IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-658
[2013] NZHC 1165

UNDER	the Defamation Act 1992
BETWEEN	AUGUSTINE LAU Plaintiff
AND	ACP MEDIA LIMITED First Defendant
AND	DONNA CHISHOLM Second Defendant

Hearing: 16 May 2013

Counsel: DM Salmon and ED Nilsson for defendants

A Lau, plaintiff in person

Judgment: 21 May 2013

JUDGMENT OF ASSOCIATE JUDGE FAIRE
[on applications for summary judgment and strike out]

This judgment was delivered by me on 21 May 2013 at 4:50pm
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors: LeeSalmonLong, PO Box 2026, Auckland 1140

And To: A Lau, PO Box 276 138, Manukau Mall, Auckland

Introduction

[1] The plaintiff acts for himself. He filed this proceeding on 12 February 2013 together with an application for summary judgment and his affidavit in support.

[2] The defendants filed a notice of opposition to the application for summary judgment together with an application to strike out the statement of claim or, in the alternative, seeking an order for security for costs. An affidavit in support of the defendants' notice of opposition and application has been filed.

[3] The application for summary judgment and the defendants' application to strike out were called before Associate Judge Sargisson on 13 March 2013. Her Honour gave specific directions, which included fixing a fixture to dispose of both applications, filing of reply affidavits and the filing of submissions, copies of authorities and an appropriate casebook. The plaintiff did not comply with those directions. The defendants' submissions were filed together with a casebook of the relevant pleadings and affidavits and a bundle of authorities on 10 May 2013. I issued a minute warning the plaintiff of the consequences of non-compliance dated 10 May 2013. The plaintiff presented a submission to the court shortly before the hearing commenced on 16 May 2013.

The summary judgment application

[4] At the commencement of the hearing I explained to Mr Lau that his summary judgment application was non-compliant with r 12. In particular, the affidavit in support, which is required, did not comply with r 12.4(5). The affidavit neither verified the allegations in the statement of claim nor did it depose to a belief that the plaintiff claimed that the defendants had no defence to the allegations set out in the statement of claim. I explained to Mr Lau that, whilst I considered the application itself was defective and was unlikely to be able to be cured that did not dispose of his proceeding as such. He accepted my statement of the position to him and, as a result, I announced in court that the summary judgment application was dismissed.

The strike out application

[5] As a result, it was necessary to proceed with the strike out application. I announced to the parties that it was important that they realised that I was now dealing with a chambers application and accordingly the hearing was in chambers. Two members of the press were present. They sought permission to be present during the chambers hearing and to report on the hearing. I sought Mr Lau's and Mr Salmon's views on the application from the press. Both advised me that they had no objection to the press officers being present and reporting on the hearing. On that basis, I announced that permission had been given for the press officers to be present and to report on the hearing.

[6] Because the court was dealing with the strike out application only I ordered that Mr Salmon would commence as it was now his clients' application that required a determination by the court.

The grounds relied upon in support of the strike out application

[7] In summary, the grounds relied upon in respect of the strike out application are:

(a) The plaintiff's statement of claim discloses no tenable cause of action;

(b) The plaintiff's statement of claim in its present form is not compliant with the rules and cannot be properly pleaded to; and

(c) The defendants relied on s 21 of the Copyright Act 1994, ss 26, 27 and 37 of the Defamation Act 1992 and ss 2 and 11 of the Privacy Act 1993.

[8] The strike out application is made in reliance on r 15.1. Rule 15.1 provides:

> **15.1 Dismissing or staying all or part of proceeding**
>
> (1) The court may strike out all or part of a pleading if it—

(a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or

(b) is likely to cause prejudice or delay; or

(c) is frivolous or vexatious; or

(d) is otherwise an abuse of the process of the court.

(2) If the court strikes out a statement of claim or a counterclaim under subclause (1), it may by the same or a subsequent order dismiss the proceeding or the counterclaim.

(3) Instead of striking out all or part of a pleading under subclause (1), the court may stay all or part of the proceeding on such conditions as are considered just.

(4) This rule does not affect the court's inherent jurisdiction.

The court's approach to a strike out application

[9] The general principles to be applied in a strike out application are well known. They were confirmed in *Attorney-General v Prince and Gardner* where the Court of Appeal said:[1]

> A striking-out application proceeds on the assumption that the facts pleaded in the statement of claim are true. That is so even although they are not or may not be admitted. It is well settled that before the Court may strike out proceedings the causes of action must be so clearly untenable that they cannot possibly succeed (*R Lucas & Son (Nelson Mail) Ltd v O'Brien* [1978] 2 NZLR 289 at pp 294-295; *Takaro Properties Ltd (in receivership) v Rowling* [1978] 2 NZLR 314 at pp 316-317); the jurisdiction is one to be exercised sparingly, and only in a clear case where the Court is satisfied it has the requisite material (*Gartside v Sheffield, Young & Ellis* [1983] NZLR 37 at p 45; *Electricity Corporation Ltd v Geotherm Energy Ltd* [1992] 2 NZLR 641); but the fact that applications to strike out raise difficult questions of law, and require extensive argument does not exclude jurisdiction (*Gartside v Sheffield, Young & Ellis*).

[10] The principles referred to above were endorsed by the Supreme Court in *Couch v Attorney-General.*[2]

---

1 *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267.

2 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725.

Statement of claim

[11] The plaintiff says the second defendant is the author of an article published by the first defendant in its *Metro* magazine in November 2012.

[12] The statement of claim contains 20 paragraphs followed by a number of prayers for relief. It is not broken up into specific causes of action.

[13] It pleads that the plaintiff has been defamed by the article. The plaintiff takes issue with the use of the word *scam* in the article with reference to certain property transactions that the article alleges the plaintiff undertook. The plaintiff also takes issue with the article's description of him as *an Amway salesman*. This claim lacks particularisation and I will discuss this aspect later in this judgment. Mr Lau in his submissions, however, made it clear that had the article referred to *a suspected scam* he would have had no complaint. So far as the article refers to Mr Lau as a *salesman* he says his complaint was that he was not a saleman as such but rather an Amway independent business owner (IBO) or Amway distributor.

[14] The statement of claim also refers to the Privacy Act 1993 and with the apparent purpose of claiming that there was a breach when the article was published because its contents were not authorised by Mr Lau. In addition, he alleges that there was interference in a relationship that he had with Sky City pursuant to which he received benefits from Sky City that were withdrawn as a result of the article and contact by the second defendant with Sky City.

[15] The statement of claim also asserts that the plaintiff held copyright in the photographs and that his copyright was infringed by the publication of the photographs in the article.

[16] When developing his argument, Mr Salmon dealt with the statement of claim on the basis that it, in essence, pleaded three causes of action covering the areas that I have just mentioned.

[17] In respect of those parts of the statement of claim that allege breach of the Privacy Act, he submitted that the Privacy Act cannot apply to the activities of the defendant at issue in this proceeding and, in particular, in relation to the article that is the subject of the proceeding. He drew attention to the interpretation section in the Privacy Act 1993 and to the definition of *agency* and in particular the exclusion of any news medium in relation to its news activities. He next drew attention to the definition of *news medium* which is defined as meaning:

> any agency whose business, or part of whose business, consists of a news activity; but, in relation to principles 6 and 7, does not include Radio New Zealand Limited or Television New Zealand Limited:

[18] He next referred to *news activity* which is defined as meaning:

> (a) The gathering of news, or the preparation or compiling of articles or programmes of or concerning news, observations on news, or current affairs, for the purposes of dissemination to the public or any section of the public:
>
> (b) The dissemination, to the public or any section of the public, of any article or programme of or concerning—
>
> (i) News:
>
> (ii) Observations on news:
>
> (iii) Current affairs:

[19] He submitted that a broad approach should be taken in the interpretation of these provisions.[3]

[20] He submitted that, in any event, the first defendant falls squarely within the definition of *news medium*. That is because one of its business activities includes the production and publication of the *Metro* magazine, a magazine that regularly features articles of public interest. He further submitted that the acts complained of were carried out in relation to the first defendant's news activities. The photographs were taken for the purpose of publication of the article. The publication of the article

[3] John Burrows and Ursula Cheer *Media Law in New Zealand* (6th ed, Lexis Nexis, Wellington, 2010) at 377-378. A wide approach to interpretation is supported by the outcome in cases decided by the Human Rights Review Tribunal – see *Talley Family v National Business Review* (1997) 4 HRNZ 72, *Case Note* 38197 [2003] NZPrivCmr 24 and *Case Note* 62972 [2005] NZPrivCmr 1.

appears to constitute the disclosure of the personal information to Sky City which is the subject of Mr Lau's complaint.

[21] He next referred to s 4 of the Privacy Act 1993 and correctly submitted that the second defendant's actions must be attributed to the first defendant. He concluded his submissions, submitting that the Privacy Act has no application to any of the activities complained of in the proceeding.

[22] I accept his submissions in the manner that I have summarised in this judgment as a correct statement of the position. He drew attention, however, to an alternative ground, namely that no right is conferred on the plaintiff by the Privacy Act which is enforceable in a court having regard to section 11 of the Privacy Act 1993. Section 11 provides:

> **11 Enforceability of principles**
>
> (1) The entitlements conferred on an individual by subclause (1) of principle 6, in so far as that subclause relates to personal information held by a public sector agency, are legal rights, and are enforceable accordingly in a court of law.
>
> (2) Subject to subsection (1) of this section, the information privacy principles do not confer on any person any legal right that is enforceable in a court of law.

[23] He next drew attention to the definition of *public sector agency* in s 2. He submitted that the first defendant, which is a private publishing company, falls outside the scope of that definition. He noted that it is only where an individual seeks access to personal information concerning that individual held by a public sector agency that enforcement action can be taken before the courts. There is no entitlement provided by the Privacy Act to enforce the rights complained of in a case such as that set out in the statement of claim.[4] I accept his analysis as correct.

[24] Accordingly, for the above reasons the complaints made in the statement of claim relying on the Privacy Act simply cannot be sustained and provide no reasonable cause of action. They must therefore be struck out.

---

[4] *McPhail v The University of Auckland* HC Auckland CIV-2008-404-5616, 17 February 2009 at [15].

[25] So far as the allegations that assert an infringement of Mr Lau's copyright are concerned, there is a lack of any proper particularisation. Nevertheless, Mr Lau's allegation appears to be that copyright in the photograph rests with him. That, as a proposition, having regard to the facts that are set out in the statement of claim is, as Mr Salmon submitted, untenable because:

(a) Under s 21 of the Copyright Act 1994 copyright in a commissioned photograph belongs to the person commissioning it;

(b) The second defendant's evidence is that the relevant photographs were commissioned by the first defendant with the result that it is the owner of the copyright in them; and

(c) Mr Lau therefore lacks any standing to bring a proceeding for infringement of copyright in the photographs.

[26] The above short analysis, as with the analysis dealing with the allegations relying on the Privacy Act indicate that, so far as the allegations that assert infringement of copyright are concerned they do not support any reasonable cause of action in this case and must therefore be struck out.

[27] Mr Salmon then referred to those portions of the statement of claim that allege that the plaintiff has been defamed. The current statement of claim makes no attempt at all to meet the requirements of either s 37 of the Defamation Act 1992 or r 5.26. For completeness' sake I set out s 37 of the Defamation Act 1992:

> **37 Particulars of defamatory meaning**
>
> (1) In any proceedings for defamation, the plaintiff shall give particulars specifying every statement that the plaintiff alleges to be defamatory and untrue in the matter that is the subject of the proceedings.
>
> (2) Where the plaintiff alleges that the matter that is the subject of the proceedings is defamatory in its natural and ordinary meaning, the plaintiff shall give particulars of every meaning that the plaintiff alleges the matter bears, unless that meaning is evident from the matter itself.
>
> (3) Where the plaintiff alleges that the matter that is the subject of the proceedings was used in a defamatory sense other than its natural

> and ordinary meaning, the plaintiff shall give particulars specifying—
>
> (a) The persons or class of persons to whom the defamatory meaning is alleged to be known; and
>
> (b) The other facts and circumstances on which the plaintiff relies in support of the plaintiff's allegations.

[28] Mr Salmon submitted, correctly, that the requirements of s 37 are important. The starting point is that a court or a jury is not entitled to find for a plaintiff on a basis that the plaintiff has disclaimed or has never put forward and which the defendant has never been called upon to meet. Further, a defendant may not plead a plainly non-defamatory meaning to be given to the words concerned and then prove its truth.[5]

[29] By not complying with s 37 of the Defamation Act it is not possible for the defendants to respond to the pleading that the relevant publications are incapable at law to bear the alleged meanings. It is not possible for a defendant to plead an affirmative defence.

[30] Mr Salmon advanced alternative arguments in the event that I was not prepared to strike out the proceeding. It is difficult to do justice to the position when the current pleading is so deficient in its particularisation. I simply refer to the fact that Mr Salmon would want to raise an affirmative of truth and reliance on s 8 and in reliance on findings in earlier court decisions that the scheme that was described as the scam in the article has been held by a court to be designed to frustrate the right of a mortgagee bank to access its security to effect repayment of its loans.[6]

[31] Further, Mr Salmon questioned whether the reference to an Amway salesman could, in fact, create some defamatory position. Once again, it is not readily apparent to me how same could be defamatory of Mr Lau, even if his position was somewhat different from the classic salesman's position. However, I regard it as dangerous to postulate because there is no proper pleading.

---

5 *Broadcasting Corporation of New Zealand v Crush* [1988] 2 NZLR 234 (CA) at 237; *Polly Peck (Holdngs) Plc v Trelford* [1986] QB 1000 (CA).

6 *Westpac New Zealand Ltd v Law* [2012] NZHC 890.

[32] The conclusion I have reached is that this statement of claim is so wholly deficient and, in fact on its face, having regard to the material that has been placed before me, discloses no reasonable cause of action and should be struck out. Mr Lau did not suggest to me that he could provide an amendment that would cure the deficiencies in the statement of claim.

[33] Mr Salmon had an alternative fallback position in case I ruled against his primary application to strike out, namely that it was appropriate to order security for costs. In the event that I was required to consider security for costs, he submitted that an appropriate order would be an order of $25,000.

The court's approach to security for costs applications

[34] Although it is unnecessary for me to determine this issue, again a brief summary of the position and an indication of what my view would have been had it been necessary to decide this question may be helpful.

[35] The application is made in reliance on r 5.45 of the High Court Rules. The relevant parts of that rule for the purposes of this application are as follows:

> **5.45 Order for security of costs**
>
> (1) Subclause (2) applies if a Judge is satisfied, on the application of a defendant,—
>
> …
>
> (b) that there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the plaintiff's proceeding.
>
> (2) A Judge may, if the Judge thinks it is just in all the circumstances, order the giving of security for costs.
>
> (3) An order under subclause (2)—
>
> (a) requires the plaintiff or plaintiffs against whom the order is made to give security for costs as directed for a sum that the Judge considers sufficient—
>
> (i) by paying that sum into court; or

(ii) by giving, to the satisfaction of the Judge or the Registrar, security for that sum; and

(b) may stay the proceeding until the sum is paid or the security given.

[36] In *McLachlan v MEL Network Ltd* helpful guidance is given as to the approach that should be taken on applications for security for costs.[7] For the purposes of this application the Court's comments at [13] – [16] are particularly helpful:

> [13] Rule 60(1)(b) High Court Rules provides that where the Court is satisfied, on the application of a defendant, that there is reason to believe that the plaintiff will be unable to pay costs if unsuccessful, "the Court may, if it thinks fit in all the circumstances, order the giving of security for costs". Whether or not to order security and, if so, the quantum are discretionary. They are matters for the Judge if he or she thinks fit in all the circumstances. The discretion is not to be fettered by constructing "principles" from the facts of previous cases.
>
> [14] While collections of authorities such as that in the judgment of Master Williams in *Nikau Holdings Ltd v BNZ* (1992) 5 PRNZ 430, can be of assistance, they cannot substitute for a careful assessment of the circumstances of the particular case. It is not a matter of going through a checklist of so-called principles. That creates a risk that a factor accorded weight in a particular case will be given disproportionate weight, or even treated as a requirement for the making or refusing of an order, in quite different circumstances.
>
> [15] The rule itself contemplates an order for security where the plaintiff will be unable to meet an adverse award of costs. That must be taken as contemplating also that an order for substantial security may, in effect, prevent the plaintiff from pursuing the claim. An order having that effect should be made only after careful consideration and in a case in which the claim has little chance of success. Access to the Courts for a genuine plaintiff is not lightly to be denied.
>
> [16] Of course, the interests of defendants must also be weighed. They must be protected against being drawn into unjustified litigation, particularly where it is over-complicated and unnecessarily protracted.

[37] The reference in the Court of Appeal decision to r 60(1)(b) is a reference to the predecessor of the current rule that I have set out.

---

[7] *McLachlan v MEL Network Ltd* (2002) 16 PRNZ 747 (CA).

[38] The first part of the inquiry, often referred to as the threshold test, was summed up by Rodney Hansen J:[8]

> In considering whether the threshold issue of the ability of the plaintiff to pay the defendants' costs if unsuccessful has been reached, it is, as Hammond J said in *Hamilton v Papakura District Council* (supra), necessary to make a broad overall assessment. Something more than having difficulty in making payment is, however, required. Some plaintiffs will not be able to meet costs without some financial rearrangement: *NZ Kiwifruit Marketing Board v Maheatataka Coolpack Limited* (1993) 7 PRNZ 209. And if a plaintiff's financial position is improving and is likely to improve still further, there may not be reason to find an inability to pay costs: see *Rivendell Mushrooms Limited v Horowhenua Electric Power Board* (unreported, High Court, Wellington, CP844/92, 13.11.98, Master Thomson).

[39] I invited Mr Lau to advise me as to whether his income would permit him to pay security if it were ordered. He advised me that his income ranged from between $50,000 and $100,000 per annum and that it was likely that if I ordered security for costs he would be able to pay it. He has provided absolutely no information as to property which he owns other than, of course, his interest in the Amway business.

[40] If I was required to rule on this matter, I would rule that the threshold issue for awarding security for costs had been met in this case. I would further rule that an order for security for costs in the order of $15,000 to $20,000 was unlikely to prevent this plaintiff from pursuing the claim but would, at least, give some protection to the defendants against being drawn into what might be determined at trial as unjustified litigation.

[41] When I look at Schedule 3 and the allowances based on a Category 2 basis as prescribed in Schedule 2 to the High Court Rules, I conclude that there is already a potential exposure for costs of approximately $10,340 when one applies Items 2, 23, 24, 25 and 26 of Schedule 3. Clearly, the case has to have further case managing and, I suspect interlocutory considerations having regard to the current state of the pleadings before trial. Had the matter been further explored, my view is that I would have awarded security for costs to be paid in the sum of $15,000 up to and including completion of discovery and inspection with leave reserved to apply for further security before the matter proceeded to trial.

---

[8] *Keeys v Peterson* HC Whangarei CIV-2003-488-145, 20 April 2004 at [12].

Orders

[42] I order that the plaintiff's statement of claim be struck out.

Costs

[43] I invited counsel and Mr Lau to advise me if there was any disagreement that this was a Category 2 case. Both indicated to me that it was a Category 2 case. Accordingly, I order that the plaintiff pay costs in relation to the strike out application based on Category 2 Band B together with disbursements as fixed by the Registrar.

_____

JA Faire
Associate Judge