

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

CIV 2001-404-002027

BETWEEN NEW TIMES MEDIA LIMITED
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 LIMITED
First Defendant

AND STEPHEN SIK FUN WONG AKA STEPH
SIK FUN HUANG
Second Defendant

AND STELLA HU AKA HU XIU FANG
Third Defendant

CIV 2001-404-002031

AND BETWEEN WANG BINGZHANG
Plaintiff

AND CHINESE HERALD LIMITED
First Defendant

AND STEPHEN SIK FUN WONG AKA
STEPHEN SIK FUN HUANG
Second Defendant

AND

STELLA HU AKA HU XIU FANG
Third Defendant

Hearing: 10 August 2006

Appearances: Mr Darby on behalf of Mr D Watt for Plaintiffs
Mr S Wong (in person) for Defendants

Judgment: 10 August 2006

ORAL JUDGMENT OF VENNING J

Solicitors: T Darby, PO Box 90959, Auckland
Mr Weiming Chen, PO Box 68867, Newton, Auckland
Copy to: S Wong, PO Box 58588, Greenmount, Auckland

[1] The defendants apply to strike out the proceedings brought by the plaintiffs against them. The proceedings involved are two sets of defamation proceedings. The matter has an unfortunate history.

[2] The proceedings relate to allegedly defamatory comments made going back to as early as March 2000. The proceedings were issued on 21 June 2001.

[3] The plaintiffs in these sets of proceedings see themselves as supporting, in Mr Chen's words, "democracy in China" whilst the defendants are perceived by Mr Chen to support the Communist regime. The parties criticised each other in respective newspaper articles.

[4] The defendants issued their own, separate proceedings against the plaintiffs. Those proceedings were brought to a hearing and determined by Paterson J some years ago. Paterson J ruled in favour of the current defendants and entered judgment against amongst others, Mr Chen. Mr Wong holds a judgment for \$125,000. Paterson J's finding was subject to an appeal. The appeal was lodged on 29 April 2004 but subsequently abandoned.

[5] The practical position regarding the parties to these sets of proceedings has been recorded in previous minutes of the Court. It can be summarised. The sole remaining plaintiff in CIV 2001-404-002031 is currently in prison in mainland China. That was the position when the matter was last before the Court in October 2004 and it remains the position. In relation to the CIV 2001-404-002027 proceedings the plaintiff company, New Times Media Limited, has been struck off the Register of Companies. The second, third and fourth plaintiffs in CIV 2001-404-002027 are subject to the judgment in favour of Mr Wong and Ms Hu.

[6] It seems that Mr Chen is bankrupt. Notwithstanding that position Mr Chen wishes to pursue the proceedings and opposes the application to have them struck out. None of the other plaintiffs have appeared before the Court in support of Mr Chen.

[7] The matter was reviewed before the Court in October 2004. At that time a number of matters were addressed in the presence of the parties and counsel at the time Mr Watt. The only step taken in the proceedings since that conference in October 2004 was the filing of a statement of defence by the defendants on 2 December 2004. The plaintiffs have taken no steps to pursue the proceedings or advance them to a hearing since October 2004.

[8] The solicitor on record for the plaintiffs is Mr Watt. Mr Watt was convicted of an offence and imprisoned. He has effectively been suspended from practice since at least April this year. Mr Darby appeared on Mr Watt's behalf on 9 June and has appeared again this morning. Given Mr Watt's obvious inability to continue to act for the plaintiffs and given Mr Darby's appearances were as a matter of courtesy to the Court, I have granted leave to Mr Darby to withdraw as counsel and confirmed that leave is granted to Mr Watt to withdraw.

[9] As the plaintiff had failed to take any steps to advance the proceedings the defendants applied to the Court to have the proceedings struck out. When the matter was before the Court on 9 June I declined to strike the proceedings out summarily and adjourned the application to strike out through to today. I directed that if the plaintiffs were to oppose the application to strike out they were to file and serve an opposition and any affidavits by 13 July 2006. At the time Mr Chen was present in Court with an interpreter. The plaintiffs have not filed any papers in opposition. Mr Chen has, however, written to the Court by fax of 9 August to indicate that he has not received any documents regarding the hearing and wishes to pursue his case.

[10] Through the interpreter I have heard from Mr Chen in opposition to the application to strike out. He has set out the history of the case and the articles complained of. He has also advised the Court of the difficulties he has had with legal representation throughout. Mr Chen said that the first lawyer that represented the plaintiffs died after a year. The second lawyer did not, in Mr Chen's view, understand the proceedings and charged a lot but did not advance them. The third lawyer was Mr Watt, who has been imprisoned. Mr Chen submitted that he was trying his best to have the case settled and that he had appealed the earlier decision in the other proceedings and had paid Mr Watt for that but had not heard anything

further. He submitted that he would like further time to see if he could obtain legal aid and assistance and if not said he would advance this case on his own behalf.

[11] The application to strike out for want of prosecution is founded on r 478 but s 50 of the Defamation Act is also relevant. The principles to apply under r 478 are well settled. An applicant to strike out on the ground of undue delay must show the plaintiff has been guilty of inordinate delay, that the delay is inexcusable and that the defendants are seriously prejudiced. These considerations are not necessarily exclusive because at the end one must stand back and have regard to the interests of justice: *Lovie v Medical Assurance Soc NZ Ltd* [1992] 2 NZLR 244 and *Commerce Commission v Giltrap City Ltd* (1997) 11 PRNZ 573 (CA).

[12] In this case, on any view of it, there has clearly been inordinate delay in the prosecution of these proceedings. They were commenced in 2001. It is now five years later. No steps have been taken by the plaintiffs to prosecute or advance the proceedings since at least October 2004. I note that even the initiative for that step came from the Court when it convened a conference.

[13] Mr Chen points to the failings of the solicitors that have represented him from time to time to explain or excuse the delay. I accept that Mr Chen has had difficulty with solicitors for the reasons he has set out but such difficulty can not excuse the entire period of the delay. Indeed in relation to Mr Watt's representation I note that he was representing the plaintiffs in October 2004 and continued in practice until earlier this year. During that period Mr Watt was actively involved in other cases before this Court but for some reason no steps were taken to prosecute this claim.

[14] I also note that in relation to the related proceedings, the appeal was lodged in April 2004 but no steps were taken to prosecute that appeal. Even allowing for the failings in Mr Chen's advisers a significant part of the delay rests with the plaintiffs.

[15] The next issue is whether it could be said the defendant is prejudiced. In the information before the Court Mr Wong has not supplied any particular details of prejudice other than the uncertainty associated with the general delay. For instance

there is no suggestion that there are witnesses who are no longer available to answer the plaintiffs' claim. However, prejudice can also take the form of the difficulty experienced by the defendant conducting his affairs with the prospect of proceedings, certainly defamation proceedings, hanging indefinitely overhead. Clearly these proceedings have been a cause of concern for Mr Wong and other defendants. That is apparent from Mr Wong's submissions at the earlier hearing. The case of *Biss v Lambeth Health Authority* [1978] 2 All ER 125 (CA) is authority for the proposition that the sword of Damocles hanging over one's head can be prejudice.

[16] The overall interests of justice are of course the particularly relevant consideration. The Court is loathe to shut a plaintiff out from having their day in Court. On the other hand the Court is also conscious of the cost, distraction and uncertainty caused to a defendant by facing the prospect of a hearing in proceedings when a plaintiff has failed to advance such proceedings. The interests of the defendant and indeed the interests of the community as a whole in the timely progress of litigation is a relevant factor to the interests of justice.

[17] If the matter were left solely on the basis of r 478 then on balance, the Court might still have been minded to grant further time to the plaintiff. However, the particular nature of these proceedings as defamation proceedings is relevant. Defamation proceedings must be brought within two years from the date on which the cause of action accrued, rather than within six years as is the general limitation period: s 55 Defamation Act 1992. As noted, in this case the cause of action accrued in the year 2000. While the proceedings were brought within the two years as required they have frankly not been pursued by the plaintiff with any degree of responsibility or urgency since that date. It is apparent from several provisions within the Defamation Act 1992 that Parliament intended that defamation proceedings would be brought promptly and dealt with expeditiously.

[18] Section 50 of the Defamation Act provides that in any proceedings for defamation unless the Court in its discretion orders otherwise, the Court shall, on the application of the defendant, order the proceedings to be struck out for want of prosecution, if no date has been fixed for the trial and no other step has been taken

within the period of 12 months immediately preceding the date of the defendant's application.

[19] In this case no date has been set for trial. No step has been taken in these proceedings by the plaintiff within 12 months immediately preceding the date of the application to strike out. Indeed no step has been taken by the plaintiff since October 2004. I am not minded to exercise the Court's discretion in the plaintiffs' favour given the background to this case and the substantial period of delay overall.

Result

[20] In the circumstances s 50 directs the Court to order the proceedings to be struck out. I order accordingly. The plaintiffs' proceedings against the defendant are struck out.

Costs

[21] The defendant represents himself. In the circumstances there will be no order for costs.

Venning J

ADDENDUM

[22] Before withdrawing, Mr Darby advised the Court that as Mr Chen was bankrupt, Mr Wong would have to prove in the bankruptcy for the judgment he held, but Mr Chen would retain the right to pursue those defamation proceedings. I

advised Mr Chen and Mr Darby that I would look at that issue, but that it would not change the decision.

[23] Mr Darby appears correct in that submission. As proceedings in defamation are founded on a reflection on the plaintiff personally, it remains with the bankrupt and does not pass to the Official Assignee administering the bankrupt estate: *Re Wilson ex parte Vine* (1878) 8 Ch D 364.

[24] That result, in my view, adds weight to the defendants' strike out application. It would be wrong for a dilatory plaintiff to be protected from a judgment obtained against him by a party that he retained the right to sue. That is particularly so where the proceedings were both in defamation and arose out of the situation of retaliatory articles as in the present case.

Venning J