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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP 656/93

BETWEEN O. WOODROFFE

Plaintiff

AND TELEVISION NEW ZEALAND

First Defendant

AND G. MOORE

Second Defendant

Hearing: 15 December 2000

Counsel: B.P. Henry & P. Pa'u for Plaintiff
M.C. Black for Second Defendant

1756

Judgment: 15 December 2000

JUDGMENT OF FISHER J

Solicitors:

Woodroffe Law Partnership, P.O. Box 6505, Wellesley St, Auckland for Plaintiff
A.R. Thomas, P.O. Box 4166, Auckland for Second Defendant

Introduction

[1] The plaintiff Mrs Woodroffe sues the second defendant Mr Moore for allegedly defamatory statements by Mr Moore in 1993 regarding Mrs Woodroffe's role as a member of the Cyclone Val Committee. That Committee had the responsibility of administering funds donated by the New Zealand public for the relief of cyclone damage in Western Samoa.

[2] The proceedings were issued on 1 November 1993. Today the matter comes before me for the resolution of an application by Mr Moore to have the proceedings dismissed. If Mr Moore's application fails I will need to move on to applications by Mrs Woodroffe for leave to file an amended statement of claim and for leave to serve briefs of evidence out of time.

Factual background

[3] The early chronology is conveniently outlined in a judgment of Master Kennedy-Grant given on 18 August 1998. At that time he was hearing two applications. Due to her delays, Mrs Woodroffe had to apply for leave to continue under R 426A of the High Court Rules. The first defendant TVNZ (since the subject of a settlement) had applied for an order dismissing the proceedings under R 478 of the High Court Rules for want of prosecution. In granting Mrs Woodroffe leave to continue on that occasion the Master helpfully set out the following chronology:

> 1993
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> December 10 first defendant's statement of defence and notice for discovery served on plaintiff
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> December 14 second defendant's statement of defence served on plaintiff
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> 1994
>
> April 18 plaintiff's notice for discovery served on second defendant
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> April 19 plaintiff's list of documents filed and served on both defendants

May 13	first defendant's list of documents filed and served on plaintiff
May 23	second defendant's list of documents filed and served on plaintiff
August 16	second defendant completed inspection of plaintiff's documents and requested copies of the same
December?	plaintiff sought to arrange inspection of first defendant's documents

1995

May 8	plaintiff filed and served application for order requiring second defendant to produce for inspection documents in respect of which he had claimed privilege
August ?	plaintiff's application for production order against second defendant due for hearing but did not proceed because the second defendant consented to produce the documents in question
December ?	plaintiff saw first defendant's counsel in the High Court at Auckland by accident – she alleges he led her to believe there was a possibility of settlement.

1996

May 13	plaintiff inspected both defendants' documents and requested copies of the same
August 23-27	plaintiff viewed first defendant's video tapes as its solicitor's offices
December 17	plaintiff telephoned first defendant's counsel at the latter's request to arrange a meeting and was told to contact him early in 1997
December 17	first defendant commenced inspection of plaintiff's documents

1997

March 6	first defendant's counsel told plaintiff that he wished to talk to her and her counsel regarding the proceeding; they agreed that the plaintiff would prepare a dossier of documents for a "without prejudice" meeting

September ? plaintiff completed her dossier but was advised that first defendant's counsel was overseas until November 1997

November 19 plaintiff forwarded her dossier to first defendant's counsel

December 11 first defendant's counsel contacted plaintiff; she alleges he made it clear that no settlement could be reached; she decided to continue the proceeding.

[4] The Master went on to find that there had been inordinate delay by Mrs Woodroffe in various respects which he listed. He was unable to find any excuse for the extensive delay which had occurred. He nevertheless exercised his discretion in favour of Mrs Woodroffe commenting at the time that "the plaintiff's delay has indeed been long and without excuse; but she has not yet forfeited her right to come to this Court. If she is guilty of further significant delay, she may then be regarded as having forfeited her rights."

[5] That was two and a half years ago. In the intervening period there has been further delay by Mrs Woodroffe. In a minute of 23 August 1999 Master Gambrill noted that the application for further discovery filed by Mrs Woodroffe in 1999 was abandoned. She concluded that it had been filed solely to avoid further criticism under R 426A and said:

> Whether Mrs Woodroffe has a sustainable claim and the value that will be attributed to it is not a matter the court is fully au fait with. What the court is concerned about is the unexpected delay, responsibility for which must rest on the plaintiff who understands what she has taken on when she issued proceedings. What is worse is that defamation has normal in parlance short time limits for issue of proceedings because often elements that are necessary for evidence are based on people's oral statements in evidence.

She went on to effectively exhort the parties to progress the matter with expedition.

[6] The matter later came back before Master Gambrill with another conference on 11 November 1999. By that stage the original senior counsel for Mrs Woodroffe had been appointed to the bench and Mr Henry had taken over the brief. Master Gambrill noted at the conference that day that she had received a memorandum to the effect that the plaintiff was ready for trial. There was a matter raised by the

second defendant TVNZ about interrogatories but that was ultimately not pursued given the settlement which happily resulted between Mrs Woodroffe and TVNZ.

[7] The matter then came back before Master Faire at a conference on 16 August 2000. At that conference the Master gave directions that the case was to be given a fixture. He directed that Mrs Woodroffe was to pay the setting down and any jury fees by 30 August 2000. Mrs Woodroffe was directed to serve signed witness statements eight weeks before trial, the period from 20 December to 20 January 2000 being excluded from that period.

[8] On 3 October 2000 the Court Registry advised the parties that the case had been allocated a ten day fixture for hearing commencing on 26 February 2001. 29 November 2000 became the date by which Mrs Woodroffe was to serve her signed briefs of evidence and draft list of proposed exhibits. She did not do so. A conference was then arranged before me for 5 December 2000. On reading the file I noted that notwithstanding the indications which had been given by the plaintiff, the case was not in fact in a fit state to go to trial. I issued a minute commenting that "given the history of the proceedings, however, which have been running now for seven years largely due to delays on the part of the plaintiff, I think the better course is to insist that the plaintiff does proceed on 26 February and to bear whatever burdens and consequences that might hold for her." I noted that Mrs Woodroffe's briefs of evidence and draft list of proposed exhibits had still not been served. I also noted the major difficulty in the statement of claim that no publication of the alleged defamatory material had been pleaded. I made provision for a settlement conference (no longer of significance, it having since been attempted and failed). I concluded that Mrs Woodroffe would need to file an application for leave to serve briefs of evidence and draft exhibit lists and also an application for leave to file an amended statement of claim within seven days, that is to say by 12 December 2000.

[9] On 12 December 2000 Mrs Woodroffe filed an application for leave to file and serve briefs of evidence along with draft briefs and a draft bundle of documents. Apparently the draft briefs and documents were served, although without the notice of application for leave. No application was filed in respect of any amended

statement of claim, nor any amended statement of claim itself. Yesterday Mr Moore applied to strike out the statement of claim.

[10] When the matter was called before me for a further conference this morning Mr Henry handed in a draft amended statement of claim. A copy was provided to Mr Black in Court. That occurred at about 9 am this morning. Both parties were willing to hear all outstanding applications at 2.15 pm today and a defended hearing has now been completed.

Issues

[11] Mr Moore's notice of application to strike out was prepared under some pressure. However, in substance he seeks to bring the proceedings to an end on the three grounds referred to in the document, namely that the plaintiff's pleadings do not disclose a viable cause of action, that she has failed to comply with Court orders and that she has been responsible for substantial delays which have prejudiced Mr Moore in the conduct of his defence. I do not think that the precise rules are especially important in that regard but of those three grounds it seems to me that technically the first falls under RR 186 and 477(a) of the High Court Rules, the second under R 277(2)(a) and the third under R 478. I will proceed through each in turn.

(1) The plaintiff's pleadings

[12] No cause of action against Mr Moore is disclosed on the statement of claim as filed on 1 November 1993 after one makes the deletions recorded at the conference before Master Faire. The effect of the deletions was that Mrs Woodroffe was proceeding against Mr Moore only with respect to a certain statutory declaration made by him. There was no allegation that he had published that declaration to anyone. Mr Pa'u has not attempted to persuade me otherwise. The proceedings must be struck out unless in the Court's discretion it grants leave to file the draft amended statement of claim.

[13] There are other difficulties in the draft amended statement of claim. I accept that paragraph (3) of the draft properly alleges an initial publication by Mr Moore to another individual, namely Mr Liam Jeory, an employee of TVNZ. Although precise particulars are not given as to the reason why the repetition by TVNZ was a natural and probable consequence, it seems to me that that is sufficiently evident from the very nature of the recipient of the declaration. Mr Black submits that there are difficulties for the plaintiff in this pleading in that there is no suggestion that the initial publication on 14 May 1993 to Liam Jeory of itself caused any harm to the plaintiff's reputation. Rather, the harmful publication is limited to the repetition referred to in paragraph 7 by way of broadcast on 24 May 1993. In that respect Mr Black points out that if one looks at the original statement of claim and its annexures it is difficult to see that there was in fact any repetition of Mr Moore's statutory declaration or its contents. That does not inspire confidence in the plaintiff's case but I would not want to rule out the draft on that account.

[14] A more serious difficulty is that the draft amended statement of claim does not plead the defamatory meanings to be taken from the quoted extracts for which Mr Moore is said to be responsible. In that respect s 37(2) of the Defamation Act 1992 provides:

> 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.

[15] That requirement appears to express in statutory form the common law principle referred to in *Gatley on Libel and Slander* (9th ed) paras 26.20 and 26.21. In my view this is not a case in which the defamatory meaning is evident from the complicated passages referred to in the pleading. The pleading of defamatory meaning is, as Gatley points out, more than a mere matter of pedantry. The lack of such a pleading precludes the Court from ruling upon the question whether the words uttered by the defendant were capable of supporting the defamatory meanings alleged by the plaintiff. More importantly, the absence of such a pleading precludes the defendant from identifying with precision what the pleading of truth should

respond to, what the focused issues will be for the trial, and therefore the briefing of evidence and preparation for trial.

[16] Mr Moore has already pleaded truth in relation to the current statement of claim. It seems to me entirely predictable that he would wish to do so again. The situation is therefore that even now the defendant Mr Moore is seriously hampered by the lack of an adequate pleading, whether one resorts to the existing statement of claim or its proposed replacement.

(2) Non-compliance with Court orders

[17] Mrs Woodroffe accepts that the jury fees were not paid by 30 August 2000 as directed. She had ascertained that if she did pay them they would be non-refundable if the case settled. Court orders are not to be ignored. If she was not going to pay she should have sought a variation in the orders, particularly since a change in mode of trial is not a unilateral decision for one party. I am not impressed by the cavalier approach taken to these proceedings. On the other hand I accept that the non-payment is now of little significance given her election this morning to continue on a Judge-alone basis.

[18] A second non-compliance concerns the direction to serve briefs and a draft proposed exhibits list. For those documents which have now been served the delay appears to be only 13 days. A greater problem is the inadequacy in the material so far supplied. The briefs supplied are replete with hearsay and argument. Mr Henry candidly described them this morning as early drafts done in a hurry. Seven years was apparently not long enough to prepare them. This afternoon Mr Pa'u confirmed that more are to come. To take just one example, there is presently no admission or evidence that Mr Moore ever published the impugned statement. Without such evidence the plaintiff's case must fail. Mr Moore still does not know what the evidence against him will be.

[19] Thirdly, there was no timely application for leave to file an amended statement of claim, although I accept that there could have been some misunderstanding over the need for such.

(3) Delays

[20] I have already referred to the lengthy delays in the conduct of the proceedings as a whole. More recently there have been delays in the service of briefs and the provision of a draft amended statement of claim. The most recent delays could not of themselves be described as particularly substantial. What is of greater concern is the continuing inadequacy in the briefs and pleadings provided up to this date. If the proceedings are allowed to continue there will inevitably be further delays.

Prejudice

[21] The delays have caused major prejudice to Mr Moore. He deposes that at trial he would be seeking to rely upon three builders who were witnesses to the events in question. Of those three, the only one he can locate had a more peripheral role in the matter. He has been unable to locate the other two. In a defamation proceeding some seven years after the event, there is also the problem of fading memories and elusive exhibits even if those witnesses can be located. I have not overlooked in that respect the recent affidavit by Mrs Woodroffe in which she effectively denies that these builders could give useful evidence but I have no doubt that the perceptions of the plaintiff and the second defendant will differ on that subject.

[22] In the past the delays in the proceedings as a whole have not quite taken the case to the point where the proceedings were dismissed. However it is against that background that one now comes to the much more modest delays over briefs of evidence and pleadings.

[23] In the circumstances of this case it is appropriate to put the most recent delays in the context of the procedural history as a whole. If one always confined possible prejudice to the most recent delay in isolation there would be a risk of overlooking the much more important prejudice which can stem from an accumulation of delays over a period. That is particularly important in a defamation case as was pointed out by Master Gambrill. Sections 45 and 50 of the Defamation

Act 1992 underscore the importance of promptitude by a defamation plaintiff. I accept that in this case the overall delay has been major as has been the consequent prejudice to the defendant Mr Moore.

Reasons for delay

[24] Reasons advanced for the delay to 1998 were rejected by Master Kennedy-Grant. For the delay since then two matters in particular were advanced this afternoon. One was the change in senior counsel. I cannot see how that could contribute more than a couple of months or so at the outside. Furthermore, current senior counsel has been in charge of the case for over a year now.

[25] Secondly, and I think more significantly, Mrs Woodroffe relied upon settlement negotiations as a reason for the latest round of delays. One constantly hears counsel advancing this to explain delays. I reject negotiations as a justification for procedural delay. If a dispute had been susceptible to easy agreement it would not have been necessary to issue proceedings in the first place. Time and again experience has shown that where proceedings have proved necessary, procedural progress in those proceedings will be the handmaiden of successful negotiations, not its enemy. The more the issues and evidence are formally refined the easier it will be to evaluate the strengths and weaknesses on each side and settle accordingly. And there is nothing like the hot breath of an impending trial to encourage people to concentrate on the alternative of settlement – hence all the settlements on the court steps. It is fallacious to think that time or money will be saved by putting the proceedings on ice while settlement is considered. Procedural steps are stately in their progress at the best of times. There is ample time to pursue mediation and settlement negotiations while civil procedures are being worked through. There is no justification for stopping one in order to pursue the other. If negotiations fail, the judicial alternative should be available as soon as possible.

[26] I cannot accept that there has been any satisfactory reason for the delays in this case.

Overall discretion

[27] On applications of this kind the Court always starts out with a strong preference for allowing cases to be heard on their merits. To dismiss Mrs Woodroffe's proceedings now would deny her a potentially meritorious claim, and hence her access to justice. However, that must be weighed against the factors which I have identified up to this point. Defendants too are entitled to justice. Furthermore, if Court directions and procedures are to have credibility at all there must come a time at which failure to comply will attract real sanctions.

[28] The delays in these proceedings have been inordinate, particularly for a defamation case. They have been inexcusable. They have seriously prejudiced the defendant. The most recent delays have not only prejudiced the defendant but there is no end in sight given continuing difficulty over the plaintiff's briefs and pleadings.

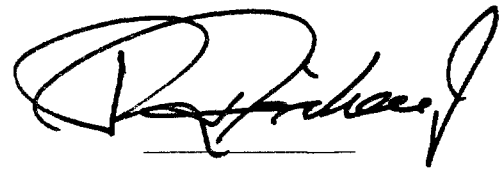
[29] In those circumstances the entire proceedings will be dismissed. At a technical level that can rest upon the lack of any currently viable cause of action. Given the delays, the consequential prejudice and all the surrounding circumstances, it is not a case in which leave should be given to file an amended statement of claim. Nor should leave be given to serve briefs of evidence or adduce such evidence at trial.

Result

[30] There will be judgment for the defendant. The proceedings are dismissed in their entirety.

[31] I have now had the benefit of hearing from counsel and Mrs Woodroffe on the question of costs. I have no reason to question Mrs Woodroffe's statement that a Calderbank letter was sent on her behalf to Mr Moore's legal advisers indicating that she offered to abandon the proceedings if both parties bore their own costs. However, Mr Moore has now achieved a better result than that offered in the Calderbank letter because Mrs Woodroffe will have to pay him costs.

[32] As to the amount, the attendances over the years have straddled the point at which the High Court Rules changed to the new costs regime. It seems to me that in the exercise of my discretion under R 46 it will produce a just outcome in this particular case if I assess costs throughout the whole of the seven year period on the hypothetical basis that the new regime had applied throughout. I therefore direct that the plaintiff pay the second defendant costs assessed on a 2B basis from the time that the proceedings were originally issued in 1993, the details to be determined by the Registrar in the absence of agreement between the parties.



RL Fisher J