

IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY

CIV-2010-404-003038  
[2012] NZHC 1801

BETWEEN                      JOSEPH FRANCIS KARAM  
   Plaintiff

AND                              KENT PARKER  
   First Defendant

AND                              VIC PURKISS  
   Second Defendant

Hearing:            18 July 2012

Judgment:        23 July 2012

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**JUDGMENT OF COURTNEY J**

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This judgment was delivered by Justice Courtney  
on 23 July 2012 at 4:00 pm  
pursuant to R 11.5 of the High Court Rules

Registrar / Deputy Registrar

Date.....

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## **Introduction**

[1] The plaintiff, Mr Karam, sues the defendants in defamation. The claim is based on statements made by the defendants and others on a Facebook website and an internet website (the Counterspin website) about Mr Karam and his motivation for campaigning in support of David Bain. Mr Bain's 1995 convictions for the murder of five family members were quashed in 2007 and Mr Bain was acquitted following a retrial in 2009. Mr Karam was instrumental in advancing Mr Bain's cause during this time.

[2] Mr Parker was the administrator of the Facebook website and creator and administrator of the Counterspin website. He is sued on the basis that, in these capacities he was a publisher of the various statements made by contributors to the sites. He is also sued in respect of statements he made himself. Mr Purkiss is sued in respect of statements he made on the websites.

[3] Although the proceedings were commenced in 2010, progress towards trial has been slow, partly as a result of unresolved interlocutory matters. In this judgment I deal with the following applications:

- (a) By the plaintiff against the defendants for an order for particular discovery and costs on that application;
- (b) By the defendants against the plaintiff for an order for particular discovery;
- (c) By the defendants for costs on an application previously brought by the defendants for determination of a preliminary question which led to the plaintiff agreeing to file an amended statement of claim.

[4] The plaintiff has signalled his intention to file a second amended statement of claim. Some of the proposed amendments are relevant to the issue of discovery and I have proceeded on the basis of the proposed draft pleading.

## **Plaintiff's application for particular discovery**

[5] The defendants filed verified lists of documents in October 2010. The plaintiff complains that the list is incomplete, having regard to the pleadings and to the fact that the defendants have recently provided copies of a number of documents that appear to be relevant but were not included in the list and without any indication that an amended list is to be provided.

[6] The categories of documents that are sought are set out at paragraph 1.7 of the plaintiff's application for particular discovery 18 November 2010. They are:

- Correspondence between the parties involving the setting up of both the Justice for Robin Bain group on the Facebook site and the Counterspin website;
- The relevant content on both sites, including any relevant material that has been removed from either site at any time, or content that is only available in private sections on either site, or drafts of any editorial or other content;
- Relevant email and other communications between the defendants and third parties relating to the matters in question in these proceedings, including, but not limited to, other members of the Facebook site or members or users of the Counterspin website, including, in relation to the second defendant, the administrators of the Trade Me message boards;
- Relevant email or other communications between the administrators of the Facebook site and other members or third parties leading to that site being made private in January 2010 to members only;
- All press releases and communications with media by the first defendant in any capacity since June 2009;

- All email and other communications by both defendants relating to interviews given by the Sunday Star Times resulting in the article published in that newspaper on 20 December 2009.

[7] In opposition, Mr Parker confirmed that he did hold documents that fell into each of these categories and that he had not disclosed them. His reason for not doing so was his belief that the plaintiff already had copies of most of these documents and he was therefore not obliged to disclose them. It was apparent that Mr Parker had misunderstood his obligations in relation to discovery. There was no other ground of opposition offered.

[8] I grant the plaintiff's application and make an order under r 8.24(a) of the High Court Rules that each defendant files and serves an affidavit listing all documents coming within the terms of r 8.18(2) in relation to documents in the categories identified at paragraph 1.7.1-1.7.6 of the plaintiff's application that are or have been in their control.

[9] Mr Morten, for the plaintiff, sought indemnity costs in respect of this application. In limited circumstances the Court may make an order requiring one party to pay the actual costs and disbursements of another.<sup>1</sup> Of relevance in this case is the provision permitting an award of indemnity costs if a party has acted improperly or unnecessarily in continuing a step in the proceeding or has disobeyed an order of the Court.

[10] In February 2011 Mr Karam served his affidavit in support of his application for particular discovery. He expressly pointed out that the defendants appeared to have misunderstood their obligations regarding discovery. Further, the ground of opposition advanced at the hearing was not referred to in the defendants' Notice of Opposition. Instead, the Notice of Opposition indicated that they would release some of the documents sought provided the plaintiff agreed to consider the defendants' demands for discovery. This was improper. The defendants did not change this position.

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<sup>1</sup> Rule 14.6 of the High Court Rules.

[11] There was no basis on which to resist the plaintiff's claim. The plaintiff ought not to have been put to the expense of making the application. The fact that the defendants are unrepresented makes no difference; the obligations on discovery are clear and not difficult to understand. I make an order that the defendants pay the reasonable costs and disbursement associated with the application.

**Defendants' application for particular discovery against plaintiff**

[12] The defendants seek particular discovery against the plaintiff of four categories of documents, being those relating to:<sup>2</sup>

- (a) The plaintiff's association with Arthur Allan Thomas including emails and letters at and around the 2009 retrial;
- (b) The engagement of witnesses for the Bain retrial;
- (c) The application for legal aid, including communications between the plaintiff and Legal Aid Services or Michael Reed QC regarding the plaintiff's engagement as a member of the defence team and legal aid recipient;
- (d) Documents regarding income derived from sources relating to the Bain case including communications between the plaintiff and his book publisher, statistics of sales and distribution of his books.

[13] The defendants filed one affidavit by Mr Purkis and two by Mr Parker in support of the application. However, neither makes out any ground for discovery of these categories of documents. Mr Parker submitted that the plaintiff should be required to discover any document that might help prove the truth of the statements made that are now the subject of the proceeding. Whilst understandable from a lay perspective, this position does not reflect the correct approach to discovery in a defamation case.

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<sup>2</sup> One category identified in its application, documents relating to a franchise once administered by the plaintiff, is not pursued.

[14] Under s 38 of the Defamation Act 1992 where a defendant alleges that statements of fact that are the subject of the proceedings are true he or she is required to give particulars specifying “the facts and circumstances on which the defendant relies in support of the allegation that those statements are true”. The parameters for discovery are determined by reference to these particulars.

[15] In *Simunovich Fisheries Ltd v Television New Zealand & Ors* the Court of Appeal confirmed that in New Zealand a plaintiff is obliged to give discovery only in relation to matters alleged in the particulars of truth and is not entitled to fish for some other defence among the plaintiff’s documents.<sup>3</sup> That statement reflects the UK position.<sup>4</sup>

[16] In their second amended statement of defence the defendants raised, in respect of each of the Facebook website and the Counterspin website the defences of innocent dissemination, truth of imputations, truth of the publication as a whole, honest opinion and qualified privilege. The particulars required by s 38 are set out in paragraphs 19-27 of the second amended statement of defence and the first, second and third schedules to that pleading.

*Documents relating to Arthur Allan Thomas*

[17] The defendant’s application identified four particular items pleaded by the plaintiff. However, only one of these is intended to be pursued, with the others being omitted in the proposed second amended statement of claim which is to be filed within the next few weeks. The only statement that is still the subject of an allegation now appears as item 20 of Table 2 in the proposed second amended statement of claim.

[18] The further particulars supporting the allegations about Mr Karam’s association with Arthur Allan Thomas appear at paragraphs 28, 39, 40 and 41 of the first schedule and paragraphs 8-13 of the third schedule of the second amended

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<sup>3</sup> *Simunovich Fisheries Ltd v Television New Zealand & Ors* [2008] NZCA 350.

<sup>4</sup> *Zierenberg & Wife v Labouchere* [1893] 2 QB 181; *Yorkshire Providence Life Assurance Co v Gilbert & Rivington* [1895] 2 QB 148; *Arnold & Butler v Bottomley* [1908] 2 KB.

statement of claim. None of these particulars would have made correspondence between Mr Thomas and Mr Karam relevant.

*Engagement of witnesses for Bain retrial*

[19] This category of documents relates to the allegations at paragraphs 15(f), 26(f), 33(f) of the first amended statement of claim and asserts a meaning that Mr Karam's conduct in seeking witnesses for the defence was improper/deceitful/criminal. In the proposed second amended statement of claim it is asserted to be an attempt to pervert the course of justice. Paragraphs 44-51 of the third schedule of the second amended statement of defence plead the facts and circumstances relied on in support of the defence of truth. There was general reference to the "Bain defence team" securing "expert witnesses" but only two defence witnesses were specifically identified. Other facts relied on were general facts relating to the cost of the trial and Mr Karam's role in the defence team.

[20] Mr Morten argued that seeking access to all correspondence between the plaintiff and any witnesses called in the retrial was no more than a fishing expedition and oppressive at that. There were hundreds of witnesses involved or potentially involved in the case. On an entirely separate ground Mr Morten pointed out that documents relating to the preparation for trial, including communications with witnesses, comprise part of David Bain's file or that of his counsel. Mr Karam, who held the power of attorney for Mr Bain, was not entitled to disclose documents as though they were his own.

[21] I consider that only documents relating to the armourer and the witness, Darryl Young, could be regarded as relevant on the basis of the pleadings. However, I accept Mr Morten's submission that documents relating to witnesses form part either of David Bain's file or counsel's file. If the plaintiff has possession of these documents he does so in his capacity as part of the Bain defence team and cannot be required to disclose them.

### *Legal aid funding*

[22] The third category relates to allegations about Mr Karam's receipt of legal aid pleaded at paragraphs 15(g), 26(g) and 33(g) of both the amended and the proposed second amended statements of claim being statements conveying that the plaintiff had defrauded the Legal Services Agency. Most of the facts and circumstances pleaded in support of the truth defence on this issue go no further than bare assertions as to the total amount the defence team received from legal aid, though the amount that the plaintiff personally received from legal aid is also stated.

[23] Mr Morten submitted that this aspect of the request was a fishing expedition, disproportionate and of questionable relevance. He pointed out that under the statutory regime in place at the relevant time it was Mr Reed QC as the lead provider who was responsible for applying for specific grants to cover aspects of the trial preparation, including approval to brief witnesses and cover disbursements, which included the plaintiff's services.

[24] Given the manner in which legal aid funding was managed through the lead provider I cannot see how documents generally relating to Mr Bain's legal aid application could be relevant to the assertion attributed to the defendants that the plaintiff had defrauded legal aid. However, to the extent that the second amended statement of defence puts in issue the amount received directly by the plaintiff I accept that documents generated by the plaintiff or received directly by him in relation to his own involvement as part of the defence team are discoverable.

### *Income derived from sources relating to the Bain case*

[25] The plaintiff has alleged that a number of the statements made on the Facebook website conveyed that he was a liar. In the second amended statement of defence the defendants pleaded a broad range of facts in support of the truth defence on this aspect. They include the assertion that the plaintiff had received income from books about the Bain case. The defendants now seek disclosure of documents regarding income "derived from sources relating to the Bain case" including communications between himself and his publisher, details of sales and distribution.



I consider that this category is irrelevant. The publication by the plaintiff of books about the Bain case does not, in itself, relate to the question of the plaintiff's truthfulness. Indeed, the facts and circumstances pleaded do not assert any misrepresentation by the plaintiff about the fact that he received income from writing books about the case. The pleading simply asserts the fact of publication and receipt of income.

[26] Not only is this line of inquiry irrelevant on the pleadings as they stand, it would be oppressive to require the plaintiff to produce his books of account showing income from these various sources, some of which, self-evidently, go back many years.

**Application by defendants for costs following withdrawal of plaintiff's strike-out application**

[27] In November 2011 the plaintiff applied to strike out the defendants' defence on the grounds that the pleading did not comply with the High Court Rules in a variety of ways, and that the particulars required to be pleaded in support of the defence of truth and honest opinion had not been pleaded. In March 2012 the defendants applied for an order that preliminary questions be determined before trial, namely, whether words allegedly published by them were reasonably capable of bearing the meanings pleaded by the plaintiff and whether the particular meanings were properly pleaded.

[28] Both applications were to be heard on 18-19 July 2012. Both were withdrawn. Mr Parker sought costs on the strike-out application on the basis that counsel was involved in the preparation for the application which was abandoned. He put the withdrawal of the defendants' application for preliminary determination in a different category, asserting that the plaintiff had agreed to re-draft his statement of claim thereby making the application unnecessary.

[29] Mr Morten had a different perspective on the reason these applications were withdrawn. He said that following an unsuccessful settlement conference between the parties on 2 July 2012 discussion between them resulted in an agreement that

both applications would be withdrawn and that there was no suggestion by either party that costs would be payable.

[30] Mr Morten drew my attention to the settlement conference minute of Associate Judge Christiansen which records that:

[3] In the course of a brief discussion between Mr Morten and Mr Parker it was agreed, in light of the further amended statement of claim to be filed, that argument over questions of separate issue hearings were largely resolved. Mr Parker did advise, however, that there were minor issues outstanding which it was hoped would be promptly resolved.

[4] In any event, the parties are agreed the respective applications of the plaintiff and Mr Parker would not require hearing on 18 and 19 July 2012. There is a determination of the parties to arrange a trial as promptly as possible.

[31] The minute then recorded the allocation of hearing time for resolution of the discovery issue. There was no reference to the question of costs on either application.

[32] It is impossible for me to determine whether there was an agreement that costs would lie where they fell or whether Mr Parker had reserved his position on that issue. Determination of that would require evidence from both Mr Parker and Mr Morten and I do not regard it as appropriate to embark on that exercise at this stage of the proceeding. The issue regarding the defendants' claim for costs in relation to the withdrawal of the plaintiff's strike-out application is reserved and will be determined at the conclusion of the substantive trial.

### **Next steps**

[33] I make the following directions regarding the outstanding issues:

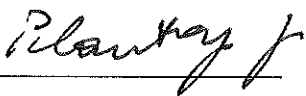
- (a) The plaintiff will file his second amended statement of claim by 8 August 2012;
- (b) The defendants are to file a statement of defence in response to the second amended statement of claim by 29 August 2012;

- (c) The plaintiff is to file a reply to the affirmative defence and amend his s 39 and s 41 notices by 19 September 2012;
- (d) The plaintiff is to file an amended list of documents by 19 September 2012 which discloses documents produced by him or received by him in relation to the amount he personally received from Legal Aid Services.

[34] I discussed the estimate of the trial time with Mr Morten and Mr Parker. In order to reduce the expected trial time the plaintiff vacates his election of trial by jury. Mr Morten estimates three days for the plaintiff's case. It is, however, very difficult to make an estimate of the time required for the defendants' case. Mr Parker advises that the defendants intend to call about two dozen witnesses, of which four will be expert witnesses. He is, however, expecting to retain counsel within the next few days to prepare for and conduct the trial. This would have a significant bearing on any trial estimate.

[35] The best I can do at this stage is set the matter down with an estimate of three weeks, that estimate to be reviewed at a further conference in the week of 1 October 2012. The defendants' counsel is to appear at that conference and be in a position to accurately assess the time required for the defendants' case.

[36] Finally, Mr Morten raised an issue regarding hearing costs. Although the plaintiff accepts the obligation to pay the setting down fee, the hearing costs, which must be paid in advance as the trial proceeds, gives rise to an issue where there are affirmative defences of the kind being raised in this case. The plaintiff asserts that the defendants should be meeting part of the hearing costs. That issue can be addressed at the next conference also.



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P Courtney J