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IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CP 4/97

000001

BETWEEN **PR YOUNG**

Plaintiff

AND **P ROSS**

Defendant

Hearing: 9 December 1999

Counsel: P Young, plaintiff in person
P Ross defendant in person

Judgment: 14 January 2000 ~~December 1999~~

JUDGMENT OF MASTER FAIRE

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Solicitors:
Frankton Village Law Centre, DX GB 21005, Hamilton for plaintiff
P Ross, 31 Lowther Place, Taradale, Napier, for defendant

[1] Two applications were listed for argument before me. They are the defendant's application to strike out and the defendant's application to review security for costs.

[2] The plaintiff filed an application to strike out parts of the statement of defence and certain paragraphs in an affidavit. The plaintiff's application sought in the alternative leave to file notices that opinion was not genuinely held pursuant to s 39 of the Defamation Act 1992 and of ill-will pursuant to s 41(3) of the Defamation Act 1992. This application was filed on 22 November 1999. It was filed well after the fixture date was established.

[3] The applications to strike out and for review of security for costs were adjourned on 8 September 1999 for a fixture on 9 December 1999. The minute recorded two matters. First the desire of Mr Young to have AL Hassall QC available to represent his opposition to the applications. Second, the fact that Mr Ross's application would focus on grounds that the claim is frivolous and vexatious or that it was an abuse of process because of the nature of positive defences which had been raised.

[4] The minute recorded that the Court had made provision to dispose of the two applications only. Further, that an application to answer interrogatories would be called for mention.

[5] It is fortunate that some matters were agreed by Mr Young and Mr Ross.

[6] In relation to the application for security for costs, Mr Ross advised that the application was made because of a concern that arose from a potential liability facing Mr Young in respect of two Rotorua files. They are CP 36/98 and CP 18/99. Mr Young informed the Court that both cases were about to be discontinued. Accordingly, I adjourned the application to review security for costs to 2.15pm on 10 February 2000. I directed that Mr Young is to provide Mr Ross with either the order striking out CP 36/98 and CP 18/99 of the Rotorua Registry or the discontinuance of those proceedings, forthwith. Mr Ross is to advise the Court on the receipt of that

advice and confirm that the application to review security may be struck out with costs reserved.

[7] In relation to the application to answer interrogatories, Mr Young advised that he was considering answering the interrogatories in the interests of resolving the application. He would do this so that the way was clear for the proceeding to be set down. Accordingly, I adjourned the application for an order directing that the plaintiff answer interrogatories to 2.15pm on 10 February 2000. If the answers are filed then it is likely that the application can be dismissed with costs reserved.

[8] Both Mr Young and Mr Ross requested that I determine Mr Young's application to strike out or grant leave to file the notices first. That seems appropriate because the answer clearly effects the position so far as Mr Ross's application to strike out is concerned.

[9] The interlocutory history of this file is, to say the least, unfortunate and does little credit to either party. There have been delays. Steps have been taken and points advanced for so-called tactical reasons with little consideration for the merits. A little co-operation and commonsense could have avoided a number of these steps and opened the way for this proceeding to advance to hearing if it could not be appropriately settled beforehand. I am pleased to record that the attitude adopted in relation to the security for costs application and in relation to the answers to interrogatories is a positive sign. Having said that, however, it would be wrong to overlook the position that Mr Young adopted in relation to his representation. These applications were originally adjourned so that Mr Young could obtain representation by his counsel, Mr AL Hassall QC. In a memorandum dated 6 December 1999, three days before the fixture, Mr Hassall advised

> I understand that the fixture for the hearing of the defendant's application to strike out was made as a consequence of the plaintiff intimating at an early hearing of such application that he desired counsel to appear for him at the hearing of the defendant's application. The plaintiff has now decided that he is unable to fund instructions for counsel to appear and accordingly he will be appearing on his own behalf at the hearing of both applications.

[10] Mr Young advised the Court that written submissions he presented were prepared by Mr AL Hassall. When asked why there were no submissions in support of the application for leave to file the two notices his response was simply that Mr Hassall had not given him those submissions. The position is quite unsatisfactory.

[11] The Court has been left to deal with lengthy documents which have been prepared under the supervision of counsel who, Mr Young advised, had been briefed but who did not appear. This state of affairs has already been the subject of comment by Hammond J in this proceeding on a previous judgment on the file. At page 5 of his Honour's Judgment of 30 July 1999 he said:

> Finally, as I apprehend it, Mr Young has counsel, Mr AL Hassall QC. Mr Young appeared before me in person this morning, but he was clear that Mr Hassall would conduct the trial proceedings. Mr Ross is not represented. In my view, it is inappropriate for a litigant to appear in person, when he has counsel. Under the traditional practice of the Bar it should not be permitted. Even if I am wrong on that point, it is quite undesirable on a proceeding of this kind. There are complex issues here. The Court is entitled to assistance. I said that I would grant an indulgence this morning because a fixture had been allocated for the disposal of the matter which is presently before me. But in my view, Mr Hassall should appear in future interlocutory applications in this Court.

[12] That direction has been ignored once again by Mr Young. I have not had the benefit of legal argument on this matter. However, it seems to me appropriate that a warning should be given to this litigant that the course of conduct which has been adopted will not be permitted in future applications. Lay persons have no rights of audience in the superior Courts save as litigants in person. *Re GJ Mannix Ltd* [1984] 1 NZLR 309, 313. Mr Young is not a litigant in person. His documents disclose that his solicitor is James Galt and he has given Mr Galt's firm as his address for service. His current application records that Mr AL Hassall QC is his counsel. Rule 8.01 of the Rules of Professional Conduct for Barristers and Solicitors, 5th edition, 1998 provides:

> 8.01 In the interests of the administration of justice, the overriding duty of a practitioner acting in litigation is to the Court or the Tribunal concerned. Subject to this, the practitioner has a duty to act in the best interests of the client.

[13] A failure to appear on an application in a proceeding where a practitioner has been briefed would appear to be a breach of that Rule. Issues relating to the barrister's fee, if he is briefed, are matters which are the responsibility of the instructing solicitor. It is appropriate that the Court now issue this warning to Mr Young. It is:

(1) If he retains his present solicitors and counsel and they do not appear he must be ready with appropriate authority as to why the Court should grant him audience in the absence of his solicitor and counsel.

(2) If his solicitors remain solicitors on the record, they may well be called upon to explain their absence having regard to the duty imposed on them pursuant to Rule 8.01 of the Rules of Professional Conduct for Barristers and Solicitors, 5th edition, 1998.

[14] I now consider the six specific applications that form part of Mr Young's application dated 19 November 1999. In the first application Mr Young sought an order striking out those paragraphs in the statement of defence which raise the defence of qualified privilege and, in particular, paragraphs 14, 23, 32, 45 and 80. The grounds advanced by Mr Young for striking out these paragraphs are that the particular paragraphs do not, on their face, represent a report whether fair, or accurate or otherwise, of the particular proceedings referred to in the relevant paragraphs.

[15] Mr Young accepted that that required an examination of evidence. When asked which part of Rule 186 was relied upon his response was to abandon that part of the application and to advise me that the real thrust of his case was the application for leave under both ss 39 and 41. In my view, that approach is correct on his part and accordingly I do not make any order in relation to application number one of the application and it is struck out.

[16] I put to one side the second application because it is convenient to deal with that at the same time as the fifth application is dealt with.

[17] The application numbered three seeks an order striking out certain paragraphs in the statement of defence which plead the defence of common law privilege and which are specifically paragraphs 15, 24, 33, 46, 59, 66, 73 and 81. When this ground for striking out was examined it was apparent that the objection made to it would be removed if the relevant passages in the statement of defence were amended by deleting the words *"spoken"* and replacing by the word *"written"*. Mr Young freely acknowledged that that was the position. Mr Ross made an appropriate application for amendment. In the circumstances, I direct that in relation to paragraphs 15, 24, 33, 46, 59, 66, 73 and 81 where the word *"spoken"* is used it is to be replaced by the word *"written"*. On that basis, the third application requires no further order or direction.

[18] The fourth application seeks orders striking out certain paragraphs in the statement of defence which plead the defence of honest opinion and which are paragraphs 13, 22, 31, 44, 51, 58, 65, 72 and 79. In these paragraphs the defendant pleads that the words complained of were expressions of opinion and the subject-matter of the opinion was a matter of public interest and that the opinion was genuinely held and that the defendant relies on the facts and matters stated in the publication complained of. The application to strike out asserts that the words were not, and could not be, matters of public interest. When I suggested to Mr Young that I would need to look at evidence on this issue he freely conceded that that was the position. It seems to me, and Mr Young agreed, that it was not really appropriate for an application under Rule 186, and accordingly he did not require me to determine it. On that basis application number four is struck out.

[19] The fifth application seeks an order extending the time within which the plaintiff may serve a notice required by s 39 of the Defamation Act 1992. It is appropriate that this application be dealt with at the same time as the second application because the issues raised are essentially the same, namely whether leave should be granted in the second application pursuant to s 41(3) of the Defamation Act 1992 and in the fifth application pursuant to s 39(3) of the Defamation Act 1992. Accordingly, I will return to both the applications numbered two and five shortly.

[20] The sixth application sought orders striking out paragraphs of the defendant's affidavit sworn on 3 August 1999. That affidavit was filed in support of an application to strike out the plaintiff's claim on the grounds that it was vexatious and oppressive. When pressed on this subject, Mr Ross sought to argue that the issue by Mr Young of proceedings against other parties justified the order that he was seeking. Again, when he considered the matter carefully, he conceded that really there was no point in having the paragraphs in the affidavit to which objection was taken. He advised me, accordingly, that he did not oppose the striking out of the paragraphs in the affidavit of 3 August 1999 on the basis that they are not relevant to his strike out application. Accordingly, I so order.

[21] In making this order I do not overlook that Mr Ross made reference to s 47 of the Defamation Act 1992 in argument. When I questioned him as to why this did not form part of his application itself, he freely acknowledged that he had not made that reference and therefore it was inappropriate that I deal with the matter based on an application pursuant to s 47. In my view, it would be quite wrong to do so. I have not had the benefit of evidence for that matter from Mr Young on the topic for the simple reason that he was not fairly and squarely placed on notice that it was a s 47 matter that he should be answering. Accordingly, I exclude that as an issue so far as the defendant's application to strike out is concerned.

[22] Having dealt with that matter it is appropriate that I record that Mr Ross did not press his application to strike out on the grounds mentioned therein. He preferred to have the Court concentrate on his opposition to the applications for leave to issue the two notices and which are, in effect, the second and fifth parts of the application made by the plaintiff.

[23] Accordingly, I now consider the matters which are common to both the applications for leave to issue a notice under ss 39 and 41 of the Defamation Act 1992.

[24] The subject-matter of this proceeding are the following publications:

[a] A credit alert document, issued on 2 January 1996 and being the substance of the first and fourth causes of action;

[b] A letter to the Society of Chartered Accountants dated 22 December 1995 and being the subject-matter of the second cause of action;

[c] A letter to Mike Connell, Senior Pastor of the Christian Outreach Centre, New Zealand and which is the basis of the third cause of action;

[d] A letter dated 17 January 1996 and which is the basis of the fifth cause of action;

[e] A letter dated 5 February 1996 and which is the basis of the sixth cause of action;

[f] A letter dated 20 February 1996 and which is the basis of the seventh cause of action;

[g] A letter dated 1 March 1996 and which is the basis of the eighth cause of action.

[25] The last of the publications was made on 1 March 1996. The proceeding issued in this matter was filed in the High Court at Hamilton on 13 February 1997.

[26] The proceedings were served on 15 March 1997.

[27] A praecipe to set the proceeding down was filed on 5 June 1997. A statement of defence, however, was filed on 16 June 1997. An application seeking leave to file a statement of defence out of time was filed on 29 July 1997 and a consent order granting leave to file a statement of defence by 12 September 1997 was made on 8 September 1997. The file records that the Registrar has taken a fee on the statement of defence apparently as at the date of its filing, namely 16 June 1997. That document, anyway appears to have been treated as the statement of defence for the purposes of the order granting leave made on 8 September 1997.

[28] The statement of defence pleads a number of affirmative defences, in particular, defences of honest opinion and qualified privilege. It seems to me that from the time of the granting of leave, time for the purposes of both ss 39 and 41 could be said to run. The statement of defence is a detailed and carefully drawn document. It makes reference to a number of sections in the Defamation Act, in particular, s 9 dealing with honest opinion and s 16 dealing specifically with qualified privilege. A number of interlocutory steps were taken in the interim which I do not specifically recount.

[29] The next significant application for the purposes of this matter, however, occurred with the filing of the notice of interlocutory application to strike out the statement of claim on 5 August 1999. That is significant because it was accompanied by a supporting affidavit also filed at the same time. In paragraph 18 of the affidavit Mr Ross says:

> The plaintiff having not indicated pursuant to s 39 of the Defamation Act 1992 that he challenges the genuineness of the opinion, is now unable to do so. Accordingly the defence stands.

Also in paragraph 20 of the same document, Mr Ross says:

> The plaintiff while claiming malice, has not fulfilled the requirements of s 41 of the Defamation Act in respect of such claim.

[30] There are other references to the sections I have referred to contained in the affidavit which can therefore only be taken as clear notice to the plaintiff of the requirements to give such notice or, at least at that stage, to seek the leave of the Court to give such notice. The application was met with a notice of opposition which is dated 13 August 1999. Mr Ross's application was given a mention date of hearing for 8 September 1999. I have already made reference to the matters disposed of by the Court at that time. In particular, I made reference to the adjournment and the reason for it. It, however, was not until 22 November 1999 that application was made for leave to give the notice and draft notices were actually filed. That must be compared with the last subject-matter of the proceeding, namely the letter of 1 March 1996, the time when the statement of defence was given leave for filing, namely 8 September 1997 and the date when this latest application was

filed, namely 22 November 1999. That places in perspective the period of delay that is the subject-matter of the leave application.

[31] The above summary makes it plain that the effect of the refusal of leave cannot be countered by a discontinuance of the proceedings and a re-issue of them. This is because of s 55 of the Defamation Act 1992. That section introduces a new s 4(6)(a) and (6)(b) to the Limitation Act 1950. In short, a defamation action shall not be brought after the expiration of two years from the date on which the cause of action accrued. In this case, the publications seem to have occurred, at least as to the last of them, on or about 1 March 1996 with the result that if the current proceeding were discontinued a new proceeding could not be issued inside the time prescribed by the now s 4(6)(a) of the Limitation Act 1950. I do not overlook the fact that s 4(6)(b) of the Limitation Act 1950 provides for the seeking of leave to bring proceedings after the expiry of two years but within a period of 6 years. Although I cannot resolve, at this stage, whether such application would be successful it seems to me, on balance, that I should treat this case on the basis that, if it were to be discontinued, the proceeding is subject to the bar created by the Limitation Act in relation to any proceeding the plaintiff might wish to issue.

[32] For all practical purposes, then, at this late stage, the question of whether the notices can issue or not will have a clear and direct effect on the conduct of the trial of this case.

[33] In *RTK Mahuta v ATN Ltd & Ors* 11 PRNZ 321 I had to consider an application for leave pursuant to s 41(3) of the Defamation Act 1992. I concluded that the following were relevant in considering such application, namely:

(a) The section gives the Court a wide and unfettered discretion to grant leave;

(b) No guidance is contained in the section itself as to the circumstances that would justify the granting of leave;

(c) An overriding factor in such cases must always be whether the refusal to grant leave could potentially cause a miscarriage of justice;

(d) An important aspect will be whether a defendant will be prejudiced by the grant of leave. The prejudice may arise in a variety of ways, for example, if the grant of leave were to effectively defeat a limitation defence that has subsequently arisen;

(e) The content of the notice itself may be relevant. Generally, there will be a need to show that there is at least some basis for the allegations made in the reply, although that is not to suggest that there should be anything like an examination of the issues raised in same as to their merits.

[34] In *Gillespie v McKay* 13 PRNZ 90, Wild J also had to consider an application pursuant to s 41(3) of the Defamation Act 1992. He noted that the approach that I had adopted essentially mirrored the approach taken by the Court under Rule 478 and in principle agreed with that approach. Accordingly, when considering the issue of a miscarriage of justice three questions would usually assume importance, namely

[a] Has the plaintiff been guilty of inordinate delay in seeking leave;

[b] Is that delay excusable;

[c] Has the defendant been seriously prejudiced?

[35] Dealing with the three specific issues, then, in my view there has been inordinate delay in giving the notice. This is not a case where the particular statutory provisions were unknown to the plaintiff. They were pointed out in a number of documents starting with the statement of defence and nothing was done either pursuant to ss 39 or 41.

[36] When it comes to considering whether there is any excuse for the delay, the case put by Mr Young was that he had been distracted by a number of interlocutory steps and failures on the defendant's part. The initial failure to file a statement of defence should not count against the plaintiff. However, once the statement of defence was filed which specifically made reference to the defences raised and to the sections in the Defamation Act 1992, I fail to see how the plaintiff can really put forward a plausible excuse for not considering the provisions of the Defamation Act and, if he then thought appropriate, issuing the relevant notices for the purposes of

both sections. He did not do so. Further he did not do so despite the fact that they were specifically raised in the application to strike out which was filed this year. It has not been suggested to me that that is because of any lack of legal advice. I am not satisfied that there is excuse for the delay.

[37] The next question that arises is the question of prejudice. Prejudice is, of course, effected by delay. The delay that Justice Wild considered in *Gillespie v McKay* (supra) was some seventeen months outside the ten working day period. The delay in this case is even greater and is something in excess of two years and two months. I adopt the comments of Wild J in *Gillespie v McKay* (supra) on the effect of delay. He said:

> It is clear from ss 41, 46-50, and 55 Defamation Act 1992, that one of its aims was to ensure and facilitate the prompt commencement and disposal of defamation causes of action. ... As time passes, defamation loses its sting. Or, as that brilliant advocate the late F E Smith once put it, "A libel dies".

[38] In this case, the position is exacerbated by the gap between the alleged defamatory statements and the issue of the proceeding. Whilst delay prior to the issue of proceedings will not constitute inordinate and excusable delay in a strike out situation, if that delay occurs and there is further delay, the total period will be looked at more critically by the Court for the simple reason that all factors including both pre-issue and post-issue prejudice and delay need to be taken into account. See *Lovie v Medical Assurance Society* [1992] 2 NZLR 244, 253.

[39] Mr Ross, in an affidavit in opposition to the application for leave, says that if leave is granted it will be necessary to revisit issues of discovery, interrogatories and to consider the number of witnesses needing to be called and the length of time those witnesses will require. He says that he has conducted his defence in the knowledge that the plaintiff was aware of what the defences that had been raised were, and had not challenged them. He said he will now be severely prejudiced if he has to revisit those issues now. When I pressed him in argument about this he indicated that the number of witnesses which he currently intends to call, being some nine, would be doubled if leave is granted. Those witnesses have not been briefed. He said that he was not aware whether all were contactable. He necessarily faces the problem that

briefing a witness is affected by the passing of time which always has the effect of dimming one's memory of critical events.

[40] There is the potential for a miscarriage of justice if leave is granted in this case. As Justice Wild said in *Gillespie v McKay* (supra) the availability or non-availability of (in that case) the defence of qualified privilege and (in this case) also the defence of honest opinion will be one of the several directions which will need to be put to the jury. The outcome, nevertheless, does allow the plaintiff to proceed. The plaintiff, however, is fixed with the consequences of his own delay rather than visiting those consequences, including the possible serious prejudice upon the defendant, who was not responsible for them. In short, the trial can proceed, but the issues will be limited to those which were evident form the pleadings up to and including the filing of the application on 22 November 1999.

[41] I have considered the notices. I am not persuaded that there was any particular recorded which suggests that the challenges to the defences should be allowed and that to fail to do so will lead necessarily to a miscarriage of justice. This examination is necessarily limited because of the stage of the proceeding at which I carry it out. In short, however, I record that there is nothing in the documents, which are the draft notices, which causes me to depart from the general approach that I have recorded in paragraph 40 of this judgment.

[42] Accordingly, I make the following orders:

[a] The applications of the plaintiff, namely applications 2 and 5 in the application of 22 November 1999 are declined;

[b] The applications numbered 1 and 4 of the application of 22 November 1999 are struck out;

[c] The sixth application of the application of 22 November 1999 is struck out.

[d] The defendant's application to strike out is dismissed;

[e] The application for review of security for costs and the application to answer interrogatories are adjourned to 2.15pm on 10 February 2000;

[f] The statement of defence is amended by deleting the word "spoken" and replacing it with the word "written" in paragraphs 15, 24, 33, 46, 59, 66, 73 and 81;

[g] I reserve costs.

[43] This proceeding, as a result of directions made on other applications, stands adjourned to 2.15pm on 10 February 2000. If the question of security for costs and interrogatories are resolved, as is expected, then it would appear appropriate that this proceeding be set down for trial. Both plaintiff and defendant should accordingly be ready to advise the Court on appropriate trial directions. In the case of Mr Young, his counsel should be present. He currently has a solicitor on the record who has, of course, obligations until such time as an order is made under Rule 45A of the High Court Rules.

Master J Faire