4020

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2004-404-411

04/1886

	BETWEEN	N J GIBSON Plaintiff
	AND	K BLUNT Defendant

Hearing: 1 October 2004

Appearances: P Kennelly for Plaintiff
H Wilson for Defendant

Judgment: 4 October 2004

JUDGMENT OF RANDERSON J

Lawyers:
Kennelly Law, PO Box 607, Orewa, for the Plaintiff
Kensington Swan, PO Box 10246, Wellington, for the Defendant

Introduction

[1] In this proceeding, the plaintiff alleges he was defamed by the defendant in a letter dated 4 December 2001 to the Dental Council of New Zealand. The letter was a complaint about the dental treatment the defendant received from the plaintiff and the charges made for the dental work. The plaintiff claims the letter meant he was incompetent and untruthful and fraudulent in his dealings with the defendant.

[2] The plaintiff did not issue the present proceeding until 30 January 2004, outside the 2 year time limit provided by s4(6A) of the Limitation Act 1950. The plaintiff now applies for leave to bring the defamation action out of time under s4(6B) of the Limitation Act.

[3] Sections 4(6A) and (6B) provide:

> s.4 (6A) Subject to subsection (6B) of this section, a defamation action shall not be brought after the expiration of 2 years from the date on which the cause of action accrued.
>
> (6B) Notwithstanding anything in subsection (6A) of this section, any person may apply to the Court, after notice to the intended defendant, for leave to bring a defamation action at any time within 6 years from the date on which the cause of action accrued; and the Court may, if it thinks it just to do so, grant leave accordingly, subject to such conditions (if any) as it thinks it just to impose, where it considers that the delay in bringing the action was occasioned by mistake of fact or mistake of any matter of law (other than the provisions of subsection (6A) of this section), or by any other reasonable cause.

Factual background

[4] I will set out the background in the form of a chronology:

4 December 2001	The defendant's letter of complaint was sent to the Dental Council. The date of receipt is not absolutely clear but counsel agreed that it could either have been 6 December or, at the latest, 10 December.

2 April 2002	A copy of the complaint was sent by the Dental Council to the plaintiff's then solicitor, Mr A Woodhouse of Dunedin.
May 2002	A complaint assessment committee was appointed by the Dental Council to investigate the complaints made against the plaintiff by the defendant and three others.
23 May 2003	The plaintiff applied to strike out the complaints.
27 May 2003	The plaintiff says he first became aware of the letter at issue. It was disclosed by the Dental Council to his then counsel, Ms A Fisher. Mr Gibson says further that he was, at this time, advised by Ms Fisher that the letter was privileged.
12 June 2003	The Dentists Disciplinary Tribunal declined the application to strike out the complaints and confirmed its decision on 25 June 2003.
27 June 2003	The plaintiff appealed to the High Court against the strike-out decision.
August 2003	The plaintiff retained Mr G Jenkins of Napier to act on his behalf.
1 October 2003	The plaintiff was advised that he could proceed with a defamation claim if he could establish malice. He instructed Mr Jenkins to issue proceedings for defamation on that basis.
27 November 2003	A solicitor in Mr Jenkins' firm signed the notice of proceeding for the defamation claim.

6-12 December 2003	The plaintiff was in Napier to consult Mr Jenkins and was given the relevant documents to file in this court. The two year limitation period expired sometime in this period.
14 January 2004	The High Court appeal was abandoned and judicial review proceedings substituted.
30 January 2004	The defamation proceedings were filed in the High Court in Auckland.
29 April 2004	The defamation proceedings were served on the defendant.
11 May 2004	The defendant's solicitors informed Mr Jenkins that the claim was out of time and that an application for leave was required.
11 June 2004	The application by the plaintiff for leave was filed.

The affidavit evidence

[5] In his affidavit sworn in support of the application for leave, the plaintiff deposes to the history as set out above. He states that the period between 6 and 12 December when he was in Napier consulting Mr Jenkins was an intensive period and that he was involved in attending to a variety of other legal proceedings during that time. These were time consuming, for reasons set out in his affidavit. As well, it became necessary for him to travel to Sydney to consult with a potential witness. He goes on to depose that, due to his commitment to the other matters mentioned, he 'overlooked' filing the statement of claim and notice of proceeding until 30 January 2004 upon his return from Sydney.

[6] Thereafter, he maintains that the delay in service was due to the defendant appearing to evade service (a matter denied by the defendant). The plaintiff does not

depose directly as to whether he was advised of the time limit for issuing proceedings. However, I am prepared to infer that neither he nor Mr Jenkins were aware of the time limit. If they were, then there would have been every reason to proceed promptly after the proceedings were apparently prepared in late November 2003. When the time limit was pointed out by the defendant on 11 May 2004, the application for leave was promptly brought. Had the solicitors and the plaintiff been aware of the time limit, I am prepared to infer that they would have filed an application for leave promptly as soon as they became aware of it. Instead, the proceedings were prepared and filed on 30 January 2004 without any application for leave, suggesting there was no sense of urgency on the part of the plaintiff or his advisers.

[7] The defendant has filed an affidavit but it relates only to service of the proceeding. He denies attempting to evade service and deposes that his employment requires him to travel frequently to Australia on business. Even so, his son is usually present at his home at which the plaintiff attempted service. The Tribunals officer of the Dental Council of New Zealand also filed an affidavit. She confirms that a copy of the complaint by the defendant was supplied to the plaintiff's solicitor, Mr Woodhouse, under cover of a letter dated 2 April 2002.

Plaintiff's submissions

[8] For the plaintiff, Mr Kennelly submitted first there was a mistake of law which, at least in part, served to explain the delay. He submitted that the advice given by Ms Fisher was wrong. She ought to have advised that a claim for qualified privilege could be defeated by proof of malice on the part of the defendant.

[9] For reasons which I later explain, I am not persuaded that the advice given by Ms Fisher was necessarily wrong. However, even if it were, the effect of any such mistake was spent by 1 October 2003, when the plaintiff received Mr Jenkins' contrary advice and instructed him to proceed with the defamation claim.

[10] Mr Kennelly accepted that the plaintiff is prohibited by s4(6B) from relying on ignorance of the time limit as a ground for an extension of time. That concession

was rightly made, given the decision of the Court of Appeal in *Wilson & Horton v Lee* (1997) 11 PRNZ 550, 554, where it was held that ignorance of the time limit amounted to a mistake of law. As such, s4(6B) precluded the plaintiff from relying on it.

[11] However, Mr Kennelly submitted that leave could nevertheless be granted on the grounds that the delay in bringing the action was occasioned by 'any other reasonable cause'. In that respect, Mr Kennelly relied particularly on the decision in *Wilson & Horton* where the Court of Appeal upheld the decision of Robertson J accepting (amongst other grounds) that the intending plaintiff had been involved with other pressing matters throughout the period of two years and beyond, leading up to the bringing of the proceedings and on the basis that he understood he had done all that was necessary to bring the proposed action. In that case, the total delay was two years and seven months between the alleged defamation and the application for leave.

[12] Here, Mr Kennelly submitted that the plaintiff gave instructions to Mr Jenkins to proceed on 1 October 2003 and steps were then taken to prepare the proceedings. Mr Kennelly submitted it could be inferred that the proceedings were ready in late November 2003, shortly before the expiry of the two year time limit. In the absence of any advice about time limits, he submitted that the plaintiff was entitled to believe all was in order. He submitted that the delay thereafter was not excessive and, there being no material prejudice to the defendant, it was in the interests of justice that leave be granted.

Defendant's submissions

[13] For his part, Mr Wilson accepted that the relevant period for delay was the six month period from the expiry of the time limit in December 2003 until the date of the application for leave in June 2004: *Parris v Television New Zealand Ltd* (1996) 9 PRNZ 444,449. Mr Wilson submitted that the delay during that period was substantial and had not been adequately explained. Mr Wilson submitted that, if there is no reasonable cause for part of the period of delay, it may be fatal to the plaintiff's application: *Hodge v Television New Zealand* (1996) 10 PRNZ 263.

[14] It was also submitted for the defendant that it would undermine the statutory intent of s4(6B) if inadvertence of the time limit were permitted to be relied upon as constituting 'reasonable cause' for the delay.

[15] Finally, Mr Wilson submitted that overall justice militated against the grant of consent. He submitted that the defamation proceedings were designed to put pressure on the defendant in relation to the complaint under the Dental Act 1988, and amounted to a form of abuse of process. As well, the plaintiff had become aware of the letter of complaint well before the expiry of the time limit and, if leave were granted, the defendant would be put to the cost and time of defending a claim which had no realistic prospects of success.

Discussion

[16] I have concluded that leave should be granted on the basis that the delay was occasioned by 'other reasonable cause'. The reasons may be shortly stated.

[17] First, the delay of six months is not great, bearing in mind that time may be extended for up to six years from the date the cause of action arose.

[18] Secondly, it is not a case where the plaintiff has slept on his rights. He instructed his solicitor to proceed in October 2003, two months before the time limit expired. He was entitled to expect that the solicitor would prepare and file the proceedings within any appropriate time limit. The proceedings were in fact prepared before the expiry of the time limit and then handed to the plaintiff for service. The delay in filing the proceedings thereafter was not excessive having regard to the Christmas break (when the Court office would have been closed for the Christmas vacation) and the plaintiff's other commitments during this period.

[19] Thirdly, while it is not possible on the evidence to conclude that Mr Blunt was attempting to evade service, as claimed by the plaintiff, it is unnecessary to make any finding on that issue. It is sufficient to conclude, as I do, that Mr Gibson was not sitting on his rights during this period. Some efforts were being made to effect service even if they were unsuccessful for whatever reason.

[20] Fourthly, once it became known that the claim was out of time, prompt steps were taken to make the necessary application for leave.

[21] I am satisfied there are no reasons to decline leave in the exercise of discretion. There is no suggestion that the defendant would be prejudiced by the grant of leave (other than in respect of cost and time). The defendant has been fully involved in the disciplinary proceedings under the Dental Act and it is proper to infer that he must have prepared a statement or brief of evidence in relation to those proceedings. It is not possible to conclude on the material before me that the defamation proceedings have been brought for an improper purpose.

Conclusion

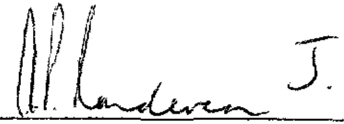
[22] In those circumstances, leave will be granted to extend the time for bringing this proceeding up to the date on which it was actually filed. As the plaintiff is seeking an indulgence, there will be no order for costs.

The issue of privilege

[23] I raised with counsel during the course of the hearing that it would seem arguable absolute privilege applies to the complaint made by the defendant by virtue of s14(1) of the Defamation Act 1992. Counsel may wish to refer to *Teletax Consultants Ltd v Williams* [1989] 1 NZLR 698 (CA). That case was concerned with a complaint made to a law society about the conduct of a solicitor. It was held that the letter of complaint was part of the disciplinary process and that it was the subject of absolute privilege accordingly. *Teletax* was decided before the passage of the Defamation Act 1992 but counsel may wish to consider whether the issue of privilege should be determined as a preliminary issue under r418 or on a strike-out application brought by the defendant.

[24] I direct that the parties consider this issue and that any application under r418 or any application for a strike-out be filed and served within four weeks of this decision.

Signed at __5pm__ this 4th day of October 2004



A P Randerson J