

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

CIV-2010-404-006349

BETWEEN FRANCISC CATALIN DELIU
First Plaintiff

AND AMICUS LAWYERS LIMITED
Second Plaintiff

AND BOON GUNN HONG
Defendant

Appearances: First Plaintiff in Person
A D Banbrook for Defendant

Judgment: 21 December 2011

JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 21 December 2011 at 3:00 pm
pursuant to R 11.5 of the High Court Rules

Registrar / Deputy Registrar

Date.....

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Introduction

[1] Mr Hong is a solicitor in sole practice in Auckland. In 2009 he acted for Mr and Mrs Ma on the purchase of a house. They subsequently commenced proceedings against him alleging negligence and breach of fiduciary duty.¹ When Mr Hong was first served with the proceedings he directed an angry response to the solicitor acting for the Mas, Mr Baker, and their counsel, Messrs Zhao and Ram. That started a chain of events that resulted in these proceedings.

[2] Messrs Zhao and Ram are members of legal chambers known as Amicus Lawyers. Mr Deliu, the first plaintiff, is a barrister in these chambers. He is also a director of the second plaintiff, Amicus Lawyers Ltd, which operates the chambers. It was Mr Deliu who replied to Mr Hong's first letter. He did so, he said, as the "head" of Amicus. Mr Deliu's reply was in very strong terms. There followed an exchange of derogatory remarks between Mr Hong and Mr Deliu, complaints by each against the other to the Lawyers Complaints Service of the New Zealand Law Society (LSC) and these proceedings, in which Mr Deliu and Amicus made allegations of abuse of process, malicious prosecution, intentional infliction of emotional distress and defamation/injurious falsehood against Mr Hong, and Mr Hong counterclaimed with similar allegations against Mr Deliu, Amicus and Messrs Zhao and Ram.

[3] Mr Deliu applied to strike out Mr Hong's statement of defence and counterclaims. Mr Hong cross-applied to strike out Amicus' claim (but not Mr Deliu's claim). Following a defended hearing Associate Judge Bell gave an oral judgment in which he struck out both the statement of claim and counterclaim in their entirety on the ground that they were frivolous. The Associate Judge refused Mr Deliu's application to recall the judgment. Mr Deliu now applies to review the Associate Judge's decisions under s 26P of the Judicature Act 1908 on the grounds that:

- (a) There was no jurisdiction to dismiss his claim in the absence of an application before the Court;

¹ The Ma's claim was baseless because the sale and purchase agreement was unconditional before Mr Hong even saw it and was eventually discontinued; *Ma v Ho and Hong* District Court Auckland CIV 2010-004-000956, 29 July 2011 .

- (b) Striking out the claim amounted to a denial of the principles of natural justice;
- (c) Striking out the claim amounted to a denial of access to justice; and
- (d) The Associate Judge erred in declining to recall the judgment.

[4] Mr Hong does not seek to review the Associate Judge's decision and accepts that his counterclaim has been properly struck out. He has, however, filed a cross-application seeking to have Mr Deliu's and Amicus' applications struck out, an order that Mr Deliu cannot appeal my decision and for costs in respect of an unsuccessful injunction made by Mr Deliu at the outset of the proceedings.

[5] Under s 26P of the Judicature Act 1908 any party to a proceeding affected by the decision of an Associate Judge in chambers may apply for a review of the decision. Where the decision under review involves the exercise of discretion, as both the striking out of pleadings and the awarding of costs do, it must be shown that the Associate Judge acted on a wrong principle or failed to take some relevant matter into account or took some irrelevant matter into account or was plainly wrong.²

[6] Where the decision follows a defended hearing and is supported by documented reasons, the review proceeds as a rehearing.³ Mr Deliu argued that the review application should be heard on a *de novo* basis. I do not accept that approaching the matter *de novo* would be correct in relation to the striking out of the Amicus claim because that order followed a defended hearing and lengthy reasons were given. The striking out of Mr Deliu's claim is different; there was no argument about it because there was no application in respect of it. Therefore it could not be regarded as having been the subject of a defended hearing. Mr Hong's application for costs on the injunction was not dealt with at all. These aspects of the review should therefore be approached on a *de novo* basis.

² *Alex Harvey Industries v Commissioner of Inland Revenue* (2001) 15 PRNZ 361 (CA) at 364.

³ High Court Rules 2008, r 2.3.

Should Mr Deliu's claim have been struck out?

[7] I do not need to consider the application regarding the striking out of Mr Deliu's claim in any detail because it is clear that that order must be set aside. An order striking out a pleading is an interlocutory order. Under r 7.43 of the High Court Rules an interlocutory order may be made either on the application of a party or on a judge's own initiative.⁴ However, before making an order on his or her own initiative a judge must give the parties an opportunity to be heard.⁵ Mr Deliu asserted that the possibility of his claim, as opposed to Amicus' claim, being struck out was not signalled to the parties and not argued. Mr Banbrook, for Mr Hong, had also appeared at the hearing before the Associate Judge and did not refute Mr Deliu's assertion.

[8] Whether Mr Deliu's claim might be amenable to being struck out upon application by Mr Hong or on the Court's initiative (following a hearing) is for another day. But clearly the claim should not have been struck out in the circumstances that existed at the time.

[9] Mr Deliu's application to recall the Associate Judge's judgment was based primarily on the complaint that the Associate Judge had struck out Mr Deliu's claim without him being heard. Because of my conclusion on that point it is unnecessary to consider the argument regarding the refusal to recall the judgment.

Did the Associate Judge err in striking out Amicus' claim?

[10] Mr Hong's application to strike out Amicus' claim was brought on the grounds that the pleading did not disclose a reasonably arguable cause of action, was likely to cause prejudice or delay, was frivolous or vexatious or otherwise an abuse of the Court process. The power to strike out a cause of action, and thereby preclude the issues arising from being tried, is to be used sparingly and only in clear cases.⁶

⁴ R 7.43(2).

⁵ R 7.43(2)(b).

⁶ *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA); *Couch v Attorney-General* [2008] NZSC 45.

[11] Although the Associate Judge did consider whether the pleadings disclosed reasonably arguable causes of action, he did not base his decision on that assessment, but rather on r 15.1(1)(c), the frivolous ground:

[22] The claims by Mr Deliu and Mr Hong are frivolous. The parties are using the pleadings to direct insults at each other. This proceeding is not being used to uphold interests which the law of torts sets out to protect. In the eyes of the law, the matters in issue in this proceeding are trivial. This proceeding lacks the seriousness required of matters for the court's determination.

[23] This decision that the pleadings are frivolous does not turn on whether Mr Deliu or Mr Hong have tenable causes of action for their claims, although that is a relevant consideration ...

[33] I do not say that all Mr Deliu's or Mr Hong's causes of action are completely untenable but their cases are very weak. They are contrived simply as vehicles in which to deliver attacks against each other. The point remains that this proceeding is not being run to serve any useful purpose.

[12] The Associate Judge's view that the claim and counterclaim were frivolous was entirely understandable. However, it is not consider it necessary to consider that aspect in any detail because, in my judgment, the causes of action by Amicus were not tenable and should properly have been struck out on that ground, without the need to consider the motivation of the parties.

[13] The amended statement of claim filed by Mr Deliu and Amicus pleaded four causes of action. Both plaintiffs asserted abuse of process, malicious prosecution and defamation/malicious falsehood. There was a further cause of action by Mr Deliu alone which is not relevant to the present issue. Bell AJ considered that neither the abuse of process nor malicious prosecution causes of action were tenable. This was mainly because the communications complained of were privileged, being made either in the context of the Ma proceeding or as part of the LCS complaints process.⁷

[14] In respect of the abuse of process cause of action the Associate Judge concluded (as had Venning J in relation to the unsuccessful injunction application) that there was no arguable cause of action because, although it would have been an abuse of process to lodge a complaint with the NZLS for an ulterior purpose, in this case Mr Hong initially complained as part of his response to the earlier complaint

⁷ *Teletax Consultants Ltd v Williams* [1989] 1 NZLR 698 (CA).

made by Mr Deliu about Mr Hong. I agree with that approach. Subsequent complaints to the NZLS on 17 June 2010 must also be regarded as part of the ongoing and escalating war of words between Mr Deliu and Mr Hong. I see no error in Bell AJ's analysis or conclusion on this point.

[15] The second cause of action was for malicious prosecution. It also rests on the complaints by Mr Hong to NZLS. The Associate Judge considered that the law in New Zealand was correctly represented by *Jones v Foreman*,⁸ which is consistent with the recent clear statement by the House of Lords in *Gregory v Portsmouth City Council*.⁹ The tort of malicious prosecution is not available in respect of civil proceedings save for very specific exceptions (which do not apply in this case). The House of Lords specifically rejected the extension of the tort to quasi-criminal disciplinary proceedings. The Associate Judge's assessment that this cause of action was not tenable must be correct.

[16] The Associate Judge concluded that the defamation/malicious falsehood causes of action, which were based on a number of emails from Mr Hong and court documents filed by him, were tenable. With one exception I respectfully disagree with that assessment. The claims were based on Mr Hong's correspondence to Mr Deliu which he had copied to Mr Baker, Messrs Zhao and Ram, his own counsel, Ms Cato and, in one instance, an unrelated solicitor, Ms Chu. The Associate Judge accepted that the pleaded parts of the correspondence appeared to have a meaning that was defamatory and that they referred to both Mr Deliu and to Amicus, and therefore that it was a "triable issue" whether Amicus had been referred to and whether its commercial reputation had been damaged. He considered that the fact that Mr Hong had sent letters to third parties meant that the privilege under s 14 of the Defamation Act 1992 was arguably not available.

[17] Although one of the letters (dated 23 September 2010) could found a cause of action in defamation or injurious falsehood by Mr Deliu personally, the other pleaded communications and documents were either privileged or not capable of supporting a cause of action in defamation or malicious falsehood by Amicus (or Mr Deliu). I deal with each of the impugned communications seriatim.

⁸ *Jones v Foreman* [1917] NZLR 798.

⁹ *Gregory v Portsmouth City Council* [2000] 1 AC 419 (HL).

[18] The letter 13 May 2010 was written to Baker Law & Conveyancing Ltd following Mr Hong's receipt of a letter from the LCS advising of a complaint by Mr Deliu against him. The letter is directed very specifically to the shortcomings of Messrs Zhao and Ram. The pleaded portion of the letter does not refer to Mr Deliu. In fact the only reference to Mr Deliu in the letter is to comment on the fact that the basis of his involvement was uncertain because he was not named as counsel. There is no reference to Amicus. It is not reasonably arguable that this letter constitutes a defamation or injurious falsehood in respect of either Mr Deliu or Amicus.

[19] The letter 23 May 2010 was addressed to the LCS and was copied to Mr Ram, Mr Zhao and Mr Deliu. It is alleged that it was copied to Mr Baker and for present purposes I treat the allegation as being correct although that does not appear from the evidence. The statements pleaded as being defamatory and/or injurious falsehood related to factual mistakes in the drafting of pleadings due to a lack of care and skill, lack of courtesy, failure to properly consider all legal issues and general incompetence in the areas of law arising in the Mas' claim. At the outset Mr Hong went to some length to record his objection to Mr Deliu's involvement on the basis that neither he nor Amicus have any standing in the matter. It is clear from that introduction that the criticisms that follow were directed to Mr Zhao and Mr Ram. Later in the letter there is concern expressed by Mr Hong about the manner in which Amicus was shown on the plaintiff's documents as the address for service. However, this aspect of the letter is concerned with Chapter 14 of the Lawyers and Conveyancers Act (Lawyers: Code and Client Care) Rules 2008 which relates to the respective roles of barrister and solicitor and does not seem to me capable of bearing a defamatory meaning. Nor do I consider that it is directed towards Amicus itself; the expression used is "Amicus Chambers practitioners" and the criticism is directed towards the (impliedly unauthorised) practice of individual barristers improperly using Amicus' address as their client's address for service.

[20] It is evident that this letter served several purposes. The first was a response to Mr Deliu's complaint. It is therefore privileged under s 14 of the Defamation Act insofar as it was sent to the LSC. The second was expressing concerns about the ongoing litigation involving the Mas. Mr Hong was the defendant in that litigation. He was entitled to correspond with Mr Baker as the solicitor on the record for the

Mas and with Mr Zhao and Mr Ram as counsel on the record. There can be no objection to that. The third purpose was the request made towards the end of the letter for the New Zealand Law Society's own intervention. It is clearly couched in terms of a complaint in respect of Mr Zhao and Mr Ram and accordingly privileged. This letter, therefore, could not have supported a claim for defamation or malicious falsehood.

[21] The letter 6 June 2010 written to Mr Baker, Mr Ram, Mr Zhao and Mr Deliu was definitely directed towards Mr Deliu. It had a stated intention of complaining to the LSC and was critical of Mr Deliu's general past performance as counsel. This letter is capable of being viewed as defamatory and does not support any obvious claim to privilege. However, the pleaded statements that are relied on make no mention of Amicus and the letter would not support a claim by that entity.

[22] The letter 9 June 2010 written to Mr Baker, Mr Ram, Mr Zhao and Mr Deliu in relation to Mr Hong's intention to seek costs in the Ma proceeding against counsel personally. It referred to Mr Deliu as having had "a history of instigating such hopeless, unmeritorious, vexatious, a wilful disregard of undisputed facts and querulous actions". The letter was written in the context of the existing proceedings on the issue of costs between Mr Hong, an unrepresented party, and the opposing solicitor and counsel. It is therefore privileged. This letter would not support the pleaded causes of action.

[23] The email 17 June 2010 to the LCS, Messrs Baker, Ram, Zhao and Ms Cato was styled as a response to Mr Deliu's complaint against Mr Hong and a cross-complaint by him about "Mr Frank Deliu and all other counsels involved". It was clearly part of the LCS complaint process and the addressees of it were all parties to that process or their counsel. Amicus was only mentioned in a descriptive sense in relation to Messrs Deliu as being "Amicus counsel". The email was privileged and could not support the causes of action pleaded.

[24] The next document pleaded was an information capsule for a counterclaim by Mr Hong in the Ma proceeding for costs against counsel filed on or about 17 September 2010. An information capsule filed in the District Court is a pleading that attracts privilege. It cannot support the causes of action pleaded.

[25] On or about 20 September 2010 Mr Hong filed a memorandum in the District Court in the Ma proceedings and copied it Mr Baker, Messrs Zhao and Ram. Given their status in the proceeding, this communication was privileged. He also copied members of the LCS and, given the ongoing complaints between Mr Deliu and Mr Hong, that communication was also privileged.

[26] The next pleaded instance of defamation/injurious falsehood was an email sent on or about 23 September by Mr Hong to an instructing solicitor of Mr Deliu, Ms Chu. This email was about a case completely unrelated to the Ma litigation and advised that “some of us practitioners, the Law Society, a Justice of the High Court are having grave issues and difficulties with Mr Deliu’s style of practice”. On the face of it this email is capable of supporting the pleaded cause of action by Mr Deliu but there was no mention of Amicus and it would therefore not support a claim by Amicus.

[27] The last document relied on was a letter/memorandum created on or about 27 September 2010 addressed to the High Court but never filed in relation to Mr Deliu’s application for injunction against Mr Hong. It was sent to Mr Patterson and Mr Grove who were, at the time, advising Mr Hong. It was clearly privileged and did not, in any event, refer to Amicus.

[28] It is evident that the causes of action by Amicus in defamation or malicious falsehood were untenable. The application to strike out that those causes of action should have succeeded on the ground alone. It follows that, although the Associate Judge may have erred in his assessment of these causes of action, he did not err in striking them out.

Costs on the injunction application

[29] In October 2010 Mr Deliu applied for an interim injunction to prevent Mr Hong from publishing allegations about him including allegations of criminal or unethical conduct or improper personal enrichment. By that time Mr Hong had engaged counsel, Mr Banbrook, who brought much needed objectivity to the situation. Mr Hong gave an undertaking confirming that he would not publish allegations of criminal or unethical conduct or improper personal enrichment except

in the context of the LCS process, the present proceedings and the Ma proceedings in the District Court.

[30] Mr Deliu did not accept the undertaking and pursued his application. Venning J was doubtful that the pleaded causes of action disclosed a serious question to be tried in relation to the defamation and injurious falsehood causes of action and that, in any event, the balance of convenience did not favour Mr Deliu, particularly in light of Mr Hong's undertaking.¹⁰ Venning J reserved costs on the injunction application and when Mr Hong applied to strike out Amicus' statement of claim he also sought costs on the injunction application. Associate Judge Bell, however, did not deal with that application at all.

[31] In the normal course costs follow the event.¹¹ In the context of an opposed interlocutory application, costs must be fixed at the time the application is determined "unless there are special reasons to the contrary".¹² Mr Deliu submitted that the reason Venning J reserved costs was that there were special reasons to do so. Further, he submitted that Associate Judge Bell's conclusion that the parties should each bear their own costs effectively determined the costs on the injunction as well. I do not accept either of these submissions. There is no basis on which I could read into Venning J's decision any particular reason behind his decision to reserve costs. Nor do I consider there to be any basis for reading into Associate Judge Bell's decision that costs should lie where they fall an intention that, in doing so, he was also determining the costs on the injunction.

[32] Given the nature of the allegations between the parties, and particularly Mr Hong's decision to involve Ms Chu, I do not criticise Mr Deliu for applying for an injunction. However, Mr Hong's undertaking, given after counsel's advice, should have been sufficient. It was unnecessary for Mr Deliu to maintain his application in the face of that offer. There will therefore be costs on a 2B basis in favour of Mr Hong on the unsuccessful injunction application.

¹⁰ *Deliu v Hong* HC Auckland CIV-2010-404-006349, 27 October 2010.

¹¹ R 14.2(A).

¹² R14.8(1).

Mr Hong's cross-application

[33] Mr Hong cross-applied to strike out the present application on the grounds that it is "mis-founded" (being unsupported by law and disclosing no reasonable cause of action), causes prejudice or delay, is frivolous, and is otherwise an abuse of the court process. In light of the conclusions I have reached above, Mr Hong's application to strike out fails and it is not necessary to consider it further.

[34] Mr Hong has also sought an order that the outcome of the present appeal is determinative of the plaintiff's application for review of Bell AJ's decision, unless leave is granted either by the High Court or the Court of Appeal. However, such an order is unnecessary and inappropriate because it would do no more than state the effect of s 26P, which provides that the High Court's findings on a review from the decision of an Associate Judge are final unless a party obtains leave from the High Court to appeal that decision, or the Court of Appeal gives special leave. Applications for leave to appeal under s 26P(1AA) are guided by the same principles as those for second appeals under s 67 of the Judicature Act. A second appeal must raise some question of law or fact capable of *bona fide* and serious argument in a matter involving sufficient interest (be it public or private) that outweighs the competing concerns of cost and delay.¹³

Conclusion

[35] For the foregoing reasons:

- (a) Mr Deliu's application for review is granted; his claim should not have been struck out without him being given the opportunity to be heard.
- (b) Amicus' application for review is refused; the causes of action it pleaded were untenable and the Associate Judge's decision to strike them out was correct, even though I have differed on the reasons for that outcome;

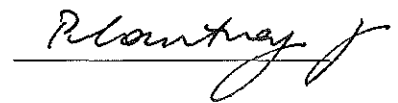
¹³ *Waller v Hider* [1998] 1 NZLR 412 (CA).

- (c) There will be costs to Mr Hong on a 2B basis on the interim injunction application; The Associate Judge erred in failing to deal with Mr Hong's application for costs and costs ought to have followed the result in that application;
- (d) Mr Hong's cross-application is dismissed.

[36] Both parties to seek costs on their respective applications:

- (a) Mr Deliu's application succeeded and there will be costs to him on that application on a 2B basis;
- (b) Amicus' application failed and there will be costs to Mr Hong on that on a 2B basis;
- (c) Mr Hong's failed and there will be costs to Mr Deliu on it on a 2B basis.

[37] If counsel cannot agree on the quantum of costs in respect of either the injunction application or the present applications they may file memoranda by 27 January 2012 and 3 February 2012 respectively.



P Courtney J