

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

**CIV-2001-404-2027 / CP 324-SD01**

BETWEEN NEW TIMES MEDIA LTD  
First Plaintiff

AND CHEN WEIMING  
Second Plaintiff

AND CHEN WEIJAN  
Third Plaintiff

AND LIU WEIZHENG  
Fourth Plaintiff

AND CHEN ERYOU  
Fifth Plaintiff

AND CHINESE HERALD LTD  
First Defendant

AND STEPHEN SIK FUN WONG  
Second Defendant

AND STELLA HU, AKA HU XIU FANG  
Third Defendant

Hearing: 9 September 2004

Appearances: Mr D Watt for plaintiffs  
S S Wong in person

Judgment: 9 September 2004

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**(ORAL) JUDGMENT OF ASSOCIATE JUDGE LANG  
[re application by defendants for leave to file counterclaim]**

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[1] By interlocutory application dated 19 April 2004 the defendants in this proceeding seek leave to file a counterclaim against the first to fourth plaintiffs. The counterclaim is in defamation, and follows an article published by the first plaintiff on 28 July 2000. The defendants claim that this article was defamatory in nature, and that they are entitled to relief against the first to fourth plaintiffs as a result.

[2] The defendants require leave to file the counterclaim by virtue of s 55 of the Defamation Act 1992. That section amended the Limitation Act 1950 as follows:

**55 Amendment to Limitation Act 1950**

The Limitation Act 1950 is hereby amended by inserting in section 4, after subsection (6), the following subsections:

“(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.”

[3] In the present case the draft counterclaim was not filed until 14 August 2004. It is therefore well outside the two year period within which claims in defamation may be brought without leave. For this reason the defendants need to satisfy the Court that grounds exist to allow the counterclaim to be filed notwithstanding that four years have now passed since the date of the publication.

[4] Before dealing with this issue I propose to deal with another issue which was raised by the plaintiffs.

*Is the claim barred by s 49(1) of the Defamation Act 1992?*

[5] The plaintiffs contend that the defendants are prevented from filing the counterclaim in any event by virtue of s 49(1) of the Defamation Act 1992. That section provides as follows:

**49 Limitation on subsequent actions**

(1) Where any proceedings for defamation have been determined by settlement, judgment, final order, or discontinuance, the plaintiff in those proceedings may not, except by the leave of the Court, commence or continue any other proceedings for defamation against any defendant in the first proceedings in relation to the same publication or to any other publication of the matter in respect of which the first proceedings were commenced.

[6] The present proceeding is but one of several between these parties. To date only one of those proceedings, CP 366-01, has been heard and determined. That proceeding was the subject of a judgment delivered by Paterson J on 11 March 2004. In that proceeding the three defendants in this proceeding alleged that the plaintiffs in this proceeding had published defamatory statements. The defendants succeeded in their claim, and Paterson J awarded them a total sum of \$150,000 in damages.

[7] One of the articles which was the subject of Paterson J's judgment was an article published in the 28 July 2000 edition of a newspaper called the "New Times Weekly". Mr Watts' initial submission was that the proposed counterclaim deals with exactly the same article. During the hearing, however, it transpired that there were in fact two articles published in the 28 July 2000 edition of the newspaper. The judgment delivered by Paterson J dealt with one of those articles, but not with the article which is now the subject of the proposed counterclaim.

[8] In my view the reference to "publication" in s 49(1) of the Act is a reference to the publication of the defamatory statement giving rise to the proceeding. Viewed in that light, the article which is the subject of the proposed counterclaim was not before the Court in the claim determined by Paterson J. It is therefore not barred by the operation of s 49(1) of the Act.

*Should leave be granted under s4(6B) of the Limitation Act 1950?*

[9] I now turn to the real issue, which is whether or not leave should be granted to file the counterclaim out of time pursuant to s 4(6B) of the Limitation Act 1950.

(i) *Have the necessary grounds been established?*

[10] The Court may grant leave to file a claim in defamation after two years from the date on which the cause of action accrued provided certain grounds are established. First, the Court must be satisfied that the delay in bringing the action was occasioned by a mistake of fact or of law (other than in relation to the provisions of sub-section (6A), which relates to the time within which proceedings must be brought). Alternatively, the Court must be satisfied that the delay has been occasioned “by any other reasonable cause”. If it is satisfied that one of those grounds has been established, the Court may grant leave if it thinks just to do so. In granting leave it may also impose such conditions as it may think just.

[11] In the present case the affidavit filed in support of the application by Mr Wong does not provide any assistance in relation to the issues the Court is required to determine. In particular, Mr Wong provides no explanation as to why the article which is the subject of the proposed counterclaim was not before the Court in the proceeding brought by himself and his co-plaintiffs in CP 366/01.

[12] Today Mr Wong advised me in his oral submissions that his solicitors must have excluded the article from the original statement of claim by mistake. He pointed out that the article had formed part of the original statement of claim, but that when he changed solicitors a new statement of claim was prepared. For reasons he cannot understand, reference to the article was omitted from the final form of the statement of claim. He can only surmise that this occurred as a result of a mistake or oversight on the part of his new solicitors. He says that he would have liked to have obtained evidence from his solicitors as to the reasons why the article was omitted from the final form of his statement of claim. He says, however, that they are now not co-operating with his requests for information.

[13] In my view there is little room to infer that Mr Wong's new solicitors mistakenly omitted the article from the second amended statement of claim. In formulating the second amended statement of claim the solicitors must have had available to them the original statement of claim. The final form of the second amended statement of claim is an extremely detailed document, in which matters are properly pleaded and particularised. It would be highly surprising if Mr Wong's solicitors, who obviously spent an enormous amount of time in preparing the new statement of claim, simply omitted by oversight to include in the statement of claim the article which is now the subject of the proposed counterclaim.

[14] In my view the only realistic inference is that Mr Wong's new solicitors concluded, for whatever reason, that the claim in CP 366/01 should proceed on the basis of the other four articles that were eventually the subject of that proceeding. I do not consider that the omission of the article could have occurred through mere oversight or mistake. For this reason I am not satisfied that Mr Wong has established that the delay in prosecuting his claim based on the second article published on 28 July 2000 was occasioned by a mistake of fact or law or by any other reasonable cause.

*(ii) Would it be just in any event to grant leave?*

[15] Even if I had taken the view that the article had been omitted by mistake, however, I would not have been prepared to grant leave to Mr Wong to file the counterclaim. This is because I do not consider that it would be just to grant him leave to do so.

[16] Mr Wong and his co-plaintiffs had ample opportunity to ensure that all outstanding issues were included in their claim against the plaintiffs in CP 366/01. I do not accept that they did not realise that the article had been omitted until just before the trial. Even if it had been, an application to amend the pleading could have been made to the trial Judge.

[17] In my view there is merit in Mr Watts' submission that there has to be an end to litigation. This matter could easily have been incorporated in Mr Wong's original

claim, and yet it was not. I do not consider that it would be just to now require the plaintiffs in this proceeding to defend a counterclaim that could and ought to have been brought as part and parcel of the earlier proceeding.

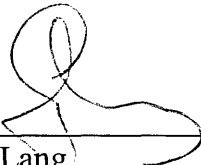
[18] Moreover, even if the article had been part of the earlier claim, I do not consider that it is likely that Paterson J would have altered the damages awarded to Mr Wong and his co-plaintiffs in any significant way. He was required to make a broad assessment of the damage the plaintiffs had suffered to their reputation and goodwill. That is necessarily an objective assessment, and in my respectful view it took into account all relevant factors. I do not see how the addition of a further defamatory article, which to my mind is along the same lines as the earlier articles in respect of which judgment was entered, would have materially altered the position. I therefore do not consider that Mr Wong and his co-plaintiffs have realistically suffered any material loss as a result of the omission of this article from the earlier proceeding.

### **Order**

[19] Taking these matters into account I have reached the conclusion that it would not be just to allow the counterclaim to proceed at this stage. Mr Wong's application is therefore dismissed.

### **Costs**

[20] The plaintiffs are entitled to a single joint award of costs. Those costs are to be calculated on a category 2B basis. I record that the hearing occupied one and a half hours and that costs should be calculated on that basis.

  
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G L Lang  
Associate Judge

Solicitors:

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