IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2009-485-000603

BETWEEN	PETER DANIEL VAUGHAN Plaintiff
AND	GORDON BRIAN CHRISTIE First Defendant
AND	PAUL THOMPSON Second Defendant
AND	IAN WILLIAMS Third Defendant
AND	CONNIE BARFOOT Fourth Defendant

Hearing: 22 July 2009

Counsel: Plaintiff in Person in support
S L Bacon for all the Defendants to oppose

Judgment: 23 July 2009

JUDGMENT OF WILD J

Introduction

[1] By application filed on 9 July the plaintiff, Mr Vaughan, seeks an extension of time to apply for a review of a decision given by Associate Judge Gendall on 11 June.

[2] That 9 July application is the second one Mr Vaughan filed. He filed a first application on 22 June. His second application, which I treat as the operative one, attempted to address comments Ronald Young J made to Mr Vaughan in a minute on

30 June. As I will explain, I think Mr Vaughan somewhat misunderstood those comments. The defendants filed a notice of opposition to Mr Vaughan's second application for an extension of time on 16 July, along with comprehensive submissions in opposition.

Background

[3] In this proceeding Mr Vaughan sues the four defendants seeking substantial damages against each for defamatory statements and conduct he alleges they made or engaged in between June 2006 and February this year. Prior to his resignation in June 2006, the plaintiff worked with the four defendants at Christie Flooring Limited, a Wellington company supplying carpet and other flooring. The gist of the plaintiff's claim is that the defendants conspired together to blame the plaintiff for fraudulent activities at Christies that the plaintiff claims were actually committed by the second defendant.

[4] The plaintiff commenced this proceeding on 30 March this year. Each of the defendants filed a statement of defence on 6 May. Each of those statements of defence began:

> The defendant by his solicitors says that the statement of claim filed by the plaintiff and served … on or about 30 March 2009 is defective. The defendant's solicitors have attempted to draw the nature and extent of those deficiencies to the attention of the plaintiff and have invited the plaintiff to remedy those deficiencies. To the extent that the defendant is able to discern the nature of the plaintiff's cause of action from the statement of claim filed, and noting that the deficiencies in the statement of claim prevent him from raising affirmative defences in accordance with the Defamation Act 1992 (as he would do if the statement of claim complied with the High Court Rules), he says by his solicitors that:

(There followed the detailed pleading to the statement of claim, paragraph by paragraph).

[5] On 8 May the defendants applied for security for costs, supporting their application with two affidavits, the more substantial one sworn by the first defendant. On 27 May the plaintiff filed a notice and affidavit in opposition to the defendants' security for costs application (these documents are incorrectly described

as a "notice of interlocutory application by the plaintiff against the defendants' application for security for costs"). Earlier, on 19 May, the plaintiff had filed an application, pursuant to s 4(6B) Limitation Act 1980, for leave to bring a defamation action in respect of defamation he alleged had occurred before March 2007. No doubt that application was in response to the defendants, in their statements of defence, invoking the two year limitation period in s 4(6A) of the Limitation Act.

Minute by Ronald Young J

[6] Mr Vaughan's original application for an extension of time came before Ronald Young J on 29 June. In a minute he issued the following day the Judge recorded:

> [1] Mr Vaughan made application for an extension of time to review Associate Judge Gendall's decision granting security for costs. I advised Mr Vaughan that he must swear an affidavit in support of this application explaining the delay and telling the Judge to hear the application for an extension why he has an arguable case on his application for review.

[7] The Judge was not in that minute indicating to Mr Vaughan that he needed to file a fresh application for review. But, as I have indicated, that is what Mr Vaughan did. He also supported it with a detailed affidavit.

[8] As I have indicated, I will treat that fresh application and supporting affidavit as the operative application, but as if it had been filed on 22 June – the filing date of the original review application.

Grounds for review

[9] Apart from an explanation for his delay in applying for review, Mr Vaughan's application is based on the following grounds:

> Natural Justice
>
> The perjured affidavits of all four defendants.
>
> The ethical standard for the defendants solicitors to knowingly use affidavits which they knew were perjured.

Case law Wakatipu Environmental Society v Queenstown Lakes District Council.

Siemer v Stissany judgment Cabassi v Vila [1940]

Disregarding all exhibits by the Plaintiff A, B, D, E, as well as www.adjective.co.nz

Delay in applying for review

[10] On Ms Bacon's calculation, Mr Vaughan was only two days out of time in applying for a review. She readily accepted this was a minimal delay, which had not prejudiced the defendants. Ms Bacon said the real issue was whether the review application had any prospect of success, and invited me to determine the application on that basis. That approach is an entirely proper one for the defendants, and I adopt it. Before turning to the merits of the proposed application, I need to say something of the Associate Judge's decision.

The decision of the Associate Judge

[11] The judgment is a considered one: it was delivered on 11 June following a hearing on 3 June.

[12] The Associate Judge set out the background to the proceeding, referred to the relevant rule (r 5.45) and to the general approach to security for costs as laid down by the Court of Appeal in *A S McLachlan Ltd v MEL Network Ltd* (2002) 16 PRNZ 747, accepted as the leading case in this area. Mr Vaughan made no criticism of any of that.

[13] The Associate Judge then recorded that Mr Vaughan conceded he was impecunious, and thus that the threshold test was satisfied. That means that the plaintiff accepted he would not be able to meet the likely orders for costs against him, should his proceeding fail at trial. Mr Vaughan, who was adjudicated bankrupt on 4 May 2009, accepted that.

[14] The Associate Judge then turned to his discretion, in particular noting the discursive nature of the statement of claim, and the defendants' criticisms of it. He referred also to the requirement in s 43(2) Defamation Act 1992 for an award of solicitor and client costs where, although a plaintiff succeeds, it is for less than the grossly excessive damages that were claimed. The Associate Judge noted that the defendants alleged that was the likely costs outcome here: damages of about $2 million claimed against the first defendant; damages totalling $1.85 million claimed against the remaining defendants.

[15] Next, the Associate Judge turned to the merits. He noted the difficulty of assessing them at this early stage of a proceeding such as this, particularly where the adequacy of the statement of claim remained an issue. His conclusion on the merits was:

> [22] … On balance, however, I am of the view here that the plaintiff's present claim against the defendants lacks proportionality and cannot be described as a particularly strong one.

[16] The Associate Judge then indicated he did not accept Mr Vaughan's contention that his present impecuniosity resulted from the defendants' actions.

[17] He then dealt with some other factors. Two are of present relevance. The first is the plaintiff's suggestion that this proceeding raised questions of public interest. The Associate Judge held:

> [26] But, clearly here, I can see no public interest aspect in this case such as was present in *Ratepayers and Residents' Assoc. Inc. v Auckland CC* [1986] 1 NZLR 746 (CA). This factor does not assist the plaintiff here.

[18] Secondly, and of less present relevance, the Associate Judge noted that the plaintiff appeared to be assisted in his proceeding by Mr Murray, also a former employee of Christie Flooring Ltd. The Associate Judge noted that Mr Murray had filed affidavits supporting the plaintiff's claim, and raised the possibility that Mr Murray may therefore have some interest in the proceeding and the means to assist the plaintiff in providing any security ordered.

[19] Those were the reasons that led the Associate Judge to conclude that he must order security here. He then turned to deal with quantum. Beyond recording that his order was for total security of $60,000, I need say nothing about that. Mr Vaughan directs his application, not to the amount of security ordered, but to the fact that any security was ordered. The plaintiff indicates he will be calling "at least 60 witnesses" in a trial he estimates will take 1-2 weeks. Given that number of plaintiff's witnesses, not to mention any for the defence, the defendants say 8 weeks is a more realistic estimate. In the face of that, and given that there are four defendants, the Associate Judge's $60,000 order is unassailable, in terms of its quantum.

Why Mr Vaughan says the Associate Judge's decision is wrong

[20] In view of the length of Mr Vaughan's supporting affidavit (54 pages including the material exhibited to it) I invited Mr Vaughan to identify the reasons why he says the Associate Judge's decision is wrong, and thus why a review of it will be successful. Mr Vaughan did that and I deal with his points one by one. As I deal with each point, I will mention Ms Bacon's response to it for the defendants.

Who is paying the defendants' costs?

[21] Mr Vaughan submitted that the defendants had relied on a "perjured affidavit" which stated that each defendant was paying his or her own legal costs of defending the proceeding. He contended that the defendants had since accepted that the first defendant (Mr Christie) was paying for the defence. Mr Vaughan did not identify the "perjured affidavit", but it can only be that sworn by Mr Christie on 8 May.

[22] I invited Mr Vaughan to explain to me what relevance this point had to his proposed review. Assuming Mr Christie was meeting the costs of defending the proceeding, how did that affect the correctness of the Associate Judge's decision? Mr Vaughan was not able to give me a satisfactory answer. In my view, the point is irrelevant and that was exactly what Ms Bacon submitted.

[23] Further, I have read Mr Christie's affidavit and can see nothing in it stating or implying that each defendant was paying his or her own costs of defending the proceeding. That was Ms Bacon's second point: there is nothing in the affidavit to that effect, and Ms Bacon roundly rejected the allegation of perjury, which she said reflected also on the defendants' solicitors.

[24] There is nothing in this point.

Mr Murray not a credible witness

[25] Mr Vaughan maintained that the Associate Judge had, without foundation, expressed the view that Mr Murray was not a credible witness. He said that Mr Murray was credible: he was a "whistle blower" who had, indeed, provided information to the plaintiff.

[26] I pointed out to Mr Vaughan that that was not at all what the Associate Judge had said. What he said was this:

> [19] … The defendants are also concerned that the plaintiff's allegations are almost exclusively based on Mr Murray's affidavits, ***who the defendants say*** is scarcely a credible witness, and that the statement of claim is merely the work of two disgruntled former employees of Christie Flooring.

The emphasis is mine, because Mr Vaughan's submission overlooks the words I have emphasised. The Associate Judge is doing no more than recording the defendants' submission about Mr Murray's credibility. The Associate Judge could not, and did not, make any assessment of Mr Murray's credibility. On what possible basis could he have done that?

[27] This point has no merit.

The plaintiff's website

[28] As I understand the position, the plaintiff has a website on which he has posted information supporting his conspiracy theory. I gather the website is

www.adjective.co.nz. Although the defendants know of this website, Mr Vaughan made the point that they have not succeeded in closing it down, although they have tried to do so. He expressed the belief that the defendants had sought legal advice but had been told they could not close down the website.

[29] Mr Vaughan's point here was to draw a comparison with the situation in the *Stiassny v Siemers* litigation, in which Mr Stiassny had been successful in closing down one or more websites on which Mr Siemers had posted material defamatory of Mr Stiassny, and had been successful in having Mr Siemer's billboards, defamatory of Mr Stiassny, taken down.

[30] It seems to me that Mr Vaughan's point is something along these lines:

> I have posted information critical of you on a website. You have not done anything about that. Therefore that information must be true.

That argument lacks logic and force. Additionally, the difficulties of removing 'objectionable' material from a website are now well publicised, particularly where the website is hosted from a foreign jurisdiction (I am unsure whether this website is in that category). Those were points that Ms Bacon made. Although the defendants do not accept the truth of the material Mr Vaughan has posted on his website, it appears not to be well visited, and Ms Bacon asserted that the defendants are more concerned to defend this proceeding. As she put it, they wish "to fight one battle at a time".

[31] There is empty of substance.

Public interest

[32] Mr Vaughan submitted that the subject matter of this proceeding included matters of public interest. That was because some of the flooring contracts had involved "well known sectors of the business community and Government Departments and Ministries".

[33] I do not accept this proceeding is of public interest. It is private litigation: it is a claim by one individual against four other individuals for damages for alleged defamation. I accept Ms Bacon's counter-submission that the proceeding gives rise to no issues of public interest.

[34] There is nothing in this aspect.

Limitation

[35] In [20] of his decision, the Associate Judge noted that the defendants had taken the limitation point I refer to in [5]. The Associate Judge noted:

> [20] … The plaintiff has applied for leave to be granted, but there is little before the Court at this stage to show any justification for the granting of such leave.

[36] Mr Vaughan expressed to me confidence that he would be granted leave. He said that he had been duped by the first defendant into believing that a Police investigation had been going on since June or July 2006. He told me that he had instructed solicitors in Dunedin, who in turn had retained Ms Ablett-Kerr to act for him. Those solicitors had advised him not to take action until the Police approached him for an interview. Mr Vaughan told me that he had eventually contacted the Police who informed him that no Police investigation had been or was underway.

[37] When I asked Mr Vaughan to direct me to the evidence about this, he responded that none of this was in evidence at present. Accordingly, I cannot place any reliance on those assertions by Mr Vaughan.

[38] I consider the Associate Judge was entirely correct to note that a limitation point had been taken in respect of a substantial number of the plaintiff's allegations, and was yet to be determined.

Result

[39] If satisfied that Mr Vaughan's application for review had a reasonable prospect of success, I would not hesitate to grant him an extension of time, and entertain his application for review. But I can see no merit in any of the grounds upon which he seeks to review the Associate Judge's decision. Accordingly, the appropriate course is to decline Mr Vaughan an extension of time. Effectively, that outcome is the same as if I had reviewed the Associate Judge's decision, and held that none of the grounds on which Mr Vaughan sought to impugn it had substance.

[40] In the result, the position is that this proceeding remains stayed unless and until the plaintiff provides security for costs to the defendants in the total sum of $60,000.

[41] For what it is worth, I allow the defendants their costs of the application on a 2B basis, together with disbursements as fixed by the Registrar.

Solicitors:
Izard Weston, Wellington for all Defendants