Federal Court of Australia

 Stead v Fairfax Media Publications Pty Ltd (No 2) [2021] FCA 65

|  |  |
| --- | --- |
| File number: |  |
|  |  |
| Judgment of: | **LEE J** |
|  |  |
| Date of judgment: | 8 February 2021 |
|  |  |
| Catchwords: | **PRACTICE AND PROCEDURE –** distinction between verdict and judgment at common law – order in terms of verdict and judgment in judge alone trial ahistorical – order for judgment only **COSTS –** whether to award indemnity costs – whether rejection of first offer of compromise unreasonable – assessment of whether judgment obtained was more favourable than the terms of the first offer – artificiality in assessing success of claim by reference to the different causes of action and imputations pleaded – need to assess whether, as a matter of substance, one state of affairs (that provided for by the judgment) is more favourable than another state of affairs (that provided for by the offer) – rejection of offer unreasonable – indemnity costs awarded in accordance with r 25.14(3) of the *Federal Court Rules 2011* (Cth) |
|  |  |
| Legislation: | *Evidence Act 1995* (Cth) s 131*Federal Court of Australia Act 1976* (Cth) ss 23, 37M, 43 53A, 53B*Federal Court Rules 2011* (Cth) r 25*Defamation Act 2005* (NSW) s 40*Supreme Court Rules 1970* (NSW) Pt 22 (prior to amendment by *Supreme Court Act 1970 - Supreme Court Rules (Amendment No 405) 2005 (2005-407)* (NSW)) |
|  |  |
| Cases cited: | *CGU Insurance Ltd v Corrections Corporation of Australia Staff Superannuation Ltd* [2008] FCAFC 173; (2009) 15 ANZ Insurance Cases 61-785*Commercial Union Assurance Company of Australia Limited v Pelosi (No 2)* (unreported, NSWCA, Handley, Sheller and Powell JJA, 27 February 1996)*Ettingshausen v Australian Consolidated Press Ltd* (1995) 38 NSWLR 404*Fotheringham v Fotheringham (No 2)* [1999] NSWCA 21*Minister Administering the Environmental Planning and Assessment Act 1979 v Carson* (1994) 35 NSWLR 342*NH v Director of Public Prosecutions for the State of South Australia* [2016] HCA 33; (2016) 260 CLR 546*Otis Elevators Pty Ltd v Zitis* (1986) 5 NSWLR 171*Phillips v Ellinson Brothers Pty Ltd* (1941) 65 CLR 221 |
|  |  |
| Division: | General Division |
|  |  |
| Registry: | New South Wales |
|  |  |
| National Practice Area: | Other Federal Jurisdiction |
|  |  |
| Number of paragraphs: | 31 |
|  |  |
| Date of hearing: | 4 February 2021  |
|  |  |
| Counsel for the Applicant: | Ms S Chrysanthou SC and Mr B Dean |
|  |  |
| Solicitor for the Applicant: | Corrs Chambers Westgarth |
|  |  |
| Counsel for the Respondents: | Ms L Barnett |
|  |  |
| Solicitor for the Respondents: | Banki Haddock Fiora |

ORDERS

|  |  |
| --- | --- |
|  | NSD 2153 of 2019 |
|   |
| BETWEEN: | ELAINE STEADApplicant |
| AND: | FAIRFAX MEDIA PUBLICATIONS PTY LTD (ACN 003 357 720)First RespondentJOE ASTONSecond Respondent |

|  |  |
| --- | --- |
| order made by: | LEE J |
| DATE OF ORDER: | 8 February 2021 |

THE COURT ORDERS THAT:

1. Judgment be entered for the applicant against the respondents in the sum of $296,500.
2. The respondents pay the applicant’s costs of the proceeding (including any costs the subject of previous costs orders or any reserved costs) from 11am on 22 April 2020 on an indemnity basis, and otherwise on a party and party basis.
3. By 4pm on 9 January 2021, the applicant is to notify the Associate to Justice Lee and the respondents of any application for a lump sum costs order in which case, subject to any request to be heard further by any party being received prior to 4pm on 10 January 2021, orders will be made in Chambers which, in the opinion of the Court, facilitate the determination of the lump sum costs assessment as quickly, inexpensively and efficiently as possible.

REASONS FOR JUDGMENT

LEE J:

# A INTRODUCTION

1. In the primary judgment, *Stead v Fairfax Media Publications Pty Ltd* [2021] FCA 15 (**PJ**) (at [314]), I directed the parties to provide a minute of order to give effect to my reasons. I did so conscious of the fact that there may be a residuum of dispute as to three areas, namely: (a) whether Fairfax and Mr Aston should be enjoined, as initially sought by Dr Stead; (b) the quantum of any interest; and (c) the appropriate order as to costs.
2. As it has turned out, the parties have commendably resolved all issues other than as to costs, and I have been provided with a minute of order by which the parties have agreed that the following order should be made to reflect the reasons:

Verdict and judgment be entered for Dr Stead in the sum of $280,000, plus interest in the sum of $16,500.

1. It follows that there are only two outstanding issues: *first*, whether an order should be made in the terms proposed by the parties; and *secondly*, the appropriate order that should be made as to costs.
2. I will deal with each of these issues in turn. For clarity, I note that all defined terms are as set out in the PJ unless otherwise stated.

# B THE PROPOSED ORDER

1. I do not propose to make the order in the minute provided to the Court. I should explain why.
2. As was noted in *NH v Director of Public Prosecutions for the State of South Australia* [2016] HCA 33; (2016) 260 CLR 546 (at 584 [78] per French CJ, Kiefel and Bell JJ), the “juristic character of a verdict is a collective act of [a] **jury**”. Speaking in broad terms, a verdict at common law is the opinion of a jury on a question of fact in a civil or criminal proceeding. A general verdict, however, “involves a compound of law, fact, and the application of law to fact”: *Otis Elevators Pty Ltd v Zitis* (1986) 5 NSWLR 171 (at 197 per McHugh JA). What is evident is that historically, irrespective as to whether the verdict is general or special, there is a fundamental difference between a verdict and a judgment.
3. At common law, no judgment could be entered without the verdict of a jury: *Phillips v Ellinson Brothers Pty Ltd* (1941) 65 CLR 221 (at 228–9 per Rich J). The verdict of the jury could be a general verdict, a special verdict or a notional general verdict subject to the decision of the Court on a special case.
4. Initially, at common law, it was the exchange of pleadings at Westminster which settled the issues for determination and upon their identification they contained one or more questions to which a jury could either answer yes or no. When the jury gave a verdict which answered the questions in the issues for trial under the *nisi prius* system, a *postea* was awarded to the successful party upon receipt of the verdict and the successful party then moved the full court for judgment at the beginning of the next term. Unless an unsuccessful party was able to move for a new trial (or for some reason was entitled to judgment notwithstanding the verdict), judgment would then be recorded in the records of the Court in favour of the party to whom the *postea* had been awarded.
5. As Young A-JA explained in *Minister Administering the Environmental Planning and Assessment Act 1979 v Carson* (1994) 35 NSWLR 342 (at 358–61), these early processes were the subject of pre-*Judicature Act*, common law procedural reform in the early part of the 19th Century, but in New South Wales, prior to procedural fusion in 1972, at common law, the prevailing procedures always reflected the fundamental distinction between verdict (as an act of a jury) and judgment (the entry of which was an act of a judge or judges). Although the separate step of bringing a separate motion for the entry of judgment had been replaced by the judge ordering judgment after receipt of a verdict (subject to any application that may be made not to proceed with this course), in the Supreme Court, after the jury’s verdict was taken, the Associate endorsed the verdict on the issues for trial and provided them to the Prothonotary who then separately entered the judgment in the Court records. Of course, the position on the equity side, with judge only hearings, was entirely different: see *Carson* (at 361 per Young A-JA).
6. Referring to a verdict as though it is a synonym for a judgment and its more general use in circumstances where there is no jury determining any issues is, with respect to the parties, ahistorical. The reference to verdicts in draft orders proposed by defamation lawyers seems to be a wistful nod to the traditional role of the jury in such proceedings, but such a course does not accurately reflect what is occurring in quelling this controversy by a judge of the Court determining all issues of fact and law and the entry of a judgment in the records of this Court. Under s 23 of the *Federal Court of Australia Act 1976* (Cth) (**FCAA**), the Court has power to make orders of such kinds as it thinks appropriate. With respect to others who may have taken a different course, it seems to me that the order appropriate to make in circumstances where the Court is constituted by a judge alone is for the entry of judgment in favour of the successful party who has prevailed on the issues at trial and the entry of judgment in an amount. That is the course I propose to take.
7. Accordingly, I propose to make an order that judgment be entered for the applicant against the respondents in the sum of $296,500.

# C COSTS

1. Dr Stead submits that Fairfax and Mr Aston should pay her costs of the entire proceeding (from various dates) on an indemnity basis, whereas Fairfax and Mr Aston submit that they should be ordered to pay only 75% of Dr Stead’s costs on a party and party basis. Before coming to considering these submissions it is necessary to set out the relevant chronology of events as revealed by the evidence:

|  |  |
| --- | --- |
| **Date** | **Events** |
| 1 November 2019 | Concerns notice sent seeking that Fairfax immediately remove the Second Matter, cease publishing any matter which conveys similar imputations, publish a correction and apology and pay Dr Stead’s legal expenses.  |
| 8 November 2019 | Fairfax asserted it will “vigorously” defend any proceeding. |
| 23 December 2019 | Proceeding commenced. |
| 20 April 2020 | First Court ordered mediation. Dr Stead made an offer of compromise which provided: (a) judgment in the sum of $190,000; (b) removal of matters complained of; and (c) payment of costs (**First Stead Offer**). |
| 21 April 2020 | First Stead Offer rejected. |
| 28 April 2020 | Dr Stead made a further offer which provided: (a) judgment; (b) payment of $140,000; (c) publishing an apology in terms stated in the offer; (d) removal of matters; and (e) payment of costs (**Second Stead Offer**). |
| 29 April 2020 | Second Stead Offer rejected. |
| 28 October 2020 | Fairfax and Mr Aston granted leave to file a second further amended defence and ordered to pay Dr Stead’s costs thrown away by virtue of the filing of the defence. |
| 2 November 2020 | Fairfax and Mr Aston made an offer which provided: (a) payment of a “confidential sum” of $200,000 inclusive of costs; (b) the proceeding be dismissed with no orders as to costs; (c) all existing costs orders be vacated; (d) clarification to be published in terms provided for in the offer; and (e) the settlement to be effected by way of a confidential settlement seed (**First Fairfax Offer**). This offer was accompanied by a detailed letter. |
| 13 November 2020 | First Fairfax Offer rejected. Dr Stead made an “open” offer to settle the proceeding which provided: (a) judgment in the sum of $650,000; (b) previous costs orders be vacated and there be no orders as to costs; (c) an apology as set out in offer; and (d) removal of matters (**Third Stead Offer**). This offer was open to be accepted up until 10am on 18 November 2020. |
| 16 November 2020 | Third Stead Offer rejected. Fairfax and Mr Aston made an offer in the same terms as the First Fairfax Offer, save for the confidential settlement sum being increased to $250,000 (**Second Fairfax Offer**). This offer was open to be accepted up until 20 November 2020 and was expressed to be the “final offer to settle the proceedings”. |
| 20 November 2020 | Second Fairfax Offer rejected. |
| 1 December 2020 | Second Court ordered mediation. |
| 2 December 2020 | Trial commenced. |

1. Dr Stead suggested several bases upon which she was entitled to indemnity costs including by virtue of the application of s 40 of the *Defamation Act 2005* (NSW) (**Act**) or by reason of the fact that Fairfax and Mr Aston had failed, in their approach to settlement, to comply with the overarching purpose of the civil practice and procedure provisions, being to facilitate the just resolution of disputes according to law as quickly, inexpensively and efficiently as possible: s 37M of the FCAA. Some complexities arose in relation to these arguments including that it may be unsafe to conclude that the First Fairfax Offer and the Second Fairfax Offer constitute the entire scope of settlement communications coming from Fairfax and Mr Aston, given the statutory prohibition in s 53B of the FCAA preventing evidence being adduced as to anything said, or of any admission made, at the two mediations ordered to take place under s 53A of the FCAA. A further (at least potential) complication is whether s 40 of the Act is “picked up” in federal jurisdiction under s 79 of the *Judiciary Act 1903* (Cth). Finally, the later offers made by Dr Stead were also somewhat complicated by both being conditional on Fairfax and Mr Aston being required to publish an apology.
2. These wrinkles can be put to one side because, during the course of oral submissions, Dr Stead accepted that her best argument for the award of indemnity costs arose by reason of the making and rejection of the First Stead Offer.
3. The primary way this was put was through the application of r 25.14(3) of the *Federal Court Rules 2011* (Cth) (**FCR**) (which applies if an offer is made by an applicant but is not accepted by a respondent and the applicant obtains a judgment that is more favourable to the applicant than the terms of the offer). In such a case, the rule provides that an applicant is entitled to an order that the respondent pay the applicant’s costs before 11am on the second business day after the offer was served on a party and party basis, and after that time on an indemnity basis. The application made by Dr Stead under the FCR comes down to an assessment of whether the judgment obtained by Dr Stead in the sum of $296,500 (and the removal of the First Internet Matter, the Second Internet Matter and part of the Third Matter as a consequence of my findings) was *more favourable* to Dr Stead than the terms of the First Stead Offer.
4. Further, Dr Stead pointed to the fact that s 43 of the FCAA confers a wide discretion and s 43(3) permits awards of costs in relation to different parts of the proceeding or to order that costs awarded against a party be assessed on an indemnity basis or otherwise (see subs (b) and (g)). Dr Stead submits that in the exercise of the general discretion as to awarding costs, the circumstances are such that an award of indemnity costs should be made. Of course, put this way, it is necessary for Dr Stead to demonstrate that the refusal of the First Stead Offer was unreasonable; a question to be judged by reference to the circumstances facing Fairfax and Mr Aston at the time of the offer. While the eventual outcome in the case may go part of the way in this regard, there is no presumption that ultimate success in the proceeding necessarily renders the rejection unreasonable: see *CGU Insurance Ltd v Corrections Corporation of Australia Staff Superannuation Ltd* [2008] FCAFC 173; (2009) 15 ANZ Insurance Cases 61-785 (at 77,135 [75] per Moore, Finn and Jessup JJ).
5. At first glance, the evaluative assessment under FCR 25.14(3) might seem straightforward. In monetary terms, Dr Stead has received a greater entitlement by the judgment, but it is not quite as straightforward as it might seem. Fairfax and Mr Aston made two important points. *First*, as noted above, the First Stead Offer made on 20 April 2020, included a requirement for Fairfax and Mr Aston to remove all the matters, including the Third Matter; it was not unreasonable for this to be rejected in circumstances where Fairfax and Mr Aston were strongly of the view that the matters were not defamatory in the sense alleged by Dr Stead, a view that was ultimately upheld with respect to the Third Matter. *Secondly*, Dr Stead was unsuccessful in relation to three of the more serious imputations pleaded and was only successful in relation to one imputation as pleaded, and three imputations on the basis that the Court was satisfied they were imputations comprehended within the pleaded meanings.
6. Despite Ms Barnett’s cogent and well-presented submissions to the contrary, I do not consider the failure of the cause of action in relation to the Third Matter and the failure to sustain a number of the pleaded meanings, leads otherwise than to the conclusion that the judgment represents a more favourable result than the First Stead Offer. It is necessary to explain this conclusion in a little detail.
7. In the PJ (at [302]), I noted the close connexion between the causes of action upon which Dr Stead has succeeded and, as a consequence, I assessed damages in a single sum. This focus on the claim for damages made by Dr Stead (rather than the individual causes of action arising from the different publications which were component parts of that claim) was the reason why I noted (at [315]) that subject to any offers of compromise or evidence of settlement negotiations admissible by reason of s 131(2)(h) of the *Evidence Act 1995* (Cth), my preliminary view was that costs should follow the event, notwithstanding Dr Stead did not succeed in relation to the Third Matter.
8. There is a degree of artificiality in proceeding otherwise. Although FCR 25.14 does not speak in terms of an offer to compromise *any claim in proceedings* (unlike the old Pt 22 rule 2 of the *Supreme Court Rules 1970* (NSW)), the submissions of Fairfax and Mr Aston echo submissions that were made in that earlier and different context when it was asserted it was necessary to focus on whether each claim in a proceeding had been vindicated rather than the result in the proceeding generally. In a proceeding at a time where each imputation was a cause of action, this led to a contention that a “claim”, for the purposes of Pt 22, meant the imputations extant at the time of the making of the offer, required a judge to distinguish between the “claims” upon which a plaintiff obtained a verdict (to use that expression in its proper sense) and the “claims” pleaded at the time of the offer.
9. In *Ettingshausen v Australian Consolidated Press Ltd* (1995) 38 NSWLR 404, Gleeson CJ and Priestley JA rejected a submission that an offer of compromise ceased to have effect once the claim to which it related had been the subject of a complete trial and did not apply in relation to the costs of any appeal. At 409 they said:

… the offer is made, not in respect of a trial, but in respect of a claim. Depending upon the circumstances of a case, a claim may not be finally heard and determined until after there have been a number of appeals, and, perhaps, a number of trials.

1. Their Honours also defined “claim” for the purposes of the *Supreme Court Rules*, coincidentally in the context of a defamation case, as follows (at 408):

First, the subject of an offer of compromise is *a* *claim in proceedings* (Pt 22, r 2). In the present case, **the claim was for damages for defamation**. In accordance with the Rules, the appellant’s offer to compromise was expressed as an offer to compromise that claim for a certain sum of money plus costs. The concept of the relevant compromise being the compromise of a claim is basic to the rules in question: see Pt 22 r 2, r 3. It is not a compromise of a hearing, or of one round in a bout of litigation. **The appellant had only one claim, and it was that which he offered to compromise.** The same claim was litigated at the second trial. That claim was only finally heard and determined at the conclusion of the second trial (and, still then, subject to the appeal process).

(Emphasis added).

1. The decision in *Ettingshausen* was considered on a number of occasions, for example, in *Commercial Union Assurance Company of Australia Limited v Pelosi (No 2)* (unreported, NSWCA, Handley, Sheller and Powell JJA, 27 February 1996) and *Fotheringham v Fotheringham (No 2)* [1999] NSWCA 21, but in the context of demonstrating the discretion to “otherwise order” in the context of an appeal and so negate the prima facie operation of an offer of compromise according to the circumstances and outcome of the appeal. It was not doubted that a “claim” within the meaning of Pt 22, for the purposes of an action in defamation comprising different causes of action, means anything other than the claim (singular) for damages and any other relief.
2. By parity of reasoning, the mere fact that under the current Act a number of causes of action are involved in a controversy does not mean the focus of FCR 25 should be diverted to a more granular examination of the result of each cause of action within the proceeding, let alone the success in establishing each pleaded meaning. To do so would divert attention away from the substance of the evaluation of whether the result has been more favourable.
3. Much litigation is hydra headed. The more granular approach postulated by Fairfax and Mr Aston exhibits some tension with the evident policy behind the Rule and also the unfathomable vicissitudes of litigation. Amendment and procedural flexibility in pleading has long been regarded as one of the distinguishing characteristics of the modern judicial process. The whole purpose of the Rule is to encourage early attention be given to appropriate compromise. This purpose would be undermined by adopting a formulaic approach that would cause the determination of an application for costs to be informed by some method of mechanical comparison.
4. If one approaches the broader, evaluative assessment required by FCR 25.14 as to whether, *as a matter of substance*, one state of affairs (that provided for by the judgment) is more favourable than another state of affairs (the First Stead Offer), the correct assessment is tolerably clear. The judgment provides for a monetary sum in excess of $100,000 more than would have been the case if the First Stead Offer had been accepted. The practical consequence of the judgment was to effect the removal of the First Internet Matter, the Second Internet Matter and an important part of the Third Matter. Although parts of Mr Aston’s tweet remain to be viewed (if one, for some reason, was inclined to scroll back or search for it) and those parts that remain contributed to Dr Stead’s contemporaneous subjective hurt, given the disparity between the money in the factual and the counterfactual, the remnant online tweet is a relevant but far from decisive consideration in the overall assessment.
5. There was no other technical reason advanced as to why FCR 25.14(3) was not engaged. There is nothing about the circumstances (including those matters referred to at [17] above), which would cause me to depart from the course of applying the Rule in accordance with its terms. It follows that Dr Stead is entitled to an order that Fairfax and Mr Aston pay her costs before 11am on the second business day after the First Stead Offer was served on a party and party basis, and after that time on an indemnity basis.
6. If I was wrong about the application of FCR 25.14(3), I would, in any event, have exercised my general discretion to award indemnity costs from around the same date. I am satisfied that in all the circumstances the refusal of the First Stead Offer was unreasonable, judged by reference to the circumstances facing Fairfax and Mr Aston at the time of the offer.
7. I have accepted that Mr Aston had genuine and cogent grounds for his concerns as to what had occurred at Blue Sky and Dr Stead’s behaviour did, as I have explained, demonstrate an apparent unwillingness to face up to the true reasons as to why Blue Sky failed. I have further explained that questions legitimately arose as to her behaviour (together with her fellow directors) in not taking steps to correct the incorrect information prevailing as to the composition of assets under management. No doubt in those circumstances the prospect of consenting to a judgment in her favour for a significant sum was perhaps galling (particularly when she had pleaded some imputations which, *ex facie*, were never soundly based).
8. But Fairfax and Mr Aston were well-advised. Although they had conscientiously pleaded truth, the snag was they did not at the relevant time have sufficient evidentiary material to justify those imputations that were likely to be found to have been conveyed (and it was by no means assured that such material would emerge). Moreover, as to honest opinion, and putting the matter very generally, the issue was not Mr Aston being critical, or even highly critical in expressing his opinions, but rather the real problem, referred to in the PJ, of proving that those opinions were properly based on *facts stated in what was written*.
9. The problem always came back to the colourful, but less than adroit way the articles were originally put together. The lack of proper material being evident in the publications meant the risks associated with making out the honest opinion defence were always high. Fairfax and Mr Aston proceeded Micawber-like, in the hope something might turn up to prove truth or allow substantial truth to be proved, notwithstanding the deficiencies in setting out some of the facts relied upon. On one level this may be understandable, but given the circumstances facing Fairfax and Mr Aston at the time of the offer, on balance, I am satisfied the refusal of the First Stead Offer was unreasonable.

|  |
| --- |
| I certify that the preceding thirty-one (31) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Lee. |

Associate:

Dated: 8 February 2021