

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

CIV 2008-404-005616

BETWEEN

ALEXANDER VIVIAN HUGH
MCPHAIL
Plaintiff

AND

THE UNIVERSITY OF AUCKLAND
Defendant

Hearing: 16 February 2009

Counsel: DJ Neutze for defendant

Appearance: AVH McPhail, plaintiff, in person

Judgment: 17 February 2009 at 1pm

**JUDGMENT OF ASSOCIATE JUDGE FAIRE
[on application to strike out]**

This judgment was delivered by me on 17 February 2009 at 1pm
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors: Brookfields, PO Box 240, Auckland for defendant

And To: AVH McPhail, 1H/18 Federal Street, Auckland

[1] The defendant applies for an order striking out the plaintiff's statement of claim. The grounds advanced in support of the application are:

- a) That the statement of claim discloses no reasonable cause of action;
- b) The pleading is likely to cause prejudice, embarrassment or delay in the proceeding;
- c) The pleading and the proceeding are frivolous and vexatious; and
- d) The pleading and the proceeding are an abuse of the process of the Court.

[2] This proceeding was filed on 29 August 2008. The application to strike out was filed on 3 September 2008. At a case management conference held on 16 October 2008 I had a discussion with the plaintiff. I pointed out problems with his proceeding. I issued a written minute in which I ordered that any amended statement of claim shall be filed and served together the plaintiff's notice of opposition to the strike out application no later than 17 November 2008. The application was adjourned to 11 December 2008 for the purpose of allocating a fixture.

[3] An amended statement of claim has been filed. A notice of opposition has been filed. The fixture was allocated. The defendant's submissions were served on Mr McPhail in advance of the hearing.

[4] The application, as framed, relied on rr 186 and 477 of the High Court Rules and the inherent jurisdiction of the Court.

[5] As a result of the Judicature (High Court Rules) Amendment Act 2008 new High Court Rules were introduced. Section 9 of that Act requires that I determine this strike out application pursuant to the new Rules in the High Court Rules as introduced by the Judicature (High Court Rules) Amendment Act 2008. This position was discussed during the hearing and explained to Mr McPhail. As a

consequence, the primary Rule which is relied upon by the defendant is r 15.1 which provides:

15.1 Dismissing or staying all or part of proceeding

- (1) The court may strike out all or part of a pleading if it—
 - (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
 - (b) is likely to cause prejudice or delay; or
 - (c) is frivolous or vexatious; or
 - (d) is otherwise an abuse of the process of the court.
- (2) If the court strikes out a statement of claim or a counterclaim under subclause (1), it may by the same or a subsequent order dismiss the proceeding or the counterclaim.
- (3) Instead of striking out all or part of a pleading under subclause (1), the court may stay all or part of the proceeding on such conditions as are considered just.
- (4) This rule does not affect the court's inherent jurisdiction.

[6] Purely for the sake of completeness, I refer to the second Rule which was referred to in submissions. That was a reference to r 108 as it appeared in the former High Court Rules. That Rules appears substantively unchanged in the new High Court Rules and is r 5.26. Rule 5.26 provides:

5.26 Statement of claim to show nature of claim

The statement of claim—

- (a) must show the general nature of the plaintiff's claim to the relief sought; and
- (b) must give sufficient particulars of time, place, amounts, names of persons, nature and dates of instruments, and other circumstances to inform the court and the party or parties against whom relief is sought of the plaintiff's cause of action; and
- (c) must state specifically the basis of any claim for interest and the rate at which interest is claimed; and
- (d) in a proceeding against the Crown that is instituted against the Attorney-General, must give particulars of the government department or officer or employee of the Crown concerned.

The Court's approach to strike out applications

[7] The general principles to be applied on a strike out application are well understood. They were confirmed by the Court of Appeal in *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 at 267 where the Court said:

A striking-out application proceeds on the assumption that the facts pleaded in the statement of claim are true. That is so even although they are not or may not be admitted. It is well settled that before the Court may strike out proceedings the causes of action must be so clearly untenable that they cannot possibly succeed. (*R Lucas & Son (Nelson Mail) Ltd v O'Brien* [1978] 2 NZLR 289 at pp 294-295; *Takaro Properties Ltd (in receivership) v Rowling* [1978] 2 NZLR 314 at pp 316-317); the jurisdiction is one to be exercised sparingly, and only in a clear case where the Court is satisfied it has the requisite material (*Gartside v Sheffield, Young & Ellis* [1983] NZLR 37 at p 45; *Electricity Corporation Ltd v Geotherm Energy Ltd* [1992] 2 NZLR 641); but the fact that applications to strike out raise difficult questions of law, and require extensive argument does not exclude jurisdiction (*Gartside v Sheffield, Young & Ellis*).

[8] Applications are determined primarily on the pleadings. The Court may have consideration to affidavits if they disclose that despite what is contained in the pleadings a cause of action that may succeed. If that is so, the Court may instead of striking out the pleading give the plaintiff an opportunity to amend so as to plead a tenable cause of action properly. However,

There may, of course, be circumstances where the pleading is so bad that the Court should not allow this opportunity and simply strike out the relevant pleading leaving it to the plaintiff to come again if within time and capable of putting his house in order.

Marshall Futures v Marshall [1992] 1 NZLR 316 at 323.

[9] Mr Neutze made reference to two judgments which have significance to this case because there is similarity between the matters pleaded and the matters which were considered in those authorities. The first is *Young v Police* [2007] DCR 261. In that case, Randerson J struck out a claim which included, in the prayer for relief, a claim for \$20,000 for defamation. His Honour said of the allegations:

[52] In relation to the allegation of defamation, no detail is given of the material alleged to have been disclosed; there is no allegation that the information disclosed was untrue or defamatory; no defamatory meanings are alleged; and no particulars of the damages claimed are given.

[53] The pleading of defamation is completely defective because it makes no allegation of defamation other than to claim damages in the prayer for relief. Rule 108(b) of the High Court Rules requires such particulars and other circumstances as may suffice to inform the Court and the parties of the cause of action. In the case of defamation, the requirement for particulars of defamatory meaning is reinforced by s 37 of the Defamation Act 1992 and, where punitive damages are claimed, particulars are required by s 44 of the Defamation Act of the facts or circumstances that the plaintiff alleges would justify such an award. No particulars are given of any consequences at all to Mr Young let alone any consequences which might justify an award of exemplary damages.

[54] The pleading is so inadequate that it is not capable of repair. A complete rewriting would be necessary. The relief seeking that details of the alleged offence be removed from the police files, is not available under s 27 NZBORA as claimed.

[55] I conclude that there is no prospect this cause of action could succeed and that the pleading is so defective as to amount to an abuse of process.

[10] The second authority referred to by Mr Neutze is the Court of Appeal decision in *Reid v New Zealand Trotting Conference* [1984] 1 NZLR 8. The Court of Appeal was considering a strike out application made in respect of a proceeding which contained four causes of action. They were namely, defamation, conspiracy, injurious falsehood and breach of natural justice. The Trotting Conference was named as the first defendant. The race course inspector who wrote the report was the second defendant. The person whose name the plaintiff had signed on the registration form was the third defendant. At page 14, paragraph 3, the Court said of the pleading:

We have already adverted to some of the deficiencies in the pleadings. They include the lack of essential particulars as to when particular statements were published and where and to whom, the want of the requisite specificity of particulars of the serious charge of conspiracy, the generalised allegations of malice and the incompleteness of the fourth cause of action as pleaded. The amended statement of claim filed in response to the applications to strike out dealt only, and in unsatisfactorily broad terms, with the calculation of damages. It seems that the plaintiff was not able at that time to remedy other defects in his pleadings. In these circumstances there is no particular reason for assuming that if he were granted the indulgence of amendment after all this time he would now be able to amend or reconstitute his pleadings so as to give those particulars to which the respondents would be reasonably entitled.

[11] The first three paragraphs of the statement of claim raise the possibility of three causes of action. The first refers to violations of the Privacy Act 1993. The

second refers to traducement and defamation. The third refers to incompetence and/or corruption. Mr Neutze referred to the fact that paragraphs 8 and 9 appear to be the only paragraphs that might provide particulars. That may be an oversimplification because there is reference to persons involved in paragraph 6.

[12] What is important, however, is that the document read as a whole does not identify or support a tenable or reasonably arguable cause of action against the defendant. The particulars, which are set out in paragraph 10, make no sense.

[13] I have referred to the requirements of the High Court Rules dealing with a statement of claim and, in particular, the requirements of r 5.26. That coincides with the old r 108, which was in operation at the time both the original statement of claim and the amended statement of claim were filed. The High Court Rules require a plaintiff to show the general nature of his claim. He must give such particulars as may suffice to inform the Court and the party against whom the relief is sought of his cause of action. The document which the plaintiff has filed is hopelessly devoid of compliance with r 5.26. Indeed, there is no foundation in the matters that are referred to in the document for me to discern any cause of action, particularly in the nature of the three areas that are referred to in the first three paragraphs. Nor is there any specific pleading by which, even if there was some wrongdoing alleged by the actions referred to in the statement of claim, where any direct connection can be made with the University which has been named as defendant.

[14] Mr Neutze, in his carefully prepared submissions, points out a number of other problems and fatal obstacles to the current pleading.

[15] He submits, quite correctly, that there are no particulars of violations of the Privacy Act 1993 supplied which might disclose an arguable cause of action. He drew attention to s 11 of the Privacy Act 1993, which provides:

11 Enforceability of principles

- (1) The entitlements conferred on an individual by subclause (1) of principle 6, in so far as that subclause relates to personal information held by a public sector agency, are legal rights, and are enforceable accordingly in a court of law.

- (2) Subject to subsection (1) of this section, the information privacy principles do not confer on any person any legal right that is enforceable in a court of law.

He correctly submitted that the only legal rights enforceable in a Court of law under s 11 relate to access to personal information held by a public sector agency. He correctly submitted that the Privacy Act 1993 does not confer any other legal rights enforceable in a Court of law. He noted that the plaintiff makes no allegation that his claim relates to access to any personal information held by the defendant. He correctly submits that the High Court, therefore, does not have the jurisdiction to determine the type of violation of the Privacy Act 1993 which the plaintiff may be referring to. Although it is not necessary, for the purposes of this decision, he helpfully set out in his submissions, the procedure which is contained in the Privacy Act 1993 for resolving complaints of breaches of that Act.

[16] Mr Neutze dealt with the general defamation matter. He correctly submitted that the amended statement of claim does not meet the requirements of either s 37 of the Defamation Act 1992 or r 5.26 of the High Court Rules. For completeness sake I set out s 37:

37 Particulars of defamatory meaning

- (1) In any proceedings for defamation, the plaintiff shall give particulars specifying every statement that the plaintiff alleges to be defamatory and untrue in the matter that is the subject of the proceedings.
- (2) Where the plaintiff alleges that the matter that is the subject of the proceedings is defamatory in its natural and ordinary meaning, the plaintiff shall give particulars of every meaning that the plaintiff alleges the matter bears, unless that meaning is evident from the matter itself.
- (3) Where the plaintiff alleges that the matter that is the subject of the proceedings was used in a defamatory sense other than its natural and ordinary meaning, the plaintiff shall give particulars specifying—
 - (a) The persons or class of persons to whom the defamatory meaning is alleged to be known; and
 - (b) The other facts and circumstances on which the plaintiff relies in support of the plaintiff's allegations.

[17] There is, in the amended statement of claim, no clear statement as to the time or date of an alleged defamatory statement. Nor is there the name of any person who made or caused the statement to be made. I do not accept Mr McPhail's response that the allegations contained in paragraph 6, and read with paragraphs 8 and 9, provide such information.

[18] Mr Neutze further correctly submitted that the plaintiff has failed to specify whether the alleged insults are defamatory on their natural or ordinary meaning or whether they are defamatory, other than on their natural or ordinary meaning. He submitted that if the plaintiff's intention was that the words are defamatory other than on their natural or ordinary meaning, the plaintiff has failed to provide any particulars specifying the person, or class of persons, to whom the defamatory meaning is alleged to be known, or any other facts and circumstances on which he relies in support of his allegation.

[19] Mr Neutze, again correctly, referred to further deficiencies in the pleading. He drew attention to the fact that the plaintiff has not claimed that either the defendant or any of the parties specified in clause of the amended statement of claim:

- a) Made any of the alleged insults; or
- b) Caused any of the insults to be made.

In short, one of the essential requirements, that of publication, has not been pleaded: *Laws NZ*, Defamation para 156.

[20] He also correctly referred to the fact that the statement of claim does not specifically allege that the defamatory words refer to the plaintiff. In addition, it does not provide any set of facts which connect whatever the statement was to the plaintiff. The need for this is referred to in *Laws NZ*, Defamation para 156.

[21] Mr Neutze submitted, but there is no need for me to finally determine the matter, that the insults referred to were innocuous and were incapable of being defamatory. It is not necessary to resolve that because the deficiencies already

referred to are sufficient by themselves to conclude that the current cause of action has no tenable basis for it.

[22] The third general matter raised is an allegation of incompetence and/or corruption. Mr Neutze drew attention to the fact that the precise pleading does not disclose any known cause of action. He was prepared, however, to analyse the matter on the basis that perhaps what was alleged by the plaintiff was negligence and/or fraud.

[23] I agree with his submission and adopt it, that the reference to incompetence or corruption does not provide, by itself, a cause of action.

[24] If one looks at the allegation as meaning an allegation of fraud, this statement of claim is seriously deficient. Allegations of this nature must be:

Specific, pointed and relevant.

Prosser v NZ Investment Trust [1937] GLR 93.

There is simply no foundation laid out for such an allegation in the current statement of claim.

[25] In relation to a pleading of negligence, particulars must be given of acts or omissions on the part of the defendant which caused or contributed to the event concerned. Those acts or omissions must be such as can be said to constitute negligence. They must also give rise to a duty of care: *McGechan on Procedure*, para 5.26.08(2).

[26] I cannot find, in the amended statement of claim, any proper basis for an allegation of fraud or an allegation of negligence.

[27] An opportunity was given to Mr McPhail to amend the proceeding. He took advantage of the opportunity but really his amended pleading adds nothing to the deficiencies which are self-evident from his pleading. As already mentioned, his reference to violation of the Privacy Act 1993 cannot provide any reasonable cause. His reference to defamation is completely defective. The pleading does not comply with r 5.26 nor does it comply with s 37 of the Defamation Act 1992, nor can I see

anything in the document which causes me to consider that yet further amendments might cure the substantial problems that the current document has.

[28] The reference to incompetence and corruption, which I have analysed as Mr Neutze did, as a possible fraud and negligence cause of action similarly fails. Of importance here is the fact that there is no suggestion that the general matters referred to by Mr McPhail in his amended statement of claim could, in fact, be cured to provide a proper cause of action.

[29] I conclude that the statement of claim and the amended statement of claim fall within those category of case which require the immediate striking out. I order accordingly.

[30] Mr Neutze sought costs on a 2B basis which he had calculated, including disbursements, at \$3,525.53. He provided a schedule attached to his submissions. Mr McPhail was given the opportunity of checking the calculation. He indicated that he did not wish to avail himself of that. Although Mr Neutze's schedule was prepared based on the old High Court Rules, the references contained in the current Schedule 3 are the same for the items mentioned in Mr Neutze's schedule and are correct. Accordingly, I order that the plaintiff pay the defendant costs and disbursements in the sum of \$3,525.53.

JA Faire
Associate Judge