

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV-2013-404-003456
[2014] NZHC 2253**

BETWEEN YI WU (AKA DICTUS EASTER WU)
Plaintiff

AND MAY MONCUR
First Defendant

STEPHEN COOK
Second Defendant

DERMOTT MALLEY
Third Defendant

TRUTH WEEKENDER LIMITED (IN
LIQUIDATION)
Fourth Defendant

ROBERT JAMES KERRIDGE
Fifth Defendant

Hearing: 12 September 2014

Appearances: F C Deliu for Plaintiff
P Johns and M E Lynch for Fifth Defendant

Judgment: 17 September 2014

JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 17 September 2014 at 11.00 am
pursuant to R 11.5 of the High Court Rules

Registrar / Deputy Registrar

Date.....

Introduction

[1] This is a defamation proceeding scheduled for trial in November 2014. The fifth defendant, Mr Kerridge, has applied for leave to apply for summary judgment or alternatively for an order striking out the claim against him. The ground for Mr Kerridge's applications is that in October 2013 he filed a statement of defence pleading affirmative defences, including honest opinion and qualified privilege but the plaintiff, Mr Wu, has never filed either a reply to the affirmative defences or notices as required by the Defamation Act 1992. As a result, the affirmative defences are deemed to be admitted.

[2] The applications are opposed on the basis that Mr Kerridge's statement of defence was, itself, filed late and since leave to extend the time for filing it was never obtained, time has not yet begun to run for the filing of a reply and notices under the Defamation Act.

[3] Before I determine the application I deal first with an oral application for recusal made by Mr Deliu, for Mr Wu, during the course of the morning's argument. I heard submissions from Mr Johns, for Mr Kerridge, prior to morning adjournment. During that session, Mr Deliu interrupted with objections about Mr Johns' submissions. These were matters that Mr Deliu should properly have kept for his own submissions and I indicated that he should sit down and wait his turn. On one of the occasions that Mr Deliu rose to object I raised my voice and told him to sit down, that he would get his turn. I reserved my decision on the application to recuse and continued to hear the matter. I now formally decline to recuse myself. It is most regrettable for a Judge to feel the need to raise his or her voice to counsel but occasionally it is necessary in order to keep control over the courtroom. I see no grounds that would justify recusal and decline Mr Deliu's application.

Mr Kerridge's applications

[4] Insofar as the substantive matter is concerned, I accept Mr Deliu's argument. The proceedings were served on Mr Kerridge on 29 July 2013. Requests were made for documents and for an extension of time for filing a defence. No extension is agreed and no documents were provided. Eventually Mr Kerridge filed a statement

of defence on 4 October 2013. There were subsequently discussions regarding the possibility of settlement but they have come to nothing.

[5] It was clear that the matter would proceed to trial and there have been conferences, with memoranda filed. These included a memorandum by Mr Kerridge's solicitors filed on 9 April 2014 noting that no reply had been filed. Mr Deliu did not respond to that reminder. He candidly admitted that he had overlooked filing a reply. The unhappy result is that both parties have been put to substantial cost.

[6] Turning then to the rules relating to the filing of a statement of defence and a reply. Under r 5.47 a defendant who intends to defend the proceeding must file and serve a statement of defence within the number of working days stated in the notice of proceeding. Under r 5.62 where a statement of defence asserts an affirmative defence the plaintiff must file and serve a reply within 10 working days after the date of service. Rule 5.63 provides that an affirmative defence that is not denied is treated as being admitted.

[7] Mr Kerridge's late filing of the statement of defence falls within r 1.5 which provides that a failure to comply with the requirements of the rules must be treated as an irregularity and does not nullify the step taken. Rule 1.5(2)(b) confers a power to deal with non-compliance and make any order the Court thinks just. However, it must follow that until leave has been granted regularising the filing of the statement of defence under r 1.19, time did not begin running under the rules for the filing of a reply and for notices under the Defamation Act. Although I indicated to counsel that I would not entertain their respective oral applications, I am satisfied that the proper course is to grant the necessary leave for the filing of the statement of defence and the reply. Both are to be treated as now having been properly filed. As a result the applications for summary judgment and strike out must fail.

[8] This does not, however, resolve the more difficult problem of the forthcoming trial. It is now only six weeks away and Mr Kerridge has, understandably, been proceeding for many months on the assumption that the affirmative defences he has raised are accepted. The reply now raises issues which

he requires time to consider and there may be further interlocutory steps needed. Mr Deliu responsibly accepted that a vacation of the fixture was likely in the event that his argument prevailed. I leave it to the parties to discuss this matter further and for Mr Kerridge to make an application for an adjournment if he perceives the need. I have recorded these matters for the benefit of the civil list Judge in the event of such an application being made.

P Courtney J