PUBLICATION RESTRICTIONS AS PER PARAGRAPH [11] B) OF THIS JUDGMENT

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: 28 October 2009

Appearances: Mr Laurenson for the plaintiff
Mr McLellan for the first defendant
Mr Upton QC and Ms Vokes for the second defendant
Miss Brown for the third defendant

Judgment: 28 October 2009 at 4 pm

JUDGMENT OF MALLON J

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[1] The plaintiff has brought defamation proceedings against the defendants. The first and third defendants have reached a settlement with the plaintiff. Under the terms of that settlement an agreed statement is to be read in open court "at the earliest convenient date" and the plaintiff will discontinue against the first and third defendants. That statement was to have been read today, the time having been allocated by the Court on the understanding that no party objected to this. That is not, however, the position – the second defendant opposes the reading of the statement.

[2] The reading of a statement in court is provided for by s 34 of the Defamation Act 1992 which is in these terms:

> (1) In any proceedings for defamation, a statement may be made by a party in open Court only in one or more of the following circumstances:
>
> (a) At any time before the final disposition of the proceedings, where–
>
> (i) The parties have agreed that such a statement may be made, and have agreed on the terms of the statement; and
>
> (ii) The Judge, in chambers, has granted leave to make the statement:
>
> (b) Where the proceedings have been settled, and the terms of the settlement permit the party to make the statement:
>
> (c) By the plaintiff, where the plaintiff has accepted, in full satisfaction of the plaintiff's claim, money paid into Court by the defendant, unless the plaintiff has agreed not to make such a statement.
>
> (2) Where–
>
> (a) Any proceedings for defamation are settled, or the plaintiff in any proceedings for defamation accepts, in full satisfaction of the plaintiff's claim, money paid into Court by the defendant; and
>
> (b) Any party to the proceedings wishes to make a statement in open Court; but
>
> (c) The parties to the proceedings cannot agree as to–
>
> (i) Whether a statement should be made; or
>
> (ii) The terms of the statement,–
>
> any party may apply to the Judge, in chambers, to determine the question.
>
> (3) On hearing an application under subsection (2) of this section, the Judge may, if he or she thinks fit, –
>
> (a) Determine the terms of the statement; or
>
> (b) Direct that no statement be made.

[3] The parties differ as to whether leave is required before the statement can be read. The second defendant contends that s 34(1)(a) applies because there has not been a final disposition of the proceedings. The plaintiff and the first defendant

contend that s 34(1)(b) applies because the proceedings against the first and third defendant have been settled. (The third defendant did not make submissions about this.)

[4] The wording of s 34 is not the clearest – it does not directly address the position that is raised here and seems to envisage in its opening words that more than one of (1)(a), (b) and (c) could apply at the same time. Section 34(2) does not assist because it seems to be dealing with a situation where there has been a settlement but there is no agreement that a statement can be made. Both interpretations contended for here are potentially open but I incline to the view that the second defendant's interpretation is the correct one. That interpretation enables a defendant with whom there has not been settlement to oppose the statement being read where the defendant can point to some prejudice to its position in proceedings that are to continue against it. That is consistent with the position in the United Kingdom although the wording of the relevant provision is different (RSC Order 82, r 5(3)).

[5] It is however unnecessary for me to resolve this issue because I consider that leave should be granted. The opposition raised by the second defendant is not that any media publicity given to the statement would prejudice a fair trial (a submission made and rejected in a not dissimilar situation in *Barnet v Crozier* [1987] 1 All ER 1041). Rather it is said that the plaintiff may improperly use the public statement against the second defendant in the context of her defence of truth in the proceeding. The second defendant refers to a proposed amended statement of claim which is not before the court in which reference is made to this.

[6] The settlement as between the plaintiff and the first and third defendants is confidential except for the statement which is to be made and that disclosure can be made to the parties' professional advisers or as required by law. Those parties have also agreed that no further comment is to be made about the issues by any of them. Therefore if the plaintiff were to make public comment about the settlement or the public statement the plaintiff would seem to be in breach of the terms of the settlement. As to any use the plaintiff may wish to make of the statement in the proceedings as against the second defendant, that will be able to be considered by the Court on an interlocutory application by the second defendant or at trial. I consider

that it is preferable for the Court to exercise the control that the second defendant seeks as and when any issue arises, and assessed in the circumstances that are then before the Court.

[7] Because I consider that the second defendant's concerns can be met in this way, I consider that the terms of the settlement that has been reached should be given effect to. There is no sufficient reason raised to refuse leave and the Court should not stand in the way of a settlement which has been agreed to.

[8] There is, however, a complication which has led me to the view that the reading of the statement should not proceed today. Under the terms of the settlement, "on the reading of the statement" the plaintiff "will discontinue" his proceedings against the first and third defendant. The plaintiff needs leave to discontinue the proceeding (r 15.20(4) of the High Court Rules). The second defendant objects to leave being granted in relation to the third defendant until it has had the opportunity to file a cross claim for contribution against the third defendant. If such a claim is to be made, the third defendant may also wish to file a cross claim against the first defendant. These claims can be made by notice where the cross claims are against existing defendants (r 4.18 of the High Court Rules). The third defendant opposes the reading of the statement separate from the plaintiff's discontinuance against the first and third defendant on the basis that it is the intention of the settlement that they occur together.

[9] If the statement is read at a time to be fixed then any cross claims can be made and the plaintiffs' discontinuance as against the first and third defendants can occur on the reading of the statement in court. There is no pressing need for the statement to be read today – it is only a term of settlement that it occur "at the earliest convenient date". It is not convenient for it to be read today when the discontinuance will not be given effect today. I also note that the second defendant may wish to appeal my decision that the reading of the statement can take place and adjourning the reading of the statement will enable her to consider her position as to any appeal.

~~[1]~~[10] I therefore order:

a) That the proposed statement can be read in court;

b) The date for the reading of the statement will be 9.30 am on 5 November 2009; and

c) Upon the reading of the statement the plaintiff will have leave to discontinue the proceedings as against the first and third defendants.

[11] As to other related matters:

a) The question of costs for today's hearing is reserved. The parties advised they wished to be heard on this. If the parties have not been able to resolve costs as between themselves then this may be able to be considered by the Court at the 5 November 2009 date;

b) The hearing today was in chambers and I ordered that there was to be no publication of the hearing. This order is in place until further order of the Court and can be reviewed on application. The order does not, however, apply to the reporting of this decision in any legal report;

c) At the hearing today it was overlooked that there were other case management type matters raised by the second defendant (see paragraph 5 of the second defendant's submissions dated 28 October 2009). The parties should endeavour to reach agreement on these matters before the proceedings come back before the Court on 5 November 2009. If there is any difficulty about what the second defendant proposes the parties are to advise the Court of their respective positions at that time.

Mallon J

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