FEDERAL COURT OF AUSTRALIA

Greiss v Seven Network Operations Ltd (Costs) [2024] FCA 377

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| File number: |  |
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| Judgment of: | **KATZMANN J** |
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| Date of judgment: | 16 April 2024 |
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| Catchwords: | **COSTS** – action for defamation – where applicant sued on three publications and succeeded on only one – where respondents allege applicant engaged in disentitling conduct – where award was less than $100,000 – whether respondents should pay applicant’s costs – whether applicant should be required to pay a substantial portion of respondents’ costs – whether costs should be reduced by a specified amount under r 40.08(a) of *Federal Court Rules 2011* (Cth) |
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| Legislation: | *Acts Interpretation Act 1901* (Cth) s 25B  *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 25(1)(c)  *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2021* (Cth) Sch 5 Pt 2  *Federal Court of Australia Act 1976* (Cth) ss 32AB(8A), 37M(3), 37N, 43  *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) s 9(3)  *Federal Court Rules 2011* (Cth) rr 1.40, 40.08  *Defamation Act 2005* (NSW) s 40(1)  *Jurisdiction of Courts (Cross-vesting) Act 1993* (ACT) s 4  *Legislation Act 2001* (ACT) s 183 |
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| Cases cited: | *Crosby v Kelly* (2012) 203 FCR 451  *El-Debel v Micheletto (Trustee) (No 2)* [2021] FCAFC 146  *Gray v Richards* (2014) 252 CLR 601  *Latoudis v Casey* (1990) 170 CLR 534  *Les Laboratoires Servier v Apotex Pty Ltd* (2016) 247 FCR 61  *Palmer v McGowan (No 6)* [2022] FCA 927; 405 ALR 462  *Rana v Google Inc* (2017)254 FCR 1  *Rawley Pty Ltd v Bell (No 3)* [2007] FCA 142  *Russell v Australian Broadcasting Corporation (No 4)* [2023] FCA 1279  *Umoona Tjutagku Health Service Aboriginal Corporation v Walsh* (2019) 268 FCR 401 |
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| Division: | General Division |
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| Registry: | New South Wales |
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| National Practice Area: | Other Federal Jurisdiction |
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| Date of hearing: | Determined on the papers |
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| Counsel for the Applicant | Ms S T Chrysanthou SC with Mr N G Olson |
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| Solicitor for the Respondents | Addisons |
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ORDERS

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|  | | NSD 292 of 2022 |
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| BETWEEN: | MINA GREISS  Applicant | |
| AND: | SEVEN NETWORK (OPERATIONS) LIMITED  First Respondent  LEONIE RYAN  Second Respondent | |

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| order made by: | KATZMANN J |
| DATE OF ORDER: | 16 APRIL 2024 |

THE COURT ORDERS THAT:

1. The first respondent pay the applicant’s costs on a party and party basis to be calculated as if the proceedings had been brought in the District Court of New South Wales.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

KATZMANN J:

1 In this proceeding Mina **Greiss** claimed to have been defamed in three publications and to be entitled to a substantial award of damages (including aggravated damages) for the harm they caused him. The first matter complained of was an article appearing on the 7News website (the **article**), the second a Facebook post on the 7News Facebook account (the **Facebook post**), both published by **Seven** Network (Operations) Limited. The third was a tweet from a journalist, Leonie Ryan (the **Ryan tweet** or **tweet**). These publications related to Mr Greiss’s conduct outside the Newcastle courthouse following the sentencing of the well-known rugby league player, Jarryd Hayne, for the sexual assault of a young woman. Mr Greiss is a friend of Mr Hayne who attended court that day to support him. After the victim emerged from the building in the company of detectives and the Crown prosecutor, Mr Greiss rose from his seat outside the building and moved towards the group. In her tweet, published a few minutes after the victim had left the court precinct, and which was accompanied by a photograph of Mr Greiss, Ms Ryan wrote:

Foul behaviour outside court following Jarryd Hayne’s sentence. One of his supporters stared his victim down and spat in her direction.

Share far & wide guys.

A grub right here.

2 The article included similar statements. The Facebook post reported that Mr Greiss “spat at” the victim.

3 Later, on the footpath in front of the courthouse, there was an exchange between Mr Greiss and Ms Ryan which was captured by television cameras. In that exchange Mr Greiss admitted to spitting towards the victim. He also derided the victim, describing her as “an escort”, by which he meant that she was a prostitute, conceding in cross-examination that he meant to convey that she was a person of little worth.

4 There was no dispute that the pleaded imputations were conveyed and that they were defamatory. The dispute concerned the respondents’ defences of justification, contextual truth and honest opinion. The contextual truth defence was raised only in relation to the article and the Ryan tweet. I found that the defence of justification was not made out and the defence of honest opinion was made out in relation to the Ryan tweet but not otherwise. But I upheld the contextual truth defence to the article and the Ryan tweet . In short, I was satisfied that Mr Greiss spat towards the victim or in her direction but I was not satisfied that he stared her down or spat at her. In the result, Mr Greiss’s case concerning the article and tweet failed but his case concerning the Facebook post succeeded.

5 In relation to the second matter I awarded damages of $35,000 plus pre-judgment interest (a total of $37,940) and dismissed the claim for aggravated damages. The sum largely reflected my assessment of his claim for hurt feelings as I considered that he was entitled to no more than a nominal sum for damage to his reputation and as vindication. I reserved the question of costs and made orders for the filing of any evidence and submissions. See *Greiss v Seven Network (Operations) Limited (No 2)* [2024] FCA 98 (the **liability judgment** or **LJ**). Some familiarity with the liability judgment is assumed.

## The evidence

6 Mr Greiss filed an affidavit from his solicitor, Margaret Antunes, attaching a raft of documents, some of which, such as the concerns notice and the response to it, were already in evidence. Among the documents were several offers of settlement, including an offer of compromise made on 20 October 2022 and a without prejudice offer from the respondents made on 8 March 2023.

7 In a letter sent to the respondents on 9 August 2021 which was accompanied by a draft originating application and statement of claim, Mr Greiss offered to settle the dispute on the following terms:

1. Immediate removal and deletion of the Article, Facebook post, Tweet and any other publication repeating the allegation that our client spat at or towards a rape victim;

2. An unreserved apology and retraction to be immediately published on the 7news website (homepage for 21 days in a clear position in a size and font consistent with other news texts on that website), 7news Facebook account (never to be deleted) and Ryan’s Twitter account (never to be deleted) as follows:

APOLOGY TO MINA GREISS

In May 2021 7news and Leonie Ryan published social media posts and an article alleging that Jarryd Hayne supporter Mina Greiss had spat at or towards the woman who accused Hayne of rape and stared her down outside of Court.

These allegations were false and defamatory and are unreservedly retracted and withdrawn by 7news and Leonie Ryan - the video footage from the day shows that he did not do these things. We apologise to Mr Greiss for the hurt and harm that has been caused to him as a result of our false publications.

The apology is to be accompanied by the photo of our client used in each of the publications.

3. Pay our client’s reasonable costs of this dispute.

4. Pay our client damages for the harm caused to him as a result of the publications:

a. $125,000 within 14 days of acceptance of this offer; OR

b. an amount to be determined by the Court (by accepting this offer now our client will accept payment of 15% less than any amount so determined).

8 The respondents responded by rejecting the offer but, “as a gesture of goodwill” and without admissions, agreed to remove the publications.

9 The offer of compromise made on 20 October 2022 was in these terms:

Mr Greiss offers to compromise the proceeding as follows:

1. Judgment in favour of [Mr Greiss] against the Respondents for $49,000.

2. This offer is made in addition to [Mr Greiss’s] costs of the proceedings as agreed or taxed.

3. This offer is made in accordance with Part 25 of the Federal Court Rules 2011.

For avoidance of doubt, this offer will only be effective if accepted by all Respondents.

This offer of compromise is open to be accepted for 14 days after service of this offer of compromise.

The amount of the offer will be paid within 28 days after acceptance of this offer.

This offer is made without prejudice except as to costs.

10 The respondents’ offer, made on 8 March 2023 — five days before the trial was due to start, was a *Calderbank* offer in the following terms:

1. Our clients pay your client $40,000 inclusive of costs.

2. The proceedings be discontinued with no order as to costs.

3. Payment within 28 days of acceptance of this offer.

4. The terms of the offer remain confidential.

The offer is open for acceptance until 9am on Monday 13 March 2023 after which time it is withdrawn.

## The relevant principles

11 Section 43 of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) confers a broad discretion on the Court with respect to costs, limited for present purposes only by the need to act judicially and by the obligations imposed by Pt VB of the Act. One of those obligations is contained in s 37M(3), which relevantly provides that the Court must exercise any power conferred on it by the civil practice and procedure provisions of the Act and the Rules of Court made under the Act in the way that best promotes their overarching purpose. That purpose is described in s 37M(1). It is to facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible.

12 The parties and their lawyers have similar obligations. They are imposed by s 37N which relevantly provides that:

(1) The parties to a civil proceeding before the Court must conduct the proceeding … in a way that is consistent with the overarching purpose.

(2) A party’s lawyer must, in the conduct of a civil proceeding before the Court … on the party’s behalf:

(a) take account of the duty imposed on the party by subsection (1); and (b) assist the party to comply with the duty.

…

(4) In exercising the discretion to award costs in a civil proceeding, the Court or a Judge must take account of any failure to comply with the duty imposed by subsection (1) or (2).

…

13 Further, s 40(1) of the *Defamation Act 2005* (NSW) entitles the Court to take into account in awarding costs the way in which the parties conducted their cases and any other matters the Court considers relevant.

14 Generally speaking, the discretion to award costs is exercised in favour of the successful party but other factors may have “a significant claim” on that discretion and where there are competing considerations the exercise of the discretion “will reflect a broad evaluative judgment of what justice requires”: *Gray v Richards* (2014) 252 CLR 601 at 681 [2] (French CJ, Hayne, Bell, Gageler and Keane JJ). In *Les Laboratoires Servier v Apotex Pty Ltd* (2016) 247 FCR 61 at [303] the Full Court (Bennett, Besanko and Beach JJ) observed:

Without amounting to an absolute rule, the principle remains that, subject to certain limited exceptions generally linked to the disentitling conduct of the successful party, a successful party in litigation is entitled to an award of costs… That is not to punish the unsuccessful party but to compensate the successful party. There is no absolute rule that, in the absence of disentitling conduct, a successful party is entitled to be compensated by the unsuccessful party, nor is there a rule that there is no jurisdiction to order a successful party to bear the costs of the unsuccessful party ... However, the Courts have been slow to order a successful party to pay the costs where it has been unsuccessful on some issues.

15 Where, as here, Mr Greiss had limited success, the parties agree that the guiding principles were as described by the Full Court (Markovic, Derrington and Colvin JJ) in *El-Debel v Micheletto (Trustee) (No 2)* [2021] FCAFC 146at [4]:

Where there has been mixed success three aspects generally assume significance in guiding the exercise of the discretion. First, an assessment as to whether one party has enjoyed real practical success. Second, a reluctance on the part of the Court to assess costs on an issue by issue basis because the Court has an eye to the interests of justice in bringing finality to the dispute and the diminishing returns involved in expending further time and costs in identifying the extent to which costs related to particular aspects of the conduct of the proceedings. Third, a preference for adjustments by way of percentage reductions made on a broad brush approach taking account of the degree of success and the likely extent of costs associated with that aspect of the case ...

16 Rule 40.08(a) of the *Federal Court Rules 2011* (Cth) read with r 1.40 gives the Court express power to order that any costs and disbursements payable by one party to another be reduced by a specified amount if Mr Greiss’s claim is for damages and he has been awarded less than $100,000. The policy behind the rule is to discourage the bringing of proceedings in this Court which might more appropriately be brought elsewhere: *Umoona Tjutagku Health Service Aboriginal Corporation v Walsh* (2019) 268 FCR 401 at [59] (White, Perry and Banks‑Smith JJ).

## The submissions

17 Neither side argued for an issue by issue approach. Nor would it have been appropriate. As Mr Greiss submitted, the respondents’ success was not in relation to issues which were clearly distinct or severable from the issues in relation to which Mr Greiss succeeded.

18 Mr Greiss submitted that an order should be made that the respondents pay his costs on the ordinary basis as he received judgment in his favour and was awarded “substantial damages”. He claims that the three matters were of equal importance and their publication was part of a single course of conduct by the respondents and raised the same issues. He accepted that the power in r 40.08(a) was enlivened, but argued that it was not inappropriate to commence proceedings in this Court. He submitted that, while this Court has jurisdiction through s 9(3) of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth) (the **Cross-vesting Act**) (see *Crosby v Kelly* (2012) 203 FCR 451 at [35]; *Rana v Google Inc* (2017)254 FCR 1 at [24]), the Federal Circuit and Family Court of Australia (**FCFCoA**) does not, unless the proceeding were transferred to it from this Court (under s 32AB(8A) of the FCA Act) and the respondents did not apply for a transfer. In *Crosby v Kelly* at [35], Robinson J explained that s 9(3) of the Cross-vesting Act picks up, as Commonwealth law, the jurisdiction of the ACT Supreme Court to hear and determine a defamation suit. The effect of Mr Greiss’s submission is that the FCFCoA did not have jurisdiction in defamation matters because s 4 of the *Jurisdiction of Courts (Cross-vesting) Act 1993* (ACT) (**ACT Cross-vesting Act**) vests jurisdiction in respect of “ACT matters” in this Court but not in the FCFCoA.

19 In any case, Mr Greiss submitted, the proceedings related to publications by a major media organisation and a journalist which were seen by hundreds of thousands of people, the defamation was serious, and provoked a barrage of hateful comments and threats, including threats of physical harm, such that, all other things being equal, he would likely have been awarded well in excess of $100,000.

20 Mr Greiss also relied on the fact that the contextual truth defence, which defeated the claims with respect to the article and the Ryan tweet, was raised very late in the proceedings. He contended that, had it been pleaded earlier, a different approach might have been taken to the compromise of the proceedings. He referred to the offer of settlement he made on 9 August 2021, before the proceedings were commenced, claiming that “at least insofar as it provided for the assessment of damages by the Court” it was a reasonable one and the offer of compromise made on 20 October 2022 which, though insufficient to entitle him to indemnity costs, was “indicative of a realistic and reasonable attitude on his part to the compromise of the dispute”, especially since it was made before the defence was amended. In contrast, he submitted that the respondents’ approach to settlement was unreasonable.

21 The respondents, on the other hand, seek an order that Mr Greiss pay 50% of their costs on the ordinary basis or, in the alternative, an amount of up to 49% of their costs. In substance, they contend that Mr Greiss had but a pyrrhic victory. As they put it, it was they, not Mr Greiss, who “enjoyed real practical success”. They submitted that the effect of the judgment is that their version of events was substantially accepted and Mr Greiss’s substantially rejected. They argued that Mr Greiss commenced the proceeding “on the basis of dishonest evidence” and called in aid the *obiter* remarks made by Lee J in *Russell v Australian Broadcasting Corporation (No 4)* [2023] FCA 1279 at [14]:

I made a finding that Mr Russell gave deliberately false evidence to the Court. It is obvious, but worth remarking, that it is fundamental to the *just* resolution of disputes that a witness tells the truth. Absent the consent of the respondents, I would have concluded that I would be acting in a manner contrary to facilitating the overarching purpose to allow Mr Russell any of his costs relating to dealing with the subject matter of his false evidence and the time spent by the respondents and the Court in dealing with this issue. To the extent I would have been required to consider onus in making a different order than as provided for upon rejection of an offer of compromise, this finding would have represented the discharge of any such onus.

22 The respondents submitted that it was an oversimplification to characterise the proceedings, as Mr Greiss did, as one in which he received judgment in his favour and was awarded “substantial damages” and inaccurate to submit that he had “overall success”. They referred to their success in defending the first and third matters and claimed that only “nominal damages” were awarded to Mr Greiss for the second matter.

23 If the Court were disposed to award costs to Mr Greiss, however, the respondents applied under r 40.08 to have his costs reduced by at least 75%. In support of that submission, the respondents contended that the proceedings could have been brought in the District Court of New South Wales, which at the time of filing had a monetary jurisdiction of $750,000, and, contrary to Mr Greiss’s submission, the FCFCoA has jurisdiction to hear defamation matters.

## Consideration

24 Under no circumstances should Ms Ryan be required to pay Mr Greiss’s costs. She was only a respondent in relation to the claim arising from her tweet (the third matter complained of) and she was wholly successful. Ordinarily, this would mean that she would be entitled to an award of costs in her favour but no such application was made, presumably because her costs were (or were also) Seven’s costs.

25 Further, I am unpersuaded by the submission that, had the contextual truth defence been raised earlier, Mr Greiss might have taken a different approach to the compromise of the proceedings. There is no evidence to support it and such evidence as there is, including Mr Greiss’s evidence at the trial, suggests it is unlikely. It is true that, in resisting the respondents’ application to amend their pleading to raise the additional defence, Mr Greiss submitted that he was prejudiced. But I found the submission to be unjustified (at LJ[82]–[83]). As the respondents put it, Mr Greiss failed to identify any prejudice to his forensic decision-making when given the opportunity to do so.

26 It is also incorrect to say that the respondents only succeeded because of the contextual truth defence, as the facts upon which it was based were in any event relevant to mitigation of damages.

27 Mr Greiss accepted that the award was low. Whether it can be described as substantial is debatable. A more apt description would be modest.

28 There is much to be said in favour of the respondents’ position.

29 As I mentioned earlier, there was no dispute that the pleaded imputations (or imputations no different in substance) were conveyed and that each was defamatory.

30 In the case of the first matter complained of (the article) those imputations were that:

(1) Mr Greiss engaged in the vile act of staring down and spitting towards Mr Hayne’s rape victim;

(2) Mr Greiss stared down and spat in the direction of Mr Hayne’s rape victim;

(3) Mr Greiss is despicable, in that he stared down and spat in the direction of Mr Hayne’s rape victim; and

(4) Mr Greiss sought to harass and intimidate Mr Hayne’s rape victim by staring her down and spitting at her.

31 In the case of the third matter (the Ryan tweet), they were imputations (2), (3) and (4) above.

32 In the case of the second matter (the Facebook post), they were:

(1) Mr Greiss spat at a rape victim outside court; and

(2) Mr Greiss is despicable, in that he spat at a rape victim outside court.

33 Broadly speaking, the issues in the trial were:

(1) whether the defences of justification, honest opinion and/or contextual truth had been made out; and

(2) if not:

(i) the extent to which any of the matters relied upon to prove those defences mitigates damages;

(ii) whether Mr Greiss had made out a case for aggravated damages; and

(iii) the amount, if any, of damages that should be awarded.

34 The respondents invited the Court to make the following factual findings about Mr Greiss’s conduct:

(1) Mr Greiss’s attention was focussed on the victim from the moment he stood up to the moment the victim left the court precinct (Fact 1);

(2) Mr Greiss stared at the rape victim (Fact 2);

(3) Mr Greiss pointed at the rape victim (Fact 3);

(4) Mr Greiss made pejorative statements to the rape victim as she passed by him (Fact 4);

(5) at the time Mr Greiss’s head made a downward motion on the CCTV, he spat (Fact 5);

(6) Mr Greiss spat in the direction of the rape victim (Fact 6);

(7) Mr Greiss intended for his spit to be a sign of disgust and contempt for the rape victim (Fact 7);

(8) Mr Greiss called the rape victim an escort on two separate occasions and urged the media to publish this allegation (Fact 8);

(9) Mr Greiss intended to harm the rape victim by calling her an escort (Fact 9); and

(10) the conduct referred to in Facts 1 to 9 above is disgraceful (Fact 10).

35 I found that all but one of these matters (Fact 4) had been proved (LJ[202]).

36 At the trial, despite what he told Ms Ryan shortly after the event, Mr Greiss denied having any interest in the victim. He claimed not to have been looking at her, let alone staring her down, and in his evidence in chief he insisted he did not spit at all, let alone towards or at the victim or in her direction until after the victim had left the court precinct. He also denied pointing at her. He initially denied asking Ms Ryan (rhetorically): “Did you put that she’s an escort?” He also denied that he wanted the media to write about the victim, although he ultimately accepted that he did ask the question of Ms Ryan and urged the journalists to report that she was an escort. He claimed to have nothing against the victim. Yet he said he wanted them to report that she was an escort because he believed she falsely accused his friend of rape and was responsible for his imprisonment. He denied that his comment “yeah, exactly” was made in response to his friend, Mr Petras, stating that “he should spit on [Ms Ryan]”, although it was uttered immediately after his friend’s statement. While video footage confirmed that, immediately before he spat towards Ms Ryan, he said “here’s another one for ya”, he denied that he was referring to his earlier spit towards the victim.

37 Despite his denials, I was satisfied that Mr Greiss spat towards the victim or in her direction as she left the court precinct. But the justification defence failed because I was not satisfied that Mr Greiss also stared the victim down, although I was satisfied (despite his protestations to the contrary) that he stared at the victim, and because I was not satisfied that Mr Greiss spat at the victim.

38 The contextual imputation pleaded by the respondents was to the effect that Mr Greiss had behaved disgracefully outside court to the woman Mr Hayne had been sentenced for raping. In substance it relied on Mr Greiss staring at the victim (rather than staring her down), spitting in her direction as she passed by him (rather than spitting at her) and his comments on the street in front of the media in which he referred to her as an escort. The particulars were in the following terms:

1. In March 2021, Mr Jarryd Hayne was found guilty of two charges of sexual assault without consent (Hayne Proceedings). Mr Hayne was to be sentenced on 6 May 2021.

2. On 6 May 2021, Mr Greiss attended Newcastle Court House to support Mr Hayne and his family at the sentencing hearing.

3. At the sentencing hearing, Mr Hayne was sentenced to 5 years and nine months in gaol.

4. Mr Greiss did not consider the sentence to be justified, for reasons including that he alleged the Victim was an escort.

5. After the sentencing hearing occurred, Mr Greiss stood with other supporters of Mr Hayne outside of the court building in an area next to a walkway, which walkway hugged the court building (Walkway).

6. When the victim in the Hayne Proceedings (Victim) left the court building, she left via the Walkway.

7. Mr Greiss faced the Walkway and stared at the Victim and spat in her direction as she passed by him to exit the court precinct.

8. After the Victim had left the Court precinct Mr Greiss described her as an “escort” to a member of the media.

9. The imputations pleaded in paragraphs 5(a)-(d), 8(a)-(b) and 11(a)-(c) of the ASOC are substantially true by reason of the facts, matters and circumstances set out in particulars 1 to 8 above.

39 In finding that the contextual imputation was conveyed, I said (at LJ[318]):

Ordinary decent people would regard any expression of contempt for a sexual assault victim as disgraceful, particularly when, as in the case of the first matter, they were informed that the sexual assault was “brutal” and that “the vile act” of Mr Greiss spitting in the victim’s direction had occurred “just hours after she declared that [her assailant] had destroyed her life …”.

40 I found that the contextual imputation was substantially true (at LJ[327]) and that such of the pleaded imputations which were not found to be substantially true did no further harm to Mr Greiss’s reputation. As I said at LJ[328]:

In circumstances in which I am satisfied that Mr Greiss spat towards the victim as a gesture of his contempt for her and publicly denounced her as a prostitute signifying that she was a person of little worth, I am persuaded that no further harm was done to his reputation by the imputation that he stared the victim down. I would add that if I am wrong to conclude that Mr Greiss spat towards the victim, the outcome would be no different as, regardless, I am satisfied that it was a gesture of his contempt for her.

41 Consequently, it is fair to say, as the respondents submitted, that I rejected the substance of Mr Greiss’s story. I also made some damning findings about his credibility.

42 Still, I accept Mr Greiss’s submission that I should not conclude that he brought the proceedings on a knowingly false basis. If that submission were to be made, it seems to me it should have been squarely put to Mr Greiss in cross-examination. While it was put to him in cross-examination that he lied about certain aspects of his evidence, it was never put to him that he brought the proceedings on a knowingly false basis. In any event, it is difficult to accept that Mr Greiss brought the proceedings on a knowingly false basis in circumstances where he succeeded in his claim in relation to the Facebook post. In my opinion, it would not be just to deny him any costs and require him to pay up to 50% of the respondents’ costs in circumstances in which he was admittedly defamed in three publications and recovered an award of damages in one. Besides, costs are not awarded by way of punishment of the unsuccessful party but as compensation by way of an indemnity to the successful party: *Latoudis v Casey* (1990) 170 CLR 534 at 543 (Mason CJ), 562–563 (Toohey J), 566–567 (McHugh J).

43 Moreover, it is incorrect to say that I awarded Mr Greiss “nominal damages”. What I said was that I would give him only a nominal sum for the damage to his reputation and as vindication (at LJ[418]). But damages in defamation are also recoverable for hurt feelings and I accepted Mr Greiss’s evidence on this subject (at LJ[419]). Thus, while I accept that Ms Ryan should not have to pay any costs, I do not accept the respondents’ argument that a costs order should be made in favour of Seven. As Lee J remarked in *Palmer v McGowan (No 6)* [2022] FCA 927; 405 ALR 462 at [34], “it would be wrong to make an award in favour of the party against whom judgment was obtained, albeit a very modest one”. I also take into account the fact that Mr Greiss made an offer of compromise which, though insufficient to give him a prima facie entitlement to indemnity costs, was only about $11,000 more than the judgment sum.

44 On the other hand, I do not think that the circumstances justify the award Mr Greiss seeks.

45 It is true, as Mr Greiss said in his submissions in reply, that the FCFCoA (Div 2) would not have jurisdiction to hear a defamation action unless the Court made an order transferring the proceedings. But it appears to be incorrect to say that the FCFCoA did not have jurisdiction. Section 9(3) of the Cross-vesting Act has the effect of conferring both on this Court and the FCFCoA (Div 1) jurisdiction to hear and determine matters within the jurisdiction of the ACT or Northern Territory Supreme Courts and s 25(1)(c) of the *Federal Circuit and Family Court of Australia Act 2021* (Cth)provides that the FCFCoA (Div 1) has original jurisdiction “as is conferred on the Court … by any other Act”.

46 Section 4(2) of the ACT Cross-vesting Act confers jurisdiction on the Family Court in the same terms as s 4(1) confers jurisdiction on this Court. Contrary to Mr Greiss’s submission, the reference to the “Family Court” in s 4 of the ACT Cross-vesting Act must be taken to be a reference to the FCFCoA (Div 1) by reason of Sch 5 Pt 2 of the *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2021* (Cth), s 25B of the *Acts Interpretation Act 1901* (Cth) and s 183(2)–(3) of the *Legislation Act 2001* (ACT).

47 Even so, assuming that the FCFCoA (Div 1) has jurisdiction to hear defamation actions within the jurisdiction of the ACT or Northern Territory Supreme Courts, however, I simply do not know whether it would be cheaper to litigate such a claim in that Court.

48 At all events, it is unnecessary for me to express a final view as to whether the FCFCoA (Div 1) would have had jurisdiction because there is no good reason why Mr Greiss could not have commenced his action in the District Court of NSW. Had he been wholly successful, it is inconceivable that he would have recovered damages anywhere near its jurisdictional limit of $750,000. His only claim was for non-economic loss and, absent an award of aggravated damages, the maximum award at the time was $459,000.

49 That circumstance alone suggests that costs should be reduced. There is no particular reason why the proceedings should have been filed in this Court. Certainly Mr Greiss did not offer one. I find it difficult to determine a specified amount by which costs should be reduced, as r 40.08(a) requires. In this case it would be arbitrary to opt for a percentage, as Finn J did in *Rawley Pty Ltd v Bell (No 3)* [2007] FCA 1429. While this was the approach the respondents argued for, they made no attempt to explain why their proposed figure was appropriate or how I might fix a different figure if I were not minded to accept their proposal. In my opinion, the most appropriate order is that Seven pay Mr Greiss’s costs on a party and party basis, to be calculated as if the proceeding had been commenced in the District Court.

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| I certify that the preceding forty-nine (49) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Katzmann. |

Associate:

Dated: 16 April 2024