IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2009-485-1233

UNDER	the Defamation Act 1992
IN THE MATTER OF	interlocutory application for summary judgment
BETWEEN	VONRICK CHRISFORD KERR Plaintiff
AND	THE DOMINION POST Defendant

Hearing: 27 January 2010

Counsel: Plaintiff in person
R K P Stewart for defendant

Judgment: 11 February 2010

RESERVED JUDGMENT OF DOBSON J

---

[1] This is an application by the plaintiff for rescission of the order striking out these proceedings made by me in a reserved judgment dated 20 November 2009.

[2] The present proceedings (the 2009 proceedings) are the second issued by Mr Kerr in relation to two articles, originally published by the defendant newspaper, in its circulated paper form, in October 2007. Essentially the same content has subsequently been electronically re-published by virtue of internet access to the electronic version of the newspapers. The articles referred to Mr Kerr's application to run his own taxi company, in circumstances where the newspaper reported him as having certain criminal convictions.

[3] The first proceedings in respect of these publications were commenced in October 2007. In January 2008, Associate Judge Gendall ordered Mr Kerr to pay security for costs in the sum of $30,000, and stayed the 2007 proceedings pending payment in full of that security. I determined an application to review that decision. In a judgment delivered on 13 March 2008, I dismissed Mr Kerr's application for review of the Associate Judge's orders. I also dismissed an application for leave to further appeal and in August 2008 Mr Kerr's application for special leave to appeal to the Court of Appeal was also dismissed. Mr Kerr acknowledges he is unable to meet the order for security for costs and accordingly the 2007 proceedings remain stayed.

[4] In June 2009, Mr Kerr commenced the 2009 proceedings. They focus on separate republication of the content by electronic means. There were minor differences in the allegations as to the content alleged to be defamatory and the innuendoes pleaded as arising from the words used. All such differences were within the parameters of what might reasonably be expected by way of an amendment to the 2007 pleading.

[5] For reasons set out in my 20 November 2009 judgment, I found commencement of a second set of proceedings in relation to publication of the same words by the Dominion Post to amount to an abuse of process, in circumstances where the original proceedings were stayed. On that basis, I struck the 2009 proceedings out.

[6] The Court's jurisdiction under r 7.49 to rescind an interlocutory order depends on the Court being satisfied that the order is wrong. Mr Kerr purported to accept that there was an onus on him, either to establish that the relevant issues were not fully argued at the original hearing, or that there is new evidence or a change of circumstances that would justify a reconsideration of the order.[1]

[7] A number of documents were filed in support of the present application. First, an affidavit from a friend of Mr Kerr, Claudia Scheidegger. This confirmed

---

[1] *Wrightson NMA Ltd v McConnell* [1989] 2 NZLR 77 at 82-83; *Arkley v Fraser Mill Properties Ltd* [1989] 2 NZLR 57.

that she had, in the course of overseas travel, accessed the electronic version of the articles in Switzerland and Trinidad and Tobago. Since the striking out order, Mr Kerr has also purported to file an application for leave to file an Amended Statement of Claim, and the terms of such an Amended Statement of Claim. That document pleads six discrete publications of one or other of the articles by persons known to Mr Kerr accessing the defendant's website. The document also claims punitive damages from the defendant on the basis of what Mr Kerr treats as continued publication (via the electronic version of the newspapers) after what he treats as the incorrect reporting about his criminal convictions having been drawn to the defendant's attention.

[8] As to the nature of the previous hearing which resulted in my 20 November 2009 judgment striking out the proceedings, Mr Kerr argued that certain matters he had addressed were not dealt with in the judgment, and therefore the matter was not "fully argued". He submitted that the process for the hearing had also been unfair in that the Court declined to hear, at the same time as the defendant's strike out application, an interlocutory application Mr Kerr had earlier filed seeking to strike out certain of the defences pleaded for the Dominion Post.

[9] I remain satisfied that the issues on the strike out were fully argued in the sense contemplated as a circumstance relevant to consideration of an application to rescind. Indeed, variants of the vast majority of the points Mr Kerr urged upon me at the present hearing had been traversed by him on the last occasion.

[10] Mr Kerr also argued that the more recent instances of electronic republication constitute a change of circumstances. This is because each individual publication of a defamatory statement gives rise to a separate cause of action, subject to its own limitation period. On this point he cited *Loutchansky v Times Newspapers Ltd & ors (No 2)*[2] and *The Law of Torts in New Zealand*[3]). Accordingly, Mr Kerr claims that the further instances of electronic publication constitute a change of circumstances, particularly as he treated the continued availability of the electronic version of the articles as being in flagrant or contemptuous breach of his rights. Thus, Mr Kerr

[2] [2002] 1 All ER 672 at [57].
[3] Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed, Brookers, Wellington 2009) at [759].

argued that these further publications, as deposed to by Ms Scheidegger, could each justify a separate case because each publication is a separate cause of action. Accordingly, Mr Kerr submits that the occurrence of new "cases" since the hearing in November 2009 justified the Court taking a fresh look at the appropriateness of staying or striking out the 2009 proceedings.

[11] The practical position remains as it appeared in November last year. All of the complaints of further publication by electronic means would inevitably be combined within a single set of proceedings. So too would any other additions or refinements to Mr Kerr's case against the Dominion Post in respect of the two articles that originally appeared in October 2007, and their subsequent electronic republication since then.

[12] For the Dominion Post, Mr Stewart accepted unequivocally that that would be the case. He further acknowledged that if and when the stay of the 2007 proceedings is lifted by Mr Kerr meeting the outstanding order for security for costs in relation to them, the Dominion Post would not oppose amendment of the Statement of Claim in the 2007 proceedings to incorporate all of the allegations that are presently contemplated by Mr Kerr.

[13] I am accordingly not persuaded that the identification of further republications, all of which could be accommodated by amendment to the 2007 proceedings, constitutes the type of change in circumstances that justifies a reconsideration of the decision to strike out the 2009 proceedings, rescission of which is presently sought.

[14] Nor do I accept that the existence, and prospect, of on-going re-publications can be treated as "aggravating conduct" on behalf of the defendant that could justify reconsideration of the grounds on which it achieved a strike out of the 2009 proceedings in November 2009. As I discussed with Mr Kerr, in order to accept his proposition that the continued availability of the electronic version of the articles constituted some aggravated breach of his rights, it would be necessary to make a finding that his claims for defamation are made out. If the Dominion Post elects not to remove the articles from the electronic versions made available via its website, it

is likely to be taken to have done so, in the full knowledge of the matters raised by Mr Kerr as justifying his claims that the items are defamatory. In those circumstances, its on-going conduct would likely leave the newspaper vulnerable to an aggravated measure of damages. However, in the present context, if the defendant elects to run that risk, it is not a circumstance that could justify reconsideration of the appropriateness of the striking out of the 2009 proceedings.

[15] Accordingly, I am not persuaded that there are any material changes in circumstances that would justify reconsidering the correctness of the decision made in November 2009.

[16] Although Mr Kerr denied that he was in effect attempting to re-argue the merits of the original order made against him for security for costs, the thrust of much of what he said to me was addressed to that topic. He suggested that the Court could treat the procedural opportunity afforded by further publications in 2009 as sufficient to warrant the commencement of another set of proceedings, even if they would eventually be consolidated with the claims previously made and which are now subject to stay. He argued that the balance of interests on the security for costs application could now be reconsidered because the conduct of the Dominion Post in continuing to make the electronic version of its newspaper available on its website, once on notice of the factual and defamatory errors in its articles (in Mr Kerr's view), demonstrated that the well-resourced defendant was itself abusing the Court processes by keeping "the little guy" from his day in Court on the merits. Mr Kerr's final plea was that the Court ought to recognise the injustice in what had occurred, and avoid the injustice created by the stay of the earlier proceedings, by rescinding the order that had struck out the 2009 proceedings.

[17] The difficulty with these pleas is that they overlook the fully reasoned basis on which the Associate Judge was originally persuaded to order security for costs in the 2007 proceedings. I was not persuaded that there was any error in that, and the Court of Appeal declined to grant special leave for a further appeal. The Dominion Post cannot have held against it in this context the election implicit in its conduct that it can justify the use of the words in the articles complained of, and would be able to do so if and when the matter is substantively tried. If the

newspaper is wrong in that judgement, then the quantum of damages for which it is liable is likely to be greater than it would otherwise be because of the electronic republications. In the meantime, however, that does not warrant a revisiting of the decision made last year in respect of the future of the 2009 proceedings.

[18] I accordingly dismiss the application to rescind the order.

[19] The Dominion Post sought costs and it is entitled to them on the present application, on a 2B basis.

Dobson J

Solicitors:
V C Kerr, 22 Warwick Street, Wilton, Wellington
Izard Weston, Wellington for defendant