length (though not unnecessarily) on the issues in opening and closing his case. I watched him give evidence in chief and under cross-examination over several days and I heard Ms MacGregor's evidence about his behaviour over the three years she worked with him. I had ample opportunity, therefore, to assess Mr Craig's personality. He is plainly intelligent and articulate. There is no doubt, either, that he was highly ambitious politically and that he was single-minded in his approach to achieving his political aspirations. Although Mr Craig professed to be interested only in Ms MacGregor's wellbeing, he did not act accordingly. The heavy demands he placed on Ms MacGregor during the 2014 election campaign demonstrated that he lacked real empathy for her. I assessed Mr Craig as being a man who is extremely confident in his opinions, self-absorbed, lacking self-awareness and insight and, to a degree, hypocritical. Self-justification appears to come easily to him.

[69] That may go some way to explaining why, although Mr Craig acknowledged to Ms MacGregor on several occasions that it would be inappropriate for him to act on the sexual and romantic feelings he harboured for her, he continued to mislead the Conservative Party board and the public about his feelings and the true nature of

Ms MacGregor's allegations against him. Mr Craig was a married man and the leader of a political party that endorsed traditional Christian values. He is also politically aware. I do not doubt that he knew that evidence of his apparent sexual and romantic interest in one of his employees would be professionally and politically damaging if it became known to his colleagues in the Conservative Party or reached the public domain. But that does not mean that Mr Craig knew he sexually harassed Ms MacGregor.

[70] I held in the judgment that Mr Craig went so far as to manufacture evidence designed to support his position, in responding to Ms MacGregor's claims under the Human Rights Act,[53] and to mislead the Court rather than to acknowledge to others that he had behaved badly.[54] Ms MacGregor complained that Mr Craig deliberately manipulated and exploited her in terms of his demands for her time and effort in his re-election campaign and I held that his behaviour placed her under pressure and caused distress.[55] I do not think it follows, however, that Mr Craig knew his conduct towards Ms MacGregor had reached the level of sexual harassment. I refer below to passages in the judgment that convey my assessment of Mr Craig and the extent of his awareness of the inappropriate aspects of his relationship with his press secretary.

[71] It is significant that Mr Craig's initial advances and indications that he was romantically interested in Ms MacGregor were not rebuffed. Over a relatively short period after Ms MacGregor joined Mr Craig's campaign team in August 2011, they developed a close relationship which culminated in physical intimacy on the November election night. I rejected Ms MacGregor's evidence that she felt scared and awful immediately after the incident and that it marked the point at which she lost faith and trust in Mr Craig.[56] The positive communications Mr Craig received from Ms MacGregor in November and December 2011 laid something of a foundation for his ongoing perception of their relationship; it endured even when she ceased responding in that way. I addressed these events in the judgment at [69]; [71] – [73]; [420] – [421] and [424].

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53 At [208]-[219].
54 At [90]-[101].
55 At [116]-[117], [453]-[454] and [510].
56 At [76].

[72] It is apparent that, after the Christmas-New Year break, Ms MacGregor distanced herself from the physical and emotional intimacy that she had shared with Mr Craig in late 2011. While Mr Craig wrote about maintaining appropriate boundaries between them, he continued to express strong emotional attraction. He tended to rationalise his continuing romantic interest in Ms MacGregor over the subsequent years by reference to her initial receptiveness to him in the early part of their relationship. I held in the judgment that:[57]

> … the only expressions of interest by Ms MacGregor in what might be described as intimate contact with Mr Craig were those made within a few days after the 2011 election. There is no evidence that Ms MacGregor expressed herself in those terms in 2012, 2013 or 2014, and no evidence that Ms MacGregor initiated any form of sexual communication or banter with Mr Craig at any time.

[73] Although it may have been apparent to an objective observer, therefore, that Ms MacGregor never entertained the notion of rekindling the romantic aspects of her relationship with Mr Craig, it is apparent to me that Mr Craig was so absorbed with his own views that he did not recognise this. Even when cross-examining Ms MacGregor on these matters, and receiving negative responses, he clung to the notion of a mutual attraction and emotional closeness – a special relationship – between himself and Ms MacGregor, thwarted by circumstances that required them to keep their relationship professional. I am satisfied that, at least until part of the way through the 2014 election campaign, when Ms MacGregor began to complain about the way Mr Craig was treating her, Mr Craig failed to appreciate that any resumption of romantic intimacy was an entirely unwelcome prospect for her. That is likely to have been contributed to by Ms MacGregor's belief that she could not admonish Mr Craig because she was bound to a working relationship with him by career and financial considerations. The aspects of Mr Craig's personality I have described above played a key role in maintaining his delusion. This is something I alluded to in my judgment:

> [79] …by the time Ms MacGregor returned to work after the 2011-2012 holiday break she did not entertain any romantic or sexual interest in Mr Craig… Ms MacGregor considered it to be important that they should agree on arrangements for the future conduct of their working relationship that precluded any repeat of the election night encounter.

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[57] At [427].

…

[81] Mr Craig… gave evidence about the inner conflict he experienced between his romantic and sexually oriented thoughts about Ms MacGregor and the feelings he had for her, and his acceptance that he could not give them tangible expression through physical intimacy with her. The problem, as I perceive it, is that Mr Craig believed he was entitled to convey his thoughts and feelings verbally to Ms MacGregor, and that she would understand and accept his expression of such sentiments, because she reciprocated his feelings.

…

[427] … in the context of a working relationship which was to continue for over two-and-a-half years, the only expressions of interest by Ms MacGregor in what might be described as intimate contact with Mr Craig were those made within a few days after the 2011 election. There is no evidence that Ms MacGregor expressed herself in those terms in 2012, 2013 or 2014, and no evidence that Ms MacGregor initiated any form of sexual communication or banter with Mr Craig at any time.

…

[431] Mr Craig exploited his clearly dominant position in the relationship and *there is no evidence that he ever considered how that might affect Ms MacGregor's ability to respond to his sexual overtures. Mr Craig did not demonstrate, at any point in his evidence in this proceeding, any understanding of the difficulties created for an employee by an employer's expression of intense feelings of emotional engagement and sexual longing. He never acknowledged the possibility that Ms MacGregor may have felt she could not protest about, and was obliged to tolerate, sexually charged language and conduct for fear of losing her employment or failing to meet her employer's expectations*. Instead, Mr Craig attempted to justify his words and conduct on the basis Ms MacGregor and he had a "special and wonderful" relationship, as if they were engaging in intimate exchanges on equal terms outside the workplace.

[432] Moreover, Mr Craig displayed no appreciation of the potential for Ms MacGregor to be confused by his invitation to her in the February 2012 letter to tell him whether she continued to feel a strong attraction to him and to love him ("while recognising that there are boundaries in place") in view of their having spent time apart and Ms MacGregor having apparently acquired a boyfriend. He failed to address the inherent inconsistency in saying that, while there were "still boundaries", he had left the door open for Ms MacGregor to say if she needed him to kiss her. In the 7 February 2012 letter, Mr Craig expressed "true love" for Ms MacGregor, telling her he cared as deeply for her as someone could ever do, and a few lines later encouraged her to be "a supporter and helper" of his wife, Helen, and to help strengthen and build his marriage. *The extreme irony, if not hypocrisy, of this proposition appears never to have occurred to him. The evidence of Mr Craig's conduct in his relationship with Ms MacGregor and his infatuated attraction to her, while professing to be happily married and a champion of family values, demonstrates that he was somewhat self-absorbed and oblivious to the impact of his behaviour on Ms MacGregor.*

> [433] Mr Craig's lack of insight into the effect of the February 2012 letter on Ms MacGregor coloured his reaction to her response and led him to repeat his behaviour…
>
> (Emphasis added)

[74] These comments are relevant to my assessment of Mr Craig's motives in bringing the proceeding. I also described Mr Craig as "a man who was not only single-minded but also extremely confident in his own judgment and in the correctness of his views".[58] Although made in the context of outlining his political aspirations, that comment is equally applicable to Mr Craig's self-focused perception of his relationship with Ms MacGregor.

[75] It follows that I do not consider Mr Slater is entitled to indemnity costs against Mr Craig. Regardless of what I have said about his relative lack of success in the proceeding overall, I do not think Mr Craig acted vexatiously or improperly in pursuing his claims or resisting the counterclaim. He did not believe that he was guilty of sexually harassing Ms MacGregor. That position may seem wholly unreasonable to many, but it needs to be considered in the light of Ms MacGregor's failure to protest, as explicable as that may have been.

What is the appropriate recovery rate?

[76] Mr Slater seeks scale costs on a 3C basis.

[77] The High Court Rules describe Category 3 proceedings as "proceedings that because of their complexity or significance require counsel to have special skill and experience in the High Court".[59] Factors relevant to fixing the categorisation of a proceeding include:[60]

(a) Whether the case is out of the ordinary run of High Court litigation, with the length of the hearing likely to reflect the complexity of the issues;

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58 At [175].
59 Rule 14.3(1).
60 *Totara Investments Ltd v Abooth Ltd* HC Auckland CIV-2007-404-990, 4 March 2009 at [82] and *Sanford Ltd v Chief Executive of the Ministry of Fisheries* HC Wellington CIV-2009-485-379, 18 February 2010 at [6]-[8].

(b) Whether there are conceptually difficult issues of law and fact;

(c) Whether there is a considerable amount of money involved; and

(d) Whether the case has considerable public significance and the wider community has a significant interest in it.

[78] The mere fact that a proceeding is time intensive does not necessarily render it complex, but it may do so in combination with other factors.[61] These observations of MacKenzie J in *McIlroy v New Zealand ACT Party* are relevant to the decisions in this case:[62]

> [8] …I bear in mind that these are defamation proceedings, and that defamation is a specialised field of practice. The fact that it is a specialised field of practice does not of itself affect the categorisation. The question whether the proceeding is one requiring counsel of average skill and experience or special skill and experience is to be made having regard to the basic requirement that counsel must be expected to be familiar with the relevant specialty involved in the litigation. Defamation proceedings fall, within that specialty, into a range which may require counsel of average or of special skill and experience. A specialist defamation counsel is not necessarily a counsel with special skill and experience for categorisation purposes.

[79] It is pertinent also that the categorisation of a proceeding is dependent upon the proceeding itself, rather than upon the identity of counsel actually instructed.[63]

[80] I am satisfied that Category 3 is appropriate in view of:

(a) the scope and nature of the factual issues;

(b) the complexity of the legal issues, particularly concerning the qualified privileges involved and the new public interest defence; and

(c) the legitimate public interest in the proceeding.

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61 *Body Corporate 170812 v Auckland City Council* HC Auckland CIV-2003-404-7259, 4 August 2008 at [43] and [46].

62 *McIlroy v New Zealand ACT Party* HC Wellington CIV-2003-485-174, 16 December 2005.

63 *McIlroy v New Zealand ACT Party* at [10].

[81] A determination of what is a reasonable time for a step taken in proceeding must be made by reference to band C "if a comparatively large amount of time for the particular step is considered reasonable".[64] Whether a step falls into band B or C turns on the time it takes to complete that particular step; while that may include consideration of the complexity of the matter it also correlates with the volume of the material or evidence that may need to be prepared.[65]

[82] A blanket approach to banding steps taken in a proceeding is neither desirable nor permissible under the High Court Rules.[66] If a party wants other than band B, that party must demonstrate why a normal amount of time for the particular step would be insufficient:[67]

> [8] … Proceedings can be broadly categorised as 1, 2, or 3… Determining what is a reasonable time… is, on the contrary, an exercise to be undertaken, not in a broad-brush way, but on a step by step basis.
>
> [9] … If a costs-claiming party wishes to argue that a particular step required not "a normal amount of time" but rather "a comparatively large amount of time", then that party must, in the absence of agreement from the party opposing costs, explain why the step did require "a comparatively large amount of time". [Counsel] provided no such explanation in this case. From my knowledge of the file, no step in respect of which costs are currently being claimed seems to me other than "normal".

[83] For Mr Slater, Mr Henry has not explained why each, or indeed any, of the steps involved in the proceeding took a comparatively large amount of time. Rather, he asks the Court to undertake a blanket assessment for banding. As has been made clear by the Court of Appeal, that approach is not desirable. Mr Slater has provided the Court with the monthly invoices charged to him by Mr Henry. However, the invoices simply set out the total hours of work completed by Mr Henry (and Ms Foster) in each month. They do not specify how much time was spent on which steps in the proceeding. I am unable, therefore, to assess whether the time allocated to a particular step by band C might be reasonable by reference to the actual time spent by counsel for Mr Slater on that step.

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64 High Court Rules 2016, r 14.5(2)(c).

65 *Mary Moodie Family Trust Board v Attorney-General* [2016] NZHC 755, (2016) 23 PRNZ 180 at [6].

66 *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] NZCA 544, (2007) 18 PRNZ 743 at [35]; see also *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2010] NZCA 400, (2010) 24 NZTC 24,500 at [161].

67 *Beach Road Preservation Society Inc v Whangarei District Council* (2001) 16 PRNZ 13 (HC).

[84] It follows that I am unable to accept Mr Slater's proposition that band C should apply to any award of costs made in his favour. Costs should be awarded to Mr Slater on a 3B basis.

Disposition

[85] The saga that is this case needs to be brought to an end. I do not think it is desirable to add more delay by requesting further information from Mr Slater. The principles I have discussed should be applied as well as they can be to the material provided. On that basis, I direct that the award of costs to Mr Slater is to be calculated as follows:

(a) Mr Slater shall not receive costs for any interlocutory step taken in pursuing the counterclaim against Mr Craig.

(b) Because of the difficulty in identifying from the information provided how much of the preparatory work for which costs are sought under item 33 in Schedule 3 related to the counterclaim, I direct that the costs claimed under item 33 shall be discounted by 10 per cent. That is the amount which I consider reasonably accords with the trial time spent addressing the counterclaim.

(c) Costs may be claimed under item 35 for the appearance of second counsel at the hearing.

(d) Because of the difficulty in identifying with precision how much of the trial time was occupied by the counterclaim, I direct that the costs of both counsel under items 34 and 35 in Schedule 3 shall be discounted by 10 per cent. That is consistent with the approach I have taken to the cost of preparation under subparagraph (b).

(e) A further deduction is to be made to reflect the limited success that Mr Craig enjoyed on the substantive claim. On that account, the amount of costs payable by Mr Craig shall be reduced to 90 per cent of all costs and disbursements to be paid in accordance with the

calculations under the Rules and subparagraphs (a) to (d) of this paragraph.

[86] Any party shall have leave to apply for further directions if they are considered necessary to explain the approach to the calculations, but not otherwise.

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Toogood J