IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP 602sd99

BETWEEN (1) **HARVEY CORPORATION LIMITED**
(2) **EMPHASIS GROUP LIMITED**

Plaintiffs

AND **WK MOFFAT**

603

Defendant

Hearing: 31 May 2001

Counsel: GP Denholm for second plaintiff
P Dalkie for defendant

Judgment: 31 May 2001

JUDGMENT OF MASTER FAIRE

Solicitors:
Harvey Corporation, PO Box 150 383, New Lynn for plaintiffs
Wood Ruck, PO Box 22 034, Otahuhu for defendant

[1] The defendant applies to strike out that part of the claim which is advanced by the second plaintiff against the defendant.

[2] Both counsel sought an adjournment of the application to strike out. The application to strike out had been set down for a fixture today, on 19 March 2001.

[3] The principal reason for the application for the adjournment comes from the second plaintiff. The second plaintiff has only recently requested Mr Denholm to become re-involved in the proceedings. I was told that was because of the illness of the solicitor for the first and second plaintiffs.

[4] The defendant's position is that it simply did not want to waste money if there was some prospect of the second plaintiff abandoning its claim without a defended hearing.

[5] The plaintiffs' performance in this proceeding in relation to compliance with Court directions has been unsatisfactory. Although I have sympathy for the second plaintiff's position because of the illness of its former solicitor, that cannot excuse the prior defaults. No criticism is directed at Mr Denholm by these comments.

[6] I have considered the application. I expressed my concerns to counsel as to whether it really was an appropriate application in any event.

[7] This proceeding was issued by the first and second plaintiffs complaining that they had been falsely and maliciously defamed by words published on a board and placed in the premises at 18 Uxbridge Road, Howick. The defendant's application to strike out the second plaintiff's claim alleges that the second plaintiff cannot prove an essential element of the cause of action. The claim is that the second plaintiff cannot prove that the alleged defamation has caused pecuniary loss or is likely to cause pecuniary loss to the second plaintiff. That is an element of the cause of action against the defendant by virtue 6 of the Defamation Act 1992.

[8] What is apparent, however, is that the resolution of that issue requires evidence.

[9] The principles applicable in a strike out application were confirmed by the Court of Appeal in *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262, 267 where the Court said

> 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] For the purposes of this case, further matters should be added. Strike out applications are usually based on the pleadings alone. However, it is permissible to refer to affidavit evidence where the evidence is undisputed and is not inconsistent with the pleadings. *Attorney-General v McVeagh* [1995] 1 NZLR 558, 566.

[11] When I pressed Mr Dalkie on the question of the basis for the application he conceded there were difficulties having regard to the fact that the application did require an evaluation of the evidence. He was not in a position to consent to the strike out of the application but equally he did not resist and I indicated that was my intention. In my view, it is appropriate that the strike out application be dismissed.

[12] That does not conclude the matter. I have mentioned the fact that the plaintiffs' performance in this case has been unsatisfactory. It is appropriate that I briefly list the steps that have been taken which are revealed from the Court file:

23 December 1999	statement of claim and notice of proceeding filed
1 March 2000	statement of defence filed

19 April 2000	initial conference held
21 April 2000	directions conference adjourn by consent because of non-compliance with directions
1 September 2000	Plaintiffs default again and an unless order is made
29 September 2000	Further directions are made
23 November 2000	Application to strike out is filed by defendant
24 November 2000	First call of strike out application. It is adjourned for directions made relative to its disposal
1 December 2000	An amended application to strike out is filed in accordance with the directions
19 December 2000	Counsel for the second plaintiff and defendant, by memorandum, seek a fixture.
20 December 2000	The strike out application is further adjourned because of the plaintiffs' non-compliance with the directions made on 24 November 2000
26 January 2001	Second plaintiff is again in default. The position is noted and the Court makes further directions
19 March 2001	No appearance is entered by the plaintiffs. A fixture for the strike out application is made

[13] Although I have struck out the defendant's application, in my view, the application has drawn attention to a weakness in the plaintiffs' claim. I leave to one side whether that question should simply be resolved at trial or whether it is appropriate for determination pursuant to Rule 418 of the High Court Rules. What is important is that it has signalled a problem for the second plaintiff to face up to. It is for that reason, and because of the performance of the plaintiffs to date, as I have recorded in this judgment, that I do not make any order for costs at this stage. Costs are reserved.

[14] I have mentioned that the problems associated with this file certainly bear no criticism being levelled at Mr Denholm. He has sought instructions. He understands that they will be given to him shortly. In the circumstances it is appropriate that I adjourn this proceeding to the Masters' chambers list at 11.45am on 15 June 2001. At that time, I expect counsel to advise on the following:

[a] Whether the second plaintiff intends to proceed with its claim, or, alternatively, if it consents to the claim being struck out;

[b] What further step, if any, is required in this proceeding before setting down;

[c] What steps have the parties taken to explore thoroughly the settlement of this dispute;

[d] Whether it is now appropriate to make orders for costs.

Master J Faire

Signed at 4.35 ~~am~~/pm on 31.5 - 2001