IN THE HIGH COURT OF NEW ZEALAND **CIV 2005 419 941**
HAMILTON REGISTRY

UNDER	Defamation Act 1992
IN THE MATTER	of an appeal from a decision of the District Court at Te Awamutu (CIV 2003 072 185)
BETWEEN	ERROL CRAIG NEWLANDS
	Appellant
AND	JAMES CHARLES MORRIS PARLANE
	Respondent

Hearing: 25 November 2005

Counsel: W Aklel for Appellant
P F Gorringe for Respondent

Judgment: In accordance with r 540(4) I direct the Registrar to endorse this judgment with the delivery time of 11.00 a.m. on Wednesday the 7th day of December 2005.

RESERVED JUDGMENT OF RONALD YOUNG J

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[1] This is an appeal from Judge McLean's decision to give the respondent further time to file and serve s 39(3) and s 41(3) notices under the Defamation Act 1992.

[2] The appellant says the delay complying with the statutory time limits for such notices was inordinate and inexcusable, and that the position of the appellant is seriously prejudiced because the proposed notices are deficient and serve no useful purpose and thus the appeal should be allowed. The respondent denies that the

notices are deficient but maintains this is not an appropriate stage of the proceedings to assess the notices' efficacy and in any event submits this was a decision within the Judge's discretion and should be allowed to stand.

Background facts

[3] These proceedings filed in November 2003 by Mr Parlane allege Mr Newman defamed him in the context of a discussion at a meeting of the Councillors the Waipa District Council (of which the parties are both elected members). The discussion revolved around the Waipa District Council's proposed purchase of a piece of land. The plaintiff wrote a letter to the editor of the local newspaper, the Te Awamutu Courier, complaining about the price of the property and "informal clandestine meetings" by Council members about the proposed purchase. At the Council meeting which in part discussed the plaintiff's letter the defendant made a statement about the letter and the plaintiff's motive in writing it.

[4] The plaintiff alleges that what was said was in part defamatory because (in summary):

(i) The defendant claimed the letter was designed to mislead the people of Waipa regarding the purchase of the property.

(ii) The plaintiff had been dishonest in the letter.

(iii) The plaintiff was a liar.

(iv) The plaintiff regularly acted deceitfully as a Councillor for personal advantage.

[5] The defendant admits the words alleged were used but denies the pleaded meanings. The defendant also pleaded this was an occasion of:

(i) Qualified privilege either statutory or at common law.

(ii) Honest opinion.

And the defendant pleads mitigation of damages relating to allegations of the plaintiff's previous conduct detailed in the amended statement of defence.

[6] The original statement of defence was filed 30 January 2004 and an amended statement of defence 13 December 2004. In the intervening period the proceedings have slowly progressed.

[7] Section 39(3) and s 41(3) of the Defamation Act are therefore of particular relevance. They provide as follows:

> **39 Notice of allegation that opinion not genuinely held**
>
> (1) In any proceedings for defamation, where—
>
> (a) The defendant relies on a defence of honest opinion; and
>
> (b) The plaintiff intends to allege, in relation to any opinion contained in the matter that is the subject of the proceedings,—
>
> (i) Where the opinion is that of the defendant, that the opinion was not the genuine opinion of the defendant; or
>
> (ii) Where the opinion is that of a person other than the defendant, that the defendant had reasonable cause to believe that the opinion was not the genuine opinion of that person,—
>
> the plaintiff shall serve on the defendant a notice to that effect.
>
> . . .
>
> (3) The notice required by subsection (1) of this section shall be served on the defendant within 10 working days after the defendant's statement of defence is served on the plaintiff, or within such further time as the Court may allow on application made to it for that purpose either before or after the expiration of those 10 working days.
>
> **41 Particulars of ill will**
>
> (1) Where, in any proceedings for defamation,—
>
> (a) The defendant relies on a defence of qualified privilege; and
>
> (b) The plaintiff intends to allege that the defendant was predominantly motivated by ill will towards the plaintiff, or otherwise took improper advantage of the occasion of publication,—

> the plaintiff shall serve on the defendant a notice to that effect.
>
> . . .
>
> (3) The notice required by subsection (1) of this section shall be served on the defendant within 10 working days after the defendant's statement of defence is served on the plaintiff, or within such further time as the Court may allow on application made to it for that purpose either before or after the expiration of those 10 working days.

[8] And so the plaintiff Mr Parlane had 10 days after the statement of defence was filed (30 January 2004) in which if he alleged ill will or lack of genuine belief to give notice of particulars. No such notice was given until the application to the District Court to extend time for the filing of such notices was filed on 23 March 2005 over 12 months after the time for filing such notices had expired.

[9] In considering the plaintiff's application the District Court Judge found:

(1) The relevant considerations in an application such as this were identified by Wild J in *Gillespie v McKay* 13 PRNZ 90 being:

(a) whether the plaintiff has been guilty of inordinate delay in seeking leave;

(b) whether the delay was inexcusable;

(c) whether serious prejudice has resulted to the defendant;

(d) on occasions, a consideration of whether the proposed particulars are adequate can be undertaken.

(2) The delay was inordinate.

(3) The Judge did not make an explicit finding as to whether the delay was inexcusable but found it was not the fault of Mr Parlane personally.

(4) There was no serious prejudice to the respondent.

(5) This was not an occasion to consider the adequacies of the proposed particulars of ill will and lack of honest belief because there was sufficient to satisfy him that the notices were adequate.

[10] The Judge therefore gave leave to file the notices out of time within five days of the delivery of the judgment. The notices were then filed accordingly.

The appellant's case

Inordinate delay?

[11] The first point made by the appellant was that there was no dispute about the Judge's finding that the delay here was inordinate. The appellant submitted there could not be any such argument. Mr Parlane had 10 days pursuant to s 39 and s 41 to give the particulars of ill will or lack of honest belief. In fact he waited over a year before he applied to extend time. Compared to the time given by the statute to undertake the task (10 days) and the time actually taken (at least the time to the application for leave to extend time) of over 365 days the delay must be seen as inordinate. I agree and I did not take it that the respondent tried to argue otherwise.

Was the delay inexcusable?

[12] The appellant submits that the Judge did not directly answer this question. He recorded counsel's arguments and in his summary of reasons why leave should be given he said (in part):

> The acknowledgement that at least part of the reasons for the delay may not have been that of the client himself.

[13] In fact counsel for the respondent accepted the fault was entirely his. However, as Mr Akel pointed out in both the District Court and in this Court counsel failure does not go to proper excuse nor does the concession by counsel provide his client with an excuse. (see *Lovie v Medical Assurance Society of New Zealand Ltd* [1992] 2 NZLR 244.

[14] The respondent suggest that there was an excuse for the delay which should reduce the affect or consequences of the delay. Excuse in such circumstances might consist of some form of unavoidable circumstance, for example, the illness of a client and the difficulty in getting instructions. It is not, however, in my view an excuse for a party to say that his lawyer forgot to undertake what is a statutory obligation that the issues of ill will and lack of honest belief wished to be raised. This is especially so when the party is a solicitor well able himself to identify and understand his obligations. I accept therefore the thrust of the appellant's submissions that, firstly, the Judge in failing to reach a conclusion or in concluding that the delay had in part or in whole been excused because it was caused by the respondent's counsel was wrong. I am also satisfied that the delay here was inexcusable in that the reason for the failure to file the notice of particulars within time was not caused by anything outside of the control of the party and his legal advisors such that it could not have been completed within the statutory time limit.

Prejudice?

[15] The appellant claimed in the District Court prejudice in two ways:

(1) If leave was given the appellant would have to recast his evidence and re-plead his case. This would involve additional expense and stress.

(2) The particulars of the allegations of ill-will and lack of genuine belief were inadequate thus prejudicing the appellant further in his case preparation.

[16] In part the appellant's submission is that given the particulars were 12 months late, the Court and the appellant are entitled to expect the highest standard of compliance with the statutory requirements. The appellant says the particulars of ill will and lack of genuine belief as pleaded are not clear and do not show any basis for the allegations. As to this the Judge concluded the particulars did "adequately appraise the defendant of the basis for the claim". The Judge did not specify how or why he considered the particulars adequately appraised the appellant of the respondent's defence.

[17] In my view, this was a case where the Court was justified in considering adequacy of particulars. Up until this point all of the merits were in the appellant's favour. The respondent had inordinately delayed the filing of the particulars and this was done without excuse. The appellant had claimed prejudice although somewhat unconvincingly because in every such case if leave is allowed out of time it will create a different case than the one that existed before. If the particulars were inadequate and failed to properly identify allegations of ill will and lack of genuine belief then that would almost certainly tip the balance against giving leave to file. Where the particulars are so clearly inadequate that they fail to identify the particulars of ill will or lack of genuine belief then there would hardly be a point in giving leave in such circumstances.

[18] I note that s 39 and s 41 both require a notice of claim of either lack of genuine opinion or ill will but only require particulars "if the plaintiff intends to rely on any particular facts or circumstances..." to support these allegations. On the face of it, therefore, there is no requirement for particulars unless there is to be reliance upon particular facts or circumstances to establish lack of genuine opinion or ill will. One can imagine circumstances (perhaps rare) where a Court may be prepared to infer from what is said, ill will or lack of genuine opinion. Typically, however, particulars will be required. Certainly the respondent in this appeal accepted that particulars would be required to establish ill will and/or lack of genuine opinion in this case.

[19] I consider that it is appropriate in this case to consider these particulars and see, as alleged by the appellant, whether there is little or nothing in the particulars which would in fact establish ill will or lack of genuine opinion. If there is little or nothing in the particulars then in combination with the inordinate and inexcusable delay there would be little point in allowing the plaintiff to proceed with its allegations of ill will and/or lack of genuine opinion. It would be unfair to proceed on this basis given the prospects of success in raising these issues would be modest coupled with the inordinate and inexcusable delay in giving notice. In this therefore I consider the District Court Judge was in error in failing to approach the case in this way.

[20] I turn therefore to each of the particulars. Particular (1) of the s 39 particulars states:

> 1. You were not present at the informal meeting of 14 July 2003 and thus you are not able to form an opinion that the Plaintiff's letter referred to in paragraph 26.9 of your Amended Statement of Defence was wrong in its representation of it.

[21] The meeting of 14 July 2003 mentioned in the particular above was the meeting of the Council when the possible purchase of the land in issue was discussed. The plaintiff's submission is because the defendant was not present at this meeting when the purchase of the property was discussed, Mr Newlands could not possibly know whether Mr Parlane's subsequent letter was accurate or otherwise. And thus the plaintiff says this is relevant to an inference that the defendant's view of the plaintiff's letter was not his genuine opinion. To return to the defendant's comments. The first comment in relation to the letter was that it contained a lot of "what are at best half-truths and more accurately, complete and outright lies" and further "It's cheap, nasty underhand and low...". The plaintiff's letter raised a number of issues including:

(1) An allegation that the Council did business by Councillors being sounded out on their views beforehand.

(2) By the time the issues came to be debated in Council the outcome was virtually a certainty.

(3) The property proposed to be purchased by Councillors for much more than a "formal professional" valuation of the land justifies.

[22] Given this analysis it is difficult to understand the plaintiff's allegation. The plaintiff's concern as expressed in his letter was his claim the Council proposed to pay too much for a piece of land and a claim the Council business was being discussed before the formal meetings. The defendant's presence or otherwise at the meeting of 12 July does not appear to be relevant to either of these propositions because neither are especially related to the meeting of 12 July. One could understand a particular in support of a lack of genuine opinion which alleged that the

information received by the appellant could not possibly be believed by him. That is not the allegation here however. It is simply that he was not present at the meeting and therefore could not form a genuine opinion that the plaintiff's letter was wrong in its representation of what happened at the meeting. I cannot see that Mr Newlands presence at the meeting is either here nor there as far as his ability to express and honest opinion in the circumstances. I cannot see, therefore, how this can be a particular relied upon by Mr Parlane that Mr Newlands' opinion was not genuine without more.

[23] Particular 2 of the s 39 notice is as follows:

> He spoke the words complained of by the plaintiff for the purpose of promoting himself with other Councillors and the public.

[24] As I understood it the respondent accepted that this notice of particular could not assist in establishing lack of genuine opinion. That is clearly the case. No doubt local body politicians as well as national politicians say things for the purpose of promoting themselves with the public all the time. This is part of what they are required to do to promote their re-election. It is part of and understood as a legitimate part of local and national body politics. It is simply neutral in terms of being an indication of whether the opinion held by Mr Newlands was genuine or otherwise.

[25] I turn then to s 41 of the Defamation Act and the particulars given there. Firstly particular 1:

> The words and tone of the language spoken by you at the Council meeting about the plaintiff.

[26] There are two parts to this particular. Firstly, the "words". I cannot see how the words on this occasion can be used to show that the appellant was predominantly motivated by ill will towards the plaintiff. One can understand how words in some circumstances could be indicative of ill will. For example, where a person made a comment about a particular subject matter and the response was abusive and did not appear to relate to the original comment. In those circumstances one might infer from the words used if sufficiently abusive that what was said was predominantly dominated by ill will. This case is quite different however. In this case the

statement by the appellant was in response to and in the context of what was said by the respondent. As I have said, Mr Parlane made serious accusations of improper conduct against Councillors. One of those, Councillor Mr Newlands, responded by saying that what was said were lies. That by itself was a reasonable response in context and appropriately given. The only aspect of the comments made by Mr Newlands that could possibly be seen as going outside a response to the claims by Mr Parlane was when Mr Newlands alleged that Mr Parlane had made these kinds of comments time and time again. I think it would be drawing an extremely long bow to infer that these comments illustrated that what Mr Newlands had said was motivated by ill will. Looking at the comments overall, they are essentially a response to Mr Parlane's very serious allegations against Mr Newlands and other Councillors. They were made during the heat of a public debate about what Mr Parlane had alleged. Seen in that context I consider that the particular given is extremely thin and it would be difficult to see a Court, inferring from the comment, ill will.

[27] As to the tone of the language, unfortunately no particular is given. Clearly this was a heated debate where people were making angry accusations against each other. Mr Parlane alleged improper conduct by Councillors, they denied it saying that what had been said about them was a lie. In the absence of any particular, it is difficult to see how in that context tone alone could illustrate predominant motivation by ill will. Without more, I cannot see this can be a particular of ill will.

[28] I turn to the second particular. That particular is as follows:

> 2. You declined the opportunity given to you by the Plaintiff after you had spoken the words complained of, to withdraw, explain or justify them.

[29] Mr Parlane, through counsel, now accepts that this particular cannot be a particular indicating motivation by ill will. The only circumstance where one could imagine a refusal to withdraw, explain or justify the words could be a particular of ill will is where it is clear to the defendant that what he has said about the plaintiff is wrong but refuses to withdraw, explain or justify. That refusal could carry an inference of motivation by ill will.

[30] As can be seen, therefore, the particulars fail to illustrate either lack of genuine belief or ill will, or if they could possibly constitute such particulars are in my assessment extremely thin. On the face of it, it appears the plaintiff would be very unlikely to be able to establish either lack of genuine belief or ill will.

[31] In the end, overall, it is the interests of justice that must dominate. The factors identified by Wild J are useful to give a framework but are not a substitute for the interests of justice. In my assessment the interests of justice here clearly favour refusal to grant extension of time. As a general proposition, Courts give extensions of time for litigants to file documents that are out of time on the basis that most prejudice can be cured by costs and in the end it is better to allow litigants to have their day in Court and able to raise all matters they wish. In this case, however, it seems to me that all of the factors point against providing Mr Parlane with the opportunity to file his notice of particulars. In that I disagree with the District Court Judge. As can be seen, I agree with the Judge that the very late attempt to file the notice was inordinate. I am satisfied for the reasons given that the delay was inexcusable and in that I differ from the District Court Judge. Thirdly, I consider in those circumstances it was appropriate to consider the strength of the particulars of ill will and lack of genuine belief and in that I have also differed from the District Court Judge.

[32] My analysis illustrates that one of the particulars in each of the grounds here no basis at all for alleging lack of ill will or lack of genuine belief, and that the one particular in each still surviving is so unlikely to be able to justify an allegation of ill will or lack of genuine belief as to illustrate that Mr Parlane has little or no prospect of successfully raising such a defence. In those circumstances I consider the interests of justice are in Mr Newlands favour. For those reasons I allow the appeal, quash the decision of the District Court Judge and refuse leave to give notices under s 39 and s 41 of the Defamation Act.

"Ronald Young J"

Solicitors
Simpson Grierson, Auckland, for Appellant
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