IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-425-000210

BETWEEN	SIMON ROMANA Plaintiff
AND	HAMISH MCKENZIE First Defendant
AND	APN HOLDINGS NZ LIMITED Second Defendant

Hearing: 3 June 2009

Counsel: B D Gray QC and A L Ringwood for defendants
S Romana in person

Judgment: 3 June 2009

ORAL JUDGMENT OF ASSOCIATE JUDGE ABBOTT

Solicitors:
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[1] This proceeding involves a claim by Mr Romana for very substantial damages for alleged defamation. The claim is in relation to an article written by the first defendant (a freelance journalist) and published by the second defendant in its publication, the New Zealand Listener, in May 2006.

[2] The plaintiff commenced his claim on 13 May 2008. The defendants take issue with several aspects of the pleading and with the plaintiff's failure to comply with discovery orders. They applied in October 2008 for orders striking out the proceeding for failing to comply with a discovery order, for striking out of various paragraphs of the statement of claim for failure to provide proper particulars, for proper pleading of the damages sought, and for security for costs.

[3] The plaintiff initially represented himself. In the latter part of last year he engaged a solicitor who filed memoranda for case management purposes on the plaintiff's behalf and then appeared for him at a case management conference in February 2009. The plaintiff has resumed acting for himself in more recent time and appears in person at today's hearing.

[4] It is apparent from the pleading of the statement of claim that the plaintiff does not have the knowledge or skills to present this claim on his own behalf. It is also apparent from the Court minutes that the plaintiff is equally unskilled in, and possibly unaware of, the requirements of the High Court Rules and the processes that he, as plaintiff, is required by those rules to follow. He has no understanding of the requirements for discovery.

[5] These are not new observations. The file has been before Associate Judge Doogue on at least three occasions for case management conferences. He has impressed on the plaintiff the difficulties he faces in attempting to conduct this litigation in person. He has also extended discovery orders on two occasions after non-compliance by the plaintiff.

[6] The plaintiff has raised medical difficulties in the past as part of the reason for non-compliance with orders. This led to a direction at the last case management conference that he file a medical certificate so that the Court could assess whether he had the capacity to conduct this litigation on his own. That is a matter I will come back to. In the course of the hearing today, the plaintiff informs me that he has resolved his health problems and believes that he is now capable of giving instructions for the future conduct of the proceeding.

[7] The defendants have been relatively long suffering, and have to date accepted further indulgences being granted to the plaintiff. However, they have brought their application to hearing today, and seek to have the proceeding struck out, on the basis that these indulgences have come to nought, and the proceeding is essentially in as poor state today as it was when the application was first filed. It is appropriate that I identify the principle objections at this point.

Pleading

[8] The plaintiff pleads the article in question in full in paragraph 12 of the statement of claim. In paragraphs 13 and 14 the plaintiff pleads that the entire article is defamatory in its natural and ordinary meaning. In paragraph 13 the plaintiff follows his general pleading (that the entire article is defamatory in its natural and ordinary meaning) by identifying various passages which are said to be defamatory. The particular passages are then followed by what counsel for the defendants quite reasonably describes as submissions and argument. Paragraph 14 largely repeats the general pleading of paragraph 13, but then alleges a meaning to be taken from the article as a whole.

[9] The defendants take issue with this pleading on a number of bases. First, it is impermissible to plead the whole article: *Karam v Australia Consolidated Press NZ Limited* (HC AK CIV 2003-404-000497 12 September 2003 Chambers J). Secondly, the pleading fails to identify clearly the particular words said to be defamatory, and the basis on which it is said that they are so (in other words the imputation to be taken from the particular words). Thirdly, the defendants say that a number of the phrases or words that are said to be defamatory (in the break out of the article under

paragraph 13) are not capable of defamatory meaning, or have meanings attributed that are not defamatory. The defendants say they are embarrassed by this pleading and are unable to determine the case that they are being asked to answer.

[10] The defendants additionally take issue with paragraphs 13 and 14 on the grounds that they contain unparticularised allegations of malice in several places. They contend that such allegations should only be made with care and with sufficient particulars to establish that there is a proper basis for the pleading. They say that there is no such pleading to support the allegations.

[11] In paragraph 15 of the statement of claim the plaintiff pleads special damage in the form of financial loss through lost business opportunities. He identifies nine business opportunities and two instances of personal financial loss apparently flowing from them, without providing any particulars. In paragraph 16 in the statement of claim the plaintiff seeks damages in the sum of $50 million in respect of lost business opportunities and personal losses identified in paragraph 15, but fails to show how that sum is derived from the $3,356 billion worth of lost opportunities identified in paragraph 15.

[12] The defendants also take issue with a pleading in paragraph 15 that the plaintiff has lost mana as a consequence of the article. They say that this can only be a pleading in support of general damages, and are unclear as to whether it is being alleged that there are factors which put the plaintiff apart from any other person facing a defamation claim. If so, they say that those factors should be pleaded specifically.

[13] I do not intend the foregoing summary to necessarily be exhaustive of the points raised by the defendants. It is indicative, however, of the far-reaching nature of the deficiencies in the statement of claim. I accept the submission of counsel for the defendants that it is unreasonable that a claim of this magnitude should be pleaded as poorly as this one. It is unreasonable for the claim to be left hanging over the first defendant (an individual) or over the second defendant (a publicly listed company with responsibility for reporting which it cannot meet fairly without being able to understand the claim against it).

[14] I accept that the statement of claim as pleaded does not comply with the requirements of s 37 of the Defamation Act 1992 or the requirements for pleadings of malice and special damage.

Discovery

[15] Discovery orders were made in a case management conference on 1 September 2008. Under those orders the parties were to file and serve affidavits of documents by 22 September 2008. On 21 September 2008 the plaintiff faxed a document to the Court described as an affidavit of discovery. The Court record shows that it was not accepted for filing because it was a faxed document. The original has never been filed. The document on the Court file also shows that it was not in proper format and clearly did not comply with the plaintiff's obligations. Counsel for the defendants had helpfully identified the categories of documents that it was wishing to see in the plaintiff's discovery in a memorandum filed on 27 August 2008 for the first case management conference. The plaintiff does not appear to have addressed those categories of documents.

[16] The issue over discovery came before the Court in a case management conference on 4 February 2009. The plaintiff was represented by counsel at that conference. Associate Judge Doogue noted that the plaintiff had still to provide discovery. He took into account advice from the plaintiff's counsel that the plaintiff was suffering from a health condition and accepted that as a possible reason for non-compliance. A further order was made that the plaintiff file and serve his affidavit of documents by 11 March 2009. He did not do so, but on 31 March 2009 the plaintiff faxed further documents to the Court, including another non-complying affidavit. Again that document was not accepted for registration. The matter was revisited at a case management conference on 2 April 2009. At that point Associate Judge Doogue noted that there were serious breaches of the timetable orders. His minute records the following:

> [3] There have been serious breaches of the timetable orders in this case. I have explained to Mr Romana that if the position is that he is not under any disability then there is no excuse for not complying exactly with the timetable orders that the Court makes. I have also told him that if he does

> not comply he will expose himself to sanctions from the Court. One form that those sanctions can take is that his case may be halted or may even be struck out for non-obedience of the Court orders. I hope it will not come to that. I also suggest that in order to carry out the steps that he needs to, Mr Romana really should be assisted by legal counsel. Whether he acts on that suggestion or not is a matter for him, but I do have real concerns about his ability to manage this litigation unless he instructs a solicitor and makes satisfactory arrangements with the solicitor to ensure that the solicitor will continue acting for him. He is not going to be greatly assisted by having solicitors acting on a 'start-stop' basis.

[17] Counsel for the defendants informs me today that the plaintiff provided the defendants with a further non-complying affidavit on 22 April 2009. There is no record of that document on the file. Counsel for the defendants tells me, however, that the documents really fails to advance the matter at all. The defendants rely on the decision of this Court in *Simunovich Fisheries Limited & Ors v Television New Zealand Limited & Ors* (HC AK CIV 2004-404-3903 3 August 2007, Allan J), and particularly the comments at paragraph [27] of that judgment:

> In my opinion plaintiffs who mount claims of this character and magnitude must expect to be faced with demands for detailed and comprehensive discovery and indeed the plaintiffs accept their discovery obligations. There are, however, fundamental differences between the parties about the extent of those obligations. In resolving them it is necessary to keep in mind the breadth of the *Peruvian Guano* relevance test as well as the provisions of r 300.

[18] Counsel for the defendants also submitted that what was involved here was in substance an application for further general discovery rather than an order for further and better discovery pursuant to r 300. I accept that that is the case.

[19] Counsel for the defendants submitted that the plaintiff had had more than enough opportunity to comply with the Court orders, and that it was time to sanction the plaintiff's non-compliance with strike out. He pointed out that the plaintiff had been warned of this possibility on 2 April 2009. He emphasised the very real effect of the proceeding on both defendants.

Assessment of application

[20] I have already indicated that I consider that the present statement of claim is inadequate in its pleading of defamatory words and meanings, and its pleading of damages. The plaintiff is also clearly in breach of discovery orders, and it appears from the documents that he has submitted to the Court (which are not yet filed) that what he has proposed by way of an affidavit of documents clearly does not meet his obligations under the High Court Rules.

[21] The plaintiff says to me today that the non-compliance is not deliberate. Although he now says that his health has recovered, I understand him to put his previous poor health forward as at least part of the reason for non-compliance. I can accept that that may be so, but not that he could not have engaged counsel with appropriate knowledge and expertise in defamation to assist him with this matter. Further, any solicitor would have been able to advise him on his obligations for discovery. There is nothing to stop a person representing himself in litigation, but that decision does not give a litigant person licence to ignore the rules for the proper conduct of the litigation. As I have explained to the plaintiff today, the rules are to ensure that both sides have a fair opportunity to present their respective cases. The plaintiff's actions to date do not afford the defendants that opportunity.

[22] The plaintiff accepted these criticisms when put to him in the hearing today. He informs me he wishes to have the opportunity to instruct counsel with proper expertise and skill in defamation cases. He informs me that he has approached counsel with that experience and can complete those instructions within the next few days. He also informs me that he has most documents with him here in New Zealand (in electronic form on his computer) or that they are otherwise available to him electronically (from storage in Canada). He believes that it will be possible to have properly drafted amended pleadings, and a comprehensive affidavit of documents, filed and served within the next 3 to 4 weeks.

[23] The extravagant nature of this claim, and the non-compliance with rules of pleading and orders of the Court would justify an order striking the proceeding out today. However, I accept that there have been health issues for the plaintiff in recent

time and that those could have contributed to his failure to advance his case properly. I accept the submission of counsel for the defendants that he has been given warnings and ample opportunity to correct the deficiencies. However, I intend to give him one final opportunity, but it will be on the basis that the proceeding will be struck out unless the plaintiff complies with the timetable orders I intend to make.

Application for security for costs

[24] The plaintiff is permanently resident in Canada. The defendants seek an order that he provide security for costs, on a staged basis. They point to evidence to the effect that the plaintiff has no ascertainable property within New Zealand. They say that the plaintiff's case is weak, but that does not mean that it should be taken any less seriously. This inevitably means that they will have to incur costs of significant amounts. The defendants seek an order by way of security in the sum of $15,000 each.

[25] The plaintiff did not challenge the defendants' arguments. He advised that he was prepared and in a position to provide the security sought.

[26] I am satisfied that the sum being sought by the defendants is reasonable for the likely costs up to the end of the interlocutory stage of the proceeding.

General matters

[27] In the case management conference on 2 April 2009 Associate Judge Doogue invited the plaintiff to authorise his doctor to provide a medical certificate to the Registrar, addressing the plaintiff's capacity to conduct this litigation. The plaintiff has arranged for that document to be provided to the Court. It is currently in a sealed envelope in the Court file. In light of the plaintiff's indication today that he is now in good health, I do not see the need to open the envelope and read that certificate. The plaintiff has agreed with counsel for the defendant that the letter or certificate be left in the sealed envelope, for use at a later date if necessary. I have informed the

plaintiff that, if it is to be used, in the absence of any ruling to the contrary it should also be made available at least to counsel for the defendants.

[28] Counsel for the defendants has also taken issue with the plaintiff's production of a without prejudice letter in a memorandum tendered to the Court for this hearing (the memorandum is entitled as a letter to the Court). Counsel for the defendants advises that this letter is part of a chain of without prejudice correspondence, and in itself contains reference to information that was provided to the plaintiff on a without prejudice basis. He seeks removal of the letter from the Court file. The plaintiff has accepted that. I direct that the letter be removed from the plaintiff's memorandum and returned to the plaintiff at the conclusion of this hearing.

Decision

[29] The plaintiff's claim is to be struck out unless the plaintiff files and serves the following documents by 3 July 2009:

a) an amended statement of claim addressing the deficiencies I identified in the course of this judgment, and particularly complying with s 37 of the Defamation Act 1992 and the High Court Rules in relation to pleading of malice and special damages (particularly r 5.33); and

b) an affidavit of documents complying with the High Court Rules, and addressing in particular the categories of documents identified in paragraph 15 of the memorandum of counsel for the defendants dated 27 August 2008.

[30] The plaintiff is to provide security for the costs of the defendants up to the completion of the interlocutory stages of the proceeding (in other words prior to preparation and exchange of briefs of evidence and preparation for any pre-trial conference) in the sum of $15,000 per defendant. These amounts are to be lodged with Registrar of the Court on an interest bearing account, or are to be secured in a manner acceptable to the Registrar.

[31] As the defendants have been successful on this application they are entitled to costs. The plaintiff is to pay the defendants (together) the costs of and incidental to this application on a 2B basis, together with disbursements as fixed by the Registrar.

Associate Judge Abbott