IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2007-485-2212

BETWEEN	ROBERT ALEXANDER MOODIE Plaintiff
AND	ANTHONY JOSEPH ELLIS First Defendant
AND	ELIZABETH GRACE STRACHAN Second Defendant
AND	APN SPECIALIST PUBLICATIONS NZ LIMITED Third Defendant

Hearing: 5 November 2008

Appearances: R A Moodie in person
D McLellan for the first defendant
J Upton QC and R Vokes for the second defendant
No appearance for the third defendant

Judgment: 13 November 2008

RESERVED JUDGMENT OF J WILLIAMS J

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[1] The substantive proceeding underpinning the interlocutory applications before me is a defamation claim by the plaintiff against the three defendants. The plaintiff applies for orders to modify claims of privilege in respect of the first defendant's list of documents, orders striking out certain defences of the first and second defendant together with an application for directions in respect of certain computer equipment said to be in the custody of the second defendant. In addition the first defendant applies for an order for security for costs against the plaintiff.

[2] Complicating matters are two facts. First, various applications have already been made by the defendants in respect of the pleading of the plaintiff's claim and by the second defendant in respect of security for costs. These were heard before Associate Judge Abbott in Auckland on 9 June 2008 but to date there has been no decision on them. Second, on 22 September 2008 the plaintiff filed a second amended statement of claim. This significantly expanded the causes of action pleaded and amended, to some extent at least, the pre-existing causes of action.

[3] When the applications before me were set down by Associate Judge Gendall for a two-day fixture, this was done on the basis that the decision of Associate Judge Abbott would be to hand. The fact that it is not combined with the plaintiff's amended pleading make it impossible for me to hear all but two unaffected applications because the affected applications relate to pleadings rendered obsolete by the plaintiff's second amended statement of claim of 22 September or (in respect of the security for costs application) because there is a genuine risk of inconsistency between any conclusion Judge Abbot might reach in his fully heard matter and any conclusion I might reach.

[4] In the event, all parties agreed that the application by the first defendant for security for costs and the application by the plaintiff striking out defences must be adjourned until the decision of Associate Judge Abbott is available.

[5] That leaves firstly the application for directions as to the surrender of equipment, and secondly, the application for orders modifying claims to privilege. I deal with these in order.

Surrender of equipment

[6] The background to this application is rather complicated but the long and short of it is that the plaintiff claims that the second defendant stole a computer hard drive belonging to him and containing documents relevant to the current proceeding and other documents of a personal and confidential nature. The plaintiff initially sought orders requiring the surrender of the hard drive to the Court for safe-keeping pending conclusion of the trial. At the hearing, however, he indicated that his

concerns would be met if the hard drive was kept in the safe-keeping of the second defendant's counsel or solicitors.

[7] In written submissions preceding in time the alternative course offered by the plaintiff in Court, the second defendant confirmed that the correspondence and computer equipment in question remained secure and protected at the premises of the second defendant's solicitors. The plaintiff indicated that his concerns would be met if that position continued until the substantive proceeding is concluded. I leave that arrangement for the parties by consent and there is no need for the intervention of this Court at this stage beyond recording that agreement.

Orders modifying first defendant's claims of privilege

[8] At hearing the list of documents to which this application related became confined to those numbered 9.29 to 9.46 in the first defendant's sworn list of documents. These consisted exclusively of emails between the first and second defendants which (apart from two undated emails) were written between January and April 2007.

[9] The first defendant claimed in his list of documents that these documents were privileged essentially because they were communications between the first defendant and his agents or solicitors in contemplation of litigation.

[10] The law in respect of litigation privilege is now contained in s 56 of the Evidence Act 2006 subsections (1) and (2) of which are as follows:

> (1) Subsection (2) applies to a communication or information only if the communication or information is made, received, compiled, or prepared for the dominant purpose of preparing for a proceeding or an apprehended proceeding (the "proceeding").
>
> (2) A person (the "party") who is, or on reasonable grounds contemplates becoming, a party to the proceeding has a privilege in respect of—
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> (a) a communication between the party and any other person:
> (b) a communication between the party's legal adviser and any other person:
> (c) information compiled or prepared by the party or the party's legal adviser:

> (d) information compiled or prepared at the request of the party, or the party's legal adviser, by any other person.

[11] The first defendant admits that the emails relate to preparation of proceedings that would be filed on 23 March 2007 by against Dr Moodie. The proceedings were generally in respect of remuneration for the period during which the second defendant was Dr Moodie's counsel. The second defendant, Ms Strachan, was, it appears, to be a witness in that proceeding and the emails related to her role as a witness.

[12] The plaintiff claims that Mr Ellis and Ms Strachan were never at any time in a solicitor/client, solicitor/agent or solicitor/solicitor relationship in that proceeding or this one. He argued that for the purpose of s 56 of the Evidence Act, the two parties in question should be treated as private individuals "involved in collusion to publicly damage the personal and professional reputation of the plaintiff".

[13] For the first defendant, Mr McLellan concentrated on the words of s 56 of the Evidence Act. He argued that throughout the period during which the emails were exchanged, the first defendant was either engaged in or contemplating the bringing of proceedings against the plaintiff, and that the emails were "made, received, compiled or prepared for the *dominant purpose* of preparing for a proceeding or an apprehended proceeding" (s 56(1)). That is, he argued, that the emails related to the preparation of evidence and pleadings in the 2007 proceeding by Mr Ellis against Dr Moodie and were therefore entitled to privilege.

[14] Mr McLellan referred to an email letter from Ms Strachan to Mr Ellis dated 5 January 2007 (prior to the date of the first email) annexed to the plaintiff's affidavit of 27 May 2008. That email appears to confirm that immediately prior to the exchange of emails, the first defendant was in communication with the second defendant for the purpose of preparing for the litigation already mentioned. The test in s 56(1) appears satisfied at first glance.

[15] All of that seems straightforward except for the fact that the litigation that provided the basis for this privilege was not the case currently before the Court. It was a separate case relating to matters of remuneration between a client and a

barrister. The question then is whether a document that attracts litigation privilege for one purpose is entitled to that protection for all purposes. The cases do not clearly favour one result. The 19th century English Court of Appeal decision in *Calcraft v Guest* [1898] 1 QB 759 took the view that "once privileged always privileged"[1], but in recent times that proposition has been called in question both in Canada and in New Zealand. In *Snorkel Elevating Work Platforms Ltd v Thompson* [2007] NZAR 504 Randerson J held in obiter that privileged documents relating to earlier completed proceedings may not stay privileged in the context of later proceedings (at para 14). His Honour relied on the Canadian Supreme Court decision in *Ministry of Justice v Blank* [2006] 2 SCR 319. In that case Fish J explored the purpose of litigation privilege in these terms:

> The purpose of litigation privilege, I repeat, is to create a "zone of privacy" in relation to pending or apprehended litigation. Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose – and therefore its justification. But to borrow a phrase, the litigation is not over until it is over: it cannot be said to have "terminated", in any meaningful sense of that term, where litigants or related parties remain locked in what is essentially the same legal combat. (at p 333)

[16] In light of the authorities, I do not see it necessary to resolve what appears to be a developing difference of opinion between the UK courts on the one hand and the New Zealand and Canadian courts on the other. Still less do I think it necessary to untangle the references to "a proceeding" and "the proceeding" in ss 53 and 56 to determine whether the statute intended to resolve this difference one way or the other. I am able to avoid this because although the earlier litigation related to the question of remuneration between Dr Moodie and Mr Ellis, in reality the underlying factual matrix between that case and this is significantly overlapping. The earlier case arose, it is said, from Dr Moodie's refusal to remunerate Mr Ellis for services rendered to him. The defamation proceeding relates to allegations that Dr Moodie was a "con man", "robber baron" and "deceitful" in so refusing. It seems clear that any defences to be advanced by the defendants in this proceeding will raise issues of truth and honest opinion that will essentially relitigate these underlying facts. In those circumstances, I conclude that whether one applies the *Calcraft* once privileged always privileged approach or the *Blank* test of whether the related parties

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1 At p 761.

remain locked in the same legal combat, the answer is that these two proceedings are too closely related to separate them for the purpose of attributing litigation privilege.

[17] I find therefore that the documents in question are privileged. There is accordingly no question of them being inspected by me.

[18] Costs will be reserved.

"Joe Williams J"

Solicitors:
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No appearance for third defendant