IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2004-404-005152

UNDER	the Defamation Act 1992
BETWEEN	RICHARD JOHN HUBBARD Plaintiff
AND	FOURTH ESTATE HOLDINGS LIMITED Defendant

Hearing: 7 February 2005

Appearances: G M Illingworth QC/A J Steel for Plaintiff
J Miles QC/D McLellan for Defendant

Judgment: 16 February 2005

JUDGMENT OF VENNING J
On application to strike out/stay

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Background

[1] The campaign for Mayor of Auckland in 2004 attracted a great deal of media attention. The two main contenders, Mr Banks the sitting Mayor and Mr Hubbard, while both successful businessmen in their own right were quite different personalities. The candidates were afforded significant air time by the media. On 15 September Mr Hubbard participated in a television interview on Television One's Face to Face programme with Kim Hill. Mr Banks also took part.

[2] During the interview Mr Banks referred to Mr Hubbard's adoption in his business, Hubbard Foods, of the method of financial reporting known as triple bottom line reporting (a form of reporting in which a business produces a report showing not only conventional profit and loss reporting but also its commitment to social and environmental causes). Mr Banks challenged the plaintiff's commitment to triple bottom line reporting. Mr Banks said:

> Yes, firstly I want to correct something, triple bottom line, um, Mr Hubbard believes in triple bottom line, he's reported it in 2001, not in 2002, not in 2003, not in 2004, but the Auckland City Council has a triple bottom line policy that we report every year.

[3] The interviewer, Kim Hill, asked Mr Hubbard whether this was right. Mr Hubbard responded:

> We, we did one in 2001, 2002, and we'll be doing another one shortly, we don't do everyone every year.

[4] Two days later on Friday, 17 September 2004, the National Business Review (NBR) published a front page story headline "Hubbard's triple bottom lie". In it the NBR said that Mr Hubbard had:

> … deceived the nation by falsely claiming … that he had produced his company's much-vaunted triple bottom line corporate social responsibility report twice.
>
> In fact, his first and only report was produced in 2001. His claim on TV that he produced one in 2002 was in direct contradiction to statements he made to the [NBR] this week.

[5] The article referred in detail to the interview and said that:

> … just two days earlier Mr Hubbard told NBR he had only ever filed one such report and that was in August 2001.

[6] On Wednesday, 22 September 2004 Mr Hubbard filed proceedings in defamation against the NBR, alleging that the NBR article meant that he had told a lie and had attempted to deceive the public. In breach of s 43 (1) of the Defamation Act 1992 the original statement of claim claimed specified damages of $1.5 million in the prayer for relief.

[7] The fact the plaintiff had sued NBR was leaked to the media. The next day the New Zealand Herald's billboards announced "Hubbard sues NBR for 1.5 million". There was extensive publicity of the claim in the New Zealand Herald that day. It was a front page story under the headline "Hubbard sues for $1.5 million after paper's 'hatchet job'". Mr Hubbard was reported as saying inter alia of the claim:

> I have been advised by my legal advisers that the case is both watertight and simple.

The report referred to the claim being for $1.5 million.

[8] The Herald then published three further articles or columns in its 24 September edition and one more in its 25 September edition. The articles referred to the claim for $1.5 million. The claim was also referred to on Television One News on 24 September and in other newspapers throughout the country.

[9] Following correspondence between the solicitors Mr Hubbard and his advisers accepted that the original claim was in breach of s 43 (1). His advisers conceded the section had been overlooked. An amended statement of claim was filed on 28 September 2004. It deleted reference to the claim for a specific monetary sum.

Application

[10] The defendant seeks to strike out or stay the plaintiff's action against it on the grounds:

(1) The proceeding is an abuse of process in that Mr Hubbard has no intention to proceed to trial and/or the proceeding was filed for ulterior purposes including to prevent public and media comment about matters raised by the NBR.

(2) By unlawfully claiming specified relief for 1.5 million in general damages the proceeding was an abuse of process and by itself or in conjunction with circumstances set out in point 3 below, was a contempt of Court.

(3) The plaintiff's actions after filing a statement of claim and making or causing extensive public comment referring to the relief of 1.5 million and claims as to the strength of the proceeding were a further contempt of Court.

(4) The defendant is prejudiced in that the defendant's right to a fair trial has been seriously affected.

Preliminary matter – admissibility

[11] In answer to the application to strike out Mr Hubbard filed an affidavit to which he attached a number of other articles run by the NBR about him and his wife. Counsel for the NBR objected to the admissibility of parts of the affidavit that referred to those articles on the basis they are irrelevant to the matters in issue on the application.

[12] Mr Illingworth submitted that as the application to strike out or stay is based on the comments the plaintiff made public after filing the proceedings the plaintiff was entitled to explain why he made the comments and the articles gave the

background to that. Mr Illingworth supported the submission by reference to the plaintiff's rights under s 14 of the New Zealand Bill of Rights Act 1990 and the right of a person whose reputation has been attacked to defend his reputation in public and the law.

[13] With respect, however, in my view that submission misses the point.

[14] There is a well recognised principle of law that a person whose character or conduct has been attacked is entitled to answer such attack and any defamatory statements he may make about a person who attacked him will be privileged: *Gatley on Libel and Slander* (10th ed) para 5.14; and as put rather colourfully by Lord Oaksey in *Turner v MGM Pictures Limited* [1950] 1 All ER 449:

> There is, it seems to me, an analogy between the criminal law of self defence and a man's right to defend himself against written or verbal attacks. In both cases he is entitled, if he can, to defend himself effectively, …
>
> If you are attacked by a prize fighter you are not bound to adhere to the Queensberry rules in your defence.
>
> (p 471)

[15] That principle and the right to strenuously defend one's reputation are supported by s 14 of the New Zealand Bill of Rights. To that extent I agree with the general point made by Mr Illingworth.

[16] However, the right to respond vigorously to an attack can in no way extend firstly, to permit a breach of s 43 (1) of the Defamation Act and secondly, to support a public comment about the likely outcome of the proceedings, a statement which Mr Illingworth properly accepted should not have been made, and for which he apologised on behalf of the plaintiff.

[17] The right to respond and defend himself vigorously would have, for instance, permitted Mr Hubbard to have responded to the attack by the NBR by describing the NBR's article attacking him as a 'hatchet job' and 'gutter journalism' as in fact he has. But that is quite a different issue to the actions of which the defendant complains.

[18] The reference by the plaintiff in his affidavit to other articles run by the NBR against him (upon which he does not sue), the comments he makes about them and his general statements of belief can not support the breach of s 43 (1) or his public statements about the outcome of the proceedings. The other articles are not relevant to those issues. To that extent those aspects of the affidavit are inadmissible.

[19] However, no challenge was taken to the admissibility of Mr Hubbard's statements that [the defamation proceedings] were issued:

> In circumstances of extreme urgency and unfortunately a provision concerning defamation claims against the media was overlooked. I was not aware of this special provision when the proceedings were commenced. I would never have authorised the filing of a statement of claim that deliberately breached a legal provision and I'm equally sure that my legal advisers would not have acted in that way without my knowledge. Naturally I regret the error that occurred.

and that:

> I would never have referred publicly to a damages figure had I known that a specific figure should not have been claimed.

and:

> I unequivocally state that from the moment I gave instructions for these proceedings to be commenced I fully intended to pursue them to their conclusion and that remains my intention

[20] As Mr Hubbard's statements as to his intention to pursue the proceeding are admissible and have not been challenged (leave was not sought to cross-examine Mr Hubbard on them) I accept that he intends to pursue the proceeding. The grounds in support of the application to strike out must therefore be confined to the breach of s 43 (1) of the Defamation Act, the plaintiff's public reference to his claim for $1.5 million and his public statements as to the outcome of the proceedings all of which the defendant says amount to an interference with the administration of justice.

Abuse of process/contempt of Court

[21] The application to strike out or stay the plaintiff's proceeding is brought on the grounds of abuse of process. The jurisdiction for the orders is found in rr 186,

477 and the inherent jurisdiction of the Court. In support of the application it is also alleged the actions of the plaintiff amount to contempt of Court.

[22] In the present case the defendant alleges the contempt of Court was the breach of s 43 (1) and the plaintiff's public statements about the claim and the strength of his case. The defendant says that separately or collectively the plaintiff's actions amount to interference with the administration of justice. Prima facie an attempt to interfere or an actual interference with the administration of justice would support an action to have the offending party held in contempt. The defendant does not however seek to have the plaintiff held in contempt, but rather seeks to rely on the contempt to support its application to strike out or stay the proceeding as an abuse of process.

[23] Interference with the administration of justice by attempting to influence the outcome of the proceeding which is what the defendant says the plaintiff has done, is a criminal contempt. It can be contrasted with civil contempt which generally consists of disobedience to judgment orders or other processes of the Court and involves private injury: *Taylor Bros Ltd v Taylors Group Ltd* [1991] 1 NZLR 91, 92.

[24] A criminal contempt of Court will normally be pursued by the Solicitor-General on reference from an interested party, but may be pursued by an individual: *Duff v Communicado Ltd* [1990] 2 NZLR 89. In either case, an action for committal is required. The contempt is a criminal offence. It is the only non statutory offence remaining punishable by the Courts in New Zealand: s 9 Crimes Act 1961. Further, as observed by Blanchard J in *Duff v Communicado Ltd* there are certain features that apply to an application for a finding of contempt including:

- the onus of proving contempt is on the plaintiff;

- the contempt must be proved beyond reasonable doubt;

[25] The issue for the Court on this application is whether it should engage in consideration of whether the plaintiff has acted in contempt of Court (with the

consequences that flow from that) or whether it is sufficient to consider whether the plaintiff's actions amount to an abuse of process, such that the plaintiff's proceeding should be struck out or stayed. If a party to a proceeding is in contempt of Court because their actions relating to the proceeding amount to an interference with the administration of justice, then such actions will also amount to an abuse of process. However, not every action which may amount to an abuse of process will necessarily support an action for contempt.

[26] Given the potentially serious consequences of a finding of contempt then in my view if a party is to allege contempt, the contempt ought to be pursued as a separate action in its own right rather than as in this case, where the Court is effectively invited to make findings of contempt to support a strike out on the grounds of abuse of process.

[27] In any event, in the present case, it would be sufficient for the defendant's purposes if the Court were to find that the actions of the plaintiff in breaching s 43 (1) and/or the public statements made by the plaintiff amounted to an abuse of process even without the need to make a finding that the plaintiff is guilty of contempt, and potentially open to committal for contempt.

[28] It is relevant that a finding of contempt may be sanctioned in a number of ways. In some cases the finding itself may be sufficient (perhaps coupled with costs) in other cases significant costs may be awarded, a fine may be applied, or the guilty party may be committed. None of those remedies, perhaps with the exception of costs, are available to the Court on the present application. The defendant does not pursue them.

[29] In short, in my view, it would be wrong for the Court to convert this application for stay or dismissal into a de facto action for contempt of Court. I decline to do so. The NBR is open to pursue separate contempt proceedings against Mr Hubbard if it wishes to do so, but I approach this application by considering whether Mr Hubbard's actions are an abuse of process such as to require the sanction of strike out or stay. I turn now to that issue.

Section 43 (1)

[30] Section 43 (1) of the Defamation Act reads:

> **43 Claims for damages**
>
> (1) In any proceedings for defamation in which a news medium is the defendant, the plaintiff shall not specify in the plaintiff's statement of claim the amount of any damages claimed by the plaintiff in the proceedings.

[31] The plaintiff breached s 43 (1) by referring to the damages sought of $1.5 million in the initial statement of claim. The plaintiff has deposed that the provision was overlooked when the proceedings were drawn in haste. He says that it was an error. That was confirmed by counsel in submissions. I accept the evidence of the plaintiff as confirmed by Mr Illingworth in submission, namely that the reference to the $1.5 million figure in breach of s 43 (1) was an oversight of the plaintiff and his advisers as opposed to it being a deliberate breach of the section.

[32] In considering the effect of the breach of s 43 (1) and the sanction that should apply in the circumstances it is proper to consider the purpose of s 43 (1). Section 43 (1) applies to defamation proceedings against the news media. In the past defamation writs were issued against news media with a view to stifling or inhibiting further publication of the matter of which the plaintiff complained. The Defamation Act 1992 followed the McKay Committee's Report on the existing law. At para 412 to 413 of its report the Committee identified that:

> The term "gagging writ" is used to describe a defamation writ commonly claiming high damages but really only intended to stifle publication of further matter on the same subject. The use of "gagging writs" appears to have increased in recent years in New Zealand and has been a cause of concern to the news media.

Later at para 421 to 422 the Committee went on to note:

> We do not believe that there is any one solution to the "gagging writ" because in practice it is not possible to distinguish immediately between such a writ and one that is issued bona fide.
>
> Our primary recommendation is that the plaintiff in an action for defamation in which there is a news media defendant should not be permitted to specify in his statement of claim the amount of damages claimed. This should go some distance towards removing the gagging effect of large claims. The

> enactment of such a provision would not prevent counsel specifying during the trial the amount of damages sought. Nor would it prevent discussion of damages in settlement negotiations.

Section 43 (1) then was directed at the effect of the "gagging writ".

[33] The purpose of s 43 has been considered by the authors of *Media Law in New Zealand 4th ed, OUP, Burrows and Cheer* where the authors confirm the above:

> … in defamation proceedings against a news media defendant, the plaintiff is not permitted to specify in the statement of claim the amount of damages claimed. The rationale is presumably to ensure that unrealistically large sums are not specified for purposes of intimidation. …

[34] Against that background, while there has been a clear breach of the section in this case it is significant in my view that the figure was mentioned in error rather than by way of deliberate breach and that immediately the matter was drawn to the attention of the plaintiff and his advisers the error was acknowledged and an amended claim was filed that deleted reference to the figure. That occurred within a matter of days of the issue of the proceeding on (22 September) and the first publicity on 23 September. The breach was first drawn to the plaintiff's solicitor's attention on 27 September. An amended claim was filed the next day on 28 September. At the time the media attention on the mayoralty campaign and Mr Hubbard's candidacy remained intense.

[35] There is no evidence that the NBR felt intimidated or "gagged" by the plaintiff's breach of s 43. Although Mr Gibson, the Editor in Chief of the NBR swore an affidavit in support of the application, he did not depose that the defendant was intimidated by the publicity attaching to the claim for $1.5 million. Indeed, when the author of the NBR article was interviewed he is reported as saying:

> We haven't defamed anyone … We may have upset some people and we make no apologies for that. If we weren't we wouldn't be doing our job. We have to go out there and push some buttons".

They are hardly the sentiments of an intimidated defendant.

[36] Mr Miles submitted that the effect of reference to the claim for $1.5 million could not be undone or solved by the filing of the amended claim and suggested that

the mention of the figure may influence a jury at trial. However, in my view, the primary mischief that s 43 (1) is directed at is the intimidation of the defendant rather than the impact on a jury at a later date.

[37] Further, as observed by the authors of *Media Law in New Zealand* and for that matter the McKay Committee, there is nothing to prevent counsel or indeed a party referring to the amount pursued during the course of the hearing itself. In fact, it may well be that by referring to the amount of $1.5 million the plaintiff has created potential tactical difficulties for himself in the future.

[38] Of itself I do not consider the breach of s 43 (1) in the present circumstances to be sufficient to support the defendant's application for stay or strike out.

The plaintiff's public comments

[39] However, as Mr Miles submitted the plaintiff exacerbated the situation by referring, on the issue of the proceedings, to his claim for $1.5 million and further, went on to comment on the merits of the claim. The statement:

> I have been advised by my legal advisers that the case is both watertight and simple

is particularly objectionable.

[40] The other media readily picked up on the issue of the proceedings by the plaintiff, his claim for $1.5 million and his comments. All were widely reported. The plaintiff accepts he should not have made the comments. Counsel apologised on his behalf. The damage has however been done.

[41] Mr Miles submitted that even accepting the plaintiff was not aware that he had breached s 43 (1) the plaintiff deliberately used the reference to the claim for $1.5 million and the issue of the proceedings by him to his public advantage and that such was a clear abuse of the process of the Court. Mr Miles noted that Mr Hubbard had not sued on a number of other articles run by the NBR. He submitted it was incumbent on the Court to regulate his own process and exercise the control vested

in it by its inherent jurisdiction and in rr 186 and 477 to sanction actions that amounted to an abuse of process.

[42] It is objectionable to predict the outcome of a trial, or to assume some important allegation that it is the object of the trial to determine, is true: *Attorney-General v Times Newspapers Limited* [1974] AC 273.

[43] Mr Hubbard's statements as to the strength of his case were, as he has accepted, entirely inappropriate. They were decidedly unwise and objectionable. They should not have been made. It is extremely unfortunate that such statements were made by someone in his position.

[44] Accepting as the plaintiff must that his actions were in breach of s 43 (1) and his public statements about the proceedings were extremely unwise and objectionable the issue for the Court is whether there is a real risk that there cannot now be a fair hearing of the defamation action in due course so that the only appropriate remedy is a dismissal or stay of the proceedings as an abuse of process as was submitted by Mr Miles.

[45] It is helpful to consider the discussion in contempt cases on the point of whether there can be a fair trial where there has been prior publicity of the nature complained of in this case. The authors of *Media Law in New Zealand* state:

> When deciding whether media publication has created a real risk of prejudice the courts have regard to several matters:
>
> - the nature of the statements made;
> - the circumstances of publication;
> - who, if anyone, is likely to be influenced; and
> - (in some cases) the public interest.
>
> (p 285)

[46] In the present case the following features are particularly relevant.

[47] The plaintiff was in breach of s 43 and exacerbated the breach by publicly referring to his claim for that sum and also by referring to the merits of his claim.

[48] The plaintiff was subjected to a robust public attack on his integrity by the defendant, NBR in the article he sues on.

[49] The plaintiff is a public figure, and at the time was engaged in the very public activity of campaigning for Mayor of Auckland.

[50] The plaintiff's evidence is that he issued the proceedings with the genuine intention of pursuing them to trial and he stands by that intention to date. I accept that.

[51] The breach of s 43 and the plaintiff's public comments were made by inadvertence and without an appreciation of the law. He has apologised.

[52] The trial will not be heard until towards the end of this year at the earliest. Over a year will have passed from the statements complained of and the date that the case will be heard. As was noted by the Court of Appeal in *Gisborne Herald v Solicitor-General* [1995] 1 NZLR 45 when considering the issue of whether a publication amounted to contempt:

> Where the expected lapse of time between publication and trial is beyond six or eight months, difficult questions will always arise as to the justification for concluding that the influence of [a publication] would have survived the passage of time.
>
> (p 570)

[53] In the present case the lapse of time is likely to be longer than six or eight months. While there was significant publicity at the time the statements were made and the proceedings were issued, given the profile of the plaintiff and the nature of the mayoral campaign at the time it is likely the public's residual recollection will be of the unseemly nature of the campaign itself rather than the comments made by Mr Hubbard about the merits of his claim against the NBR. The trial Judge will no doubt caution the jury that the only evidence they are to consider is the evidence adduced at trial.

[54] Mr Miles submitted that when considering the exercise of its discretion whether to strike out or stay the Court should take account of the fact that the plaintiff had effectively achieved his objective in issuing the proceedings in any event, in that the plaintiff had been returned as Mayor of Auckland - his mayoralty campaign was successful; and damages were not relevant as the plaintiff had publicly stated that any damages award received by him would, after the payment of legal expenses, be given to charity. With respect to that submission, however, it undoubtedly remains an important and valid consideration for a plaintiff in a defamation suit to have a jury find that he has been defamed and his reputation unjustly sullied, particularly where his honesty is put in issue. That in itself is a significant reason for the plaintiff to wish to pursue the proceedings. The importance of reputation is recognised in the way the remedy of apology is expressly dealt with in the Act.

[55] When I bear in mind the purpose of s 43, that the breach of the section was by inadvertence rather than deliberate, the nature of the comments made by the defendant about the plaintiff's integrity, that the plaintiff has apologised for the comments he made and that a lengthy time will pass before trial, then while the plaintiff's conduct in commenting publicly was irresponsible and in no way is condoned the defendant fails to satisfy the Court that the plaintiff's conduct is such that it requires the ultimate sanction of striking out or staying these proceedings. The defendant fails to satisfy the Court that a fair trial will no longer be possible.

Result

[56] The defendant's application is dismissed. However, the plaintiff put himself in a position that such an application was almost inevitable given his action of referring to the sum claimed and errors of judgment in the comments he made to the media. I decline to make any order for costs in the plaintiff's favour even though he has successfully opposed the application. Costs are to lie where they fall.

[57] I emphasise that in this decision I make no finding as to whether or not the conduct of the plaintiff would support a finding of contempt and if so what an

appropriate sanction might be. I also make it clear that I leave open the issue of costs on other applications during the course of this proceeding.

Directions

[58] The proceeding is to be listed for a telephone conference on 23 March 2005 at 9.15 a.m.

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G J Venning J