IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2010-404-003038

BETWEEN	JOSEPH FRANCIS KARAM Plaintiff
AND	KENT PARKER First Defendant
AND	VIC PURKISS Second Defendant

Hearing: 24 May 2011

Appearances: P A Morton and D McGill for Plaintiffs
Defendants in Person

Judgment: 29 July 2011 at 4:00 PM

RESERVED JUDGMENT OF ASSOCIATE JUDGE SARGISSON
[applications to strike out:
(i) parts of statement of defence
(ii) statement of claim]

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*This judgment was delivered by me on **29 July 2011** at **4 pm** pursuant to Rule 11.5 of the High Court Rules*

Registrar/Deputy Registrar

Date .....

Solicitors:
Duncan Cotterill, Level 1, P O Box 5326, Auckland

Introduction

[1] The plaintiff, Mr J Karam, issued this defamation proceeding against the defendants, Mr K Park and Mr V Purkiss, in May 2010. In redress, he seeks general, aggravated and punitive damages plus solicitor and client costs. The proceeding centres on the publication of material on four websites (Facebook, Counterspin, You Tube and Trade Me). The subject matter of the material relates to the David Bain case and the plaintiff's involvement in Mr Bain's defence.

[2] The questions presently at issue arise out of opposing applications to strike out pleadings and concern the amended statement of claim and the amended statement of defence. The defendants argue that there are grounds for striking out the claim in its entirety. The plaintiff contends that substantial parts of the statement of defence should be struck out. Each side opposes the application of the other.

[3] The applications are made in reliance on the court's power to strike out all or part of a defective pleading under High Court Rule 15.1.

Rule 15.1

[4] Rule 15.1 states:

> **15.1 Dismissing or staying all or part of proceeding**
>
> (1) The court may strike out all or part of a pleading if it—
>
> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
>
> (b) is likely to cause prejudice or delay; or
>
> (c) is frivolous or vexatious; or
>
> (d) is otherwise an abuse of the process of the court.
>
> (2) If the court strikes out a statement of claim or a counterclaim under subclause (1), it may by the same or a subsequent order dismiss the proceeding or the counterclaim.

> (3) Instead of striking out all or part of a pleading under subclause (1), the court may stay all or part of the proceeding on such conditions as are considered just.
>
> (4) This rule does not affect the court's inherent jurisdiction.

[5] The principles that underlie the Court's jurisdiction to strike out a pleading are well settled. The jurisdiction is to be exercised sparingly and only in clear cases where the Court is satisfied that it is the only appropriate solution.[1] In the case of a statement of claim, Elias CJ in *Attorney-General v Couch* sets out the position as follows:[2]

> It is inappropriate to strike out a claim summarily unless the court can be certain that it cannot succeed. The case must 'so certainly or clearly bad' that it should be precluded from going forward.

[6] In the case of a statement of defence, the pleading should only be struck out where a defence is so clearly untenable that it cannot possibly succeed. Where a defect can be cured by amendment then time should be allowed for that purpose.[3]

The pleadings

[7] The amended statement of claim is a lengthy document comprising some 52 pages. In three causes of action, it alleges that from July 2009 to April 2010 the first defendant published certain defamatory statements of his own and others on a Facebook website (some 45 statements) and on a website called Counterspin (some 111 statements). It also alleges, in the sole cause of action against the second defendant, that he published certain defamatory statements over the same period on the Facebook, Counterspin, You Tube and Trade Me websites.

[8] The subject statements are tabulated in the amended statement of claim. Counsel for the plaintiff alleges that, in their natural and ordinary meaning, the statements refer to the plaintiff and carry one or more defamatory meanings. These include that the plaintiff:

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[1] *Attorney-General v Prince & Gardner* [1988] 1 NZLR 262 (CA) at 268.
[2] *Couch v Attorney-General* [28] NZSC 45; [2008] 3 NZLR 725 at [33].
[3] *Simunovich and Ors v Television New Zealand (No. 7)* HC Auckland CIV-2004-404-3903, 3 August 2007 at [7].

a) lacks integrity;

b) knows David Bain is guilty of the cold blooded murder of his family but has continued to proclaim a belief in his innocence;

c) has misrepresented to the public his real motives for supporting David Bain which are money and/or fame and/or power and/or glory;

d) makes improper threats to anyone who disagrees with or opposes him; and

e) has committed a fraud on the public of New Zealand.

[9] The plaintiff alleges that he is known nationally and internationally as a high profile sportsman and author. He claims that the publication of this defamatory material has gravely injured in his professional and personal reputation; that it has exposed him to ridicule, hatred and contempt; and that he has suffered from extreme embarrassment and distress as a result.

[10] The statement of defence is similarly lengthy. Plainly, it intends to deny the allegations in the statement of claim. But it is discursive and, at times, argumentative. It has the hallmarks of a pleading prepared without the benefit of legal assistance that is usually necessary in a proceeding of this kind.

The plaintiff's application

[11] The plaintiff's application has two limbs.

[12] The first limb seeks to strike out certain paragraphs in the statement of defence, or parts of them as follows:

a) Defence to first cause of action against first defendant (Facebook site), paragraphs:

i) [9] to [12];

ii) [16] to [18];

b) Defence to second cause of action against the first defendant (Counterspin site), paragraphs:

i) [23];

ii) [26] to [29];

c) Defence to third cause of action against the first defendant (Defamation), paragraphs:

i) [33] to [36];

d) Defence to fourth cause of action against second defendant (Defamation), paragraphs:

i) [42] to [45].

[13] The question whether there should be an order striking out these paragraphs or portions of the same, turns essentially on whether:

b) The paragraphs (in whole or in part) are prolix, contain evidential, unintelligible, and irrelevant or argumentative material, or otherwise fail to comply with the requirements for statements of defence set out in r 5.48 and the requirements applicable to pleadings generally set out in rr 5.14 and 5.17; and

c) There has been an ongoing failure to deal with such defects which is causing prejudice and delay or otherwise constitutes an abuse of process under r 15.1(b) and (c).

[14] Under the second limb, the plaintiff seeks to have struck out references to the first defendant's positive defences of honest opinion, truth and qualified privilege

and the second defendant's positive defences of honest opinion and qualified privilege.

[15] Under this limb, strike out will turn on whether the defences are pleaded in a manner that breaches:

(a) High Court Rules 5.17 and 5.48(4);

(b) Section 40 of the Defamation Act 1992;

(c) Section 38;

(d) Section 8.

[16] I deal with each limb in turn.

First Limb

[17] In submissions made at the hearing, counsel for the plaintiff went through the offending parts of the statement of defence with painstaking care to point out the various breaches and defects. The breaches are too numerous to describe individually. It is sufficient to provide examples that are indicative of the far-reaching nature of deficiencies in the statement of defence under each rule.

Rule 5.14

[18] Rule 5.14 states:

> **5.14 Division into paragraphs**
>
> (1) Every document presented for filing must be divided into paragraphs which must be numbered consecutively, starting with the number 1;
>
> (2) Each paragraph must so far as possible be confined to a single topic.

[19] Counsel relies on r 5.14(2) in particular, and *Thomson v Westpac Banking Corp (No 2)*. The court observed in relation to the equivalent of r 5.14(2):[4]

> The object of obtaining crisp admissions or denials, and thus defining the points at issue, is entirely defeated by a lengthy diffuse narrative, which is likely to elicit only a generalised response.

[20] I agree with counsel for the plaintiff that the defendants tend to use a "lengthy diffuse narrative" to respond to the plaintiff's crisp pleadings. The result, in many places, is a generalised and non-specific response. The defendants' practice of repeating or invoking particular paragraphs of the defence over and over again, makes the defence convoluted and virtually impossible to follow. The result is that the defendants' prolix and diffuse narrative fails to assist in narrowing factual issues in dispute.

[21] For example, at paragraph 26 of the statement of claim the plaintiff sets out his allegations as to the natural and ordinary meanings of the words on the Courterspin website. In the first sentence of paragraph 26 of the amended statement of defence, the defendants dispute the plaintiff's alleged natural and ordinary meanings. In 11 succeeding paragraphs, the defendants repeatedly deny the defamatory meaning. The repeated denials are superfluous.

Rule 5.48

[22] Rule 5.48 requires statements of defence to either admit or deny allegations of fact. Denials of factual allegations must not be evasive. Points must be answered in substance, with a fair and substantial answer being provided in all cases. The statement of defence must give particulars of time, place, amounts, names of persons and other circumstances sufficient to inform the court and the plaintiff of the defence.

[23] The object of r 5.48 is to match specific factual allegations in the statement of claim by specific factual answers in the statement of the defence, again thereby narrowing the factual issues to those in dispute for the benefit of the court and the

[4] *Thomson v Westpac Banking Corp (No 2)* (1986) 2 PRNZ 506 at 511.

plaintiff. This also gives the plaintiff advance notice of points in issue on which evidence must be led at trial.[5]

[24] The rule does not permit a defendant to criticise a particular pleading.[6] The defence should precisely answer the claim and not criticise the terms of it. Further, the rule does not permit evasive answers which leave the plaintiff uncertain as to whether or to what extent allegations have been admitted. Such answers frustrate the purpose of the rule, and are prohibited.[7]

[25] Counsel for the plaintiff submits that the defendants' pleadings breach the basic requirements of r 5.48 time and time again. I agree.

[26] The pleading in response to paragraph 23 of the amended statement of claim is illustrative. Paragraph 23 of the statement of claim pleads the posts published on the Counterspin website are defamatory. Paragraph 23 of the statement of defence responds:

> The imputations outlined in paragraph 23 of the statement of claim belong to one of four categories as follows...

[27] The response is evasive, and neither admits nor denies the allegation. It is irrelevant what categories the imputations in paragraph 23 of the statement of claim belong to.

[28] Further, paragraph 28 of the statement of defence criticises the plaintiff numerous times. An example of such is the statement:

> The plaintiff had the opportunity to discuss the truthfulness of the content published on the website via email as a result of his correspondence with the first defendant but failed to do so.

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[5] Andrew Beck and others *McGechan on Procedure* (looseleaf ed, Brookers) at HR 5.48.03.
[6] At HR 5.48.06; *Tau v Durie* [1996] 2 NZLR 190; (1996) 9 PRNZ 7.
[7] McGechan at HR 5.48.07.

Rule 5.17

[29] Rule 5.17 is also relevant here and not complied with. I shall return to it when discussing the second limb of the plaintiff's application.

Second Limb

[30] Counsel for the plaintiff submits that the pleading of the positive defences does not comply with the provisions of the rules or the provisions of the Defamation Act 1992 that regulate the pleading of such defences.

Rules 5.48 and 5.17, and s 40 Defamation Act 1992

[31] Counsel for the plaintiff submits rr 5.48 and 5.17 are particularly relevant. Under r 5.48(4) affirmative defences must be pleaded separately. This avoids surprise and enables the plaintiff to prepare rebuttal evidence for trial. Distinct grounds of defence, founded on discrete facts, must be stated separately and clearly where possible: r 5.17. In addition, counsel points out that s 40 requires a defendant relying on truth and honest opinion to plead each of those defences separately.

[32] The statement of defence does not comply with these requirements.

[33] Paragraph 26.13 is illustrative. It pleads:

> The first defendant defends all items in paragraph 26 in the statement of claim on the basis of qualified privilege and honest opinion. The first defendant defends the following on the basis of truth: 26(d), (e) and (f).

[34] As counsel submits, the defences of truth and honest opinion are not pleaded separately or clearly, as required. References to these defences are scattered repeatedly throughout the statement of defence, and at times combined as if they were elements of the same defence.

Sections 8 and 38 Defamation Act

[35] I also accept counsel for the plaintiff's submission that the positive defences in the amended statement of defence breach other provisions of the Act.

[36] Section 8 requires the defendants to prove, and therefore clearly identify, facts and imputations relied upon when claiming the truth defence. Further, s 38 requires particularisation of the statements that are claimed to be statements of fact, and of the facts and circumstances that are relied upon in support of the allegation that those statements are true.

[37] The amended statement of defence in no way complies with ss 8 or 38.

[38] For instance, in paragraph 26.4 of the amended statement of defence, the defendants invoke the truth defence to argue that the plaintiff made improper threats to anyone who disagrees with or opposes him. Yet, the stated facts relied on in support of this positive defence are not sufficiently particularised. Such facts are vague and do not support allegations of truth. Examples include:

(a) 1997, Woman's day, Chris Cook (see: para 26.4.2.1.);

(b) 1997, TVNZ "Karem is broke" article (see: para 26.4.2.1.2);

(c) 2003, North and South, Rosemary McLeod, Magnificent Obsession article (see: para 26.4.2.1.3).

Conclusion

[39] Counsel points out, with some force, that the plaintiff has on a number of occasions invited the defendants to amend the statement of defence so that it rectifies the numerous deficiencies and conforms to the basic requirements of the High Court Rules in of pleadings.

[40] I consider the deficiencies and the defendants' conduct constitute an abuse of process under r 15.1. Redress is warranted.

The defendants' application

[41] In support of their application, the defendants submit that all of the causes of action in the plaintiff's claim are so untenable that they cannot possibly succeed and should therefore be struck out. They rely on two grounds:

(a) The first cause of action is not tenable and should be struck out as it is "improper", "based on false assumptions of publishing responsibility", and frivolous and vexatious "given that the plaintiff has other courses of action available";

(b) All four causes of action are not tenable and should be struck out as:

> The number of visitors to the pages cited in the claim against the first defendant does not warrant the expense and resources of a High Court trial. Any consideration of damages to the plaintiff should this content be deemed defamatory can only be considered to be minimal and not worth the expense from either side.

[42] I deal with each argument in turn.

First ground

[43] I am satisfied that there is no basis to strike out on the first cause of action on this ground. My brief reasons follow.

[44] In first cause of action, the plaintiff alleges that the first defendant published defamatory statements or posts on Facebook. The first defendant says he did not.

[45] However, in the amended statement of defence, the first defendant accepts that he was an administrator of the Facebook group. He acknowledges restricting access to the group page to group members. He concedes that he had the technical ability to assume control over and remove other people's posts, though he considered it improper to exercise this control until after taking a vote of users as to whether it should be a private site.

[46] Materially, the first defendant appears to accept that his acts or omissions may constitute publication. He deposes at paragraph 4 of his affidavit of 3 March 2011:

> With respect to the application to strike out the first action against me, while I had the technical ability to remove other people's posts there was no moral or legal right. This was only gained after the Facebook page was made private. The technical ability to remove posts does **not necessarily** constitute the power of publication especially where there is either a written or unwritten agreement otherwise...
>
> [Emphasis added]

[47] The phrase "not necessarily", indicates, and I so find, that the plaintiff's claim of publication is not clearly untenable and that there is an argument to be made. Whether or not the first defendant was a publisher of the posts of others on that site is a mixed question of fact and law for trial. Hence, it is not possible to say that the plaintiff's argument will fail.

[48] Moreover, given that defamation via the internet is a developing area of the law, I am satisfied that the court should be slow to strike out a claim in this area ahead of trial.

[49] Accordingly, this ground for strike out cannot succeed.

Second Ground

[50] In seeking to have the first cause of action struck out, the defendants say that the Facebook group is a special interest group and its exchanges cannot be offensive. In relation to the other three causes of action, the defendants argue that the relevant websites have a limited number of users. Therefore, though the home page on the Counterspin site had over 20,000 total views, the number of users would be significantly less. Further, that most users would only have looked at the home page.

[51] According to the defendants, these circumstances mean there would be "insufficient publication or tort to justify the right of action". They also submit that given that the proceedings are not serving the legitimate purpose of defamation

proceedings, namely, to protect the claimant's reputation, that the proceedings should be struck out as vexatious.

[52] In so submitting, the defendants rely on *Dow Jones v Jameel*.[8] Though there was worldwide publication of the alleged libel in that case, there had only been publication to five subscribers in England three of whom were associates of the plaintiff, and the other two who had never heard of the plaintiff. The Judge made an order striking out on the grounds that there was not a substantial tort in the United Kingdom.

[53] I accept counsel for the plaintiff's submission that the *Dow Jones* case is clearly distinguishable. The issue in the present case is not whether the case should be tried in this jurisdiction or another. It is whether the case should be tried at all. The plaintiff does not plead publication outside the jurisdiction. The whole of the alleged libel took place in New Zealand and vindication is sought within this jurisdiction alone.

[54] Moreover, *Dow Jones* only arose in the context of the provisions of the English court rules that govern when an application is made to serve a foreign publisher who was outside the jurisdiction in respect of the publication of the libel in England. A different legislative context exists in New Zealand.

[55] Finally, as counsel for the plaintiff points out, the defendants concede that the posts have been read by a significant number of people in New Zealand.

[56] The net result is that there are no grounds for striking out the causes of action on the basis that they cannot possibly succeed.

Result

[57] The defendants' application to strike out all causes of action in the plaintiff's claim is declined.

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[8] *Dow Jones v Jameel* [2005] EWCA Civ 75.

[58] The plaintiff's application is granted. The statement of defence is to be struck out in its entirety **unless** the defendants file and serve by **28 August 2011** the following:

(a) An amended statement of defence that rectifies the deficiencies contained in the current statement of defence so as to comply with the statutory provisions referred to in this judgment; or

(b) An amended statement of defence in the form submitted by counsel for the plaintiff at the hearing. (At my request, counsel for the plaintiff provided marked up versions for the court and the defendants at the hearing. They identify all of the deficiencies relied on by counsel for the plaintiff);

(c) Leave is reserved to the plaintiff to seek further orders in the event that these orders are not complied with. A memorandum may be filed on **2 days'** notice for that purpose.

[59] Costs should follow the event in accordance with the statutory costs regime. As the plaintiff has been successful on this application he is entitled to costs.

[60] My preliminary view is that this is a category 2 case for costs purposes and that costs on a 2B basis would be appropriate, plus disbursements. If, however, the plaintiff still wishes to pursue an application for increased or indemnity costs as counsel indicated at the hearing, then memoranda are to be filed as follows:

(a) By the plaintiff by **14 August 2011**;

(b) By the defendants by **28 August 2011**.

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Associate Judge Sargisson