IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-005218
[2014] NZHC 612

BETWEEN	CAMERON JOHN SLATER Appellant
AND	MATTHEW JOHN BLOMFIELD Respondent

Hearing: 27 March 2014

Appearances: Appellant in person
Respondent in person

Judgment: 28 March 2014

JUDGMENT OF ASHER J

This judgment was delivered by me on Friday, 28 March 2014 at 5.30 pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Copies to:
C Slater, Auckland.
M Blomfield, Auckland.

[1] In this defamation proceeding where both plaintiff and defendant are now self-represented, the appellant Cameron Slater seeks to appeal a decision of Judge Blackie in the Manukau District Court in which directions were made about interrogatories and discovery.[1] It was held that s 68 of the Evidence Act 2006 which allows journalists to refuse to disclose sources did not apply to Mr Slater's website.

[2] In the statement of claim the plaintiff Mr Blomfield has alleged that on 17 occasions between 3 May 2012 and 6 June 2012 Mr Slater has published on the website a number of statements which it is alleged contain a meaning defamatory of him. In his decision of 26 September 2013, Judge Blackie set out a number of examples of the allegedly defamatory comments, which include references to Mr Blomfield being a psychopath, loving extortion, being a pathological liar and other such comments.[2] The Judge recorded that in a revised statement of defence the defendant appeared in the main to admit publishing the material complained of and on occasions to admit defamatory meanings, but raised affirmative defences including truth and/or honest opinion.

[3] In the hearing of 2 September 2013 Judge Blackie had to consider applications for orders requiring discovery and the answering of interrogatories. Mr Slater resisted answering one question and providing documents that would disclose sources of information that had been provided to him on a confidential basis. The Judge made an order for standard discovery but made no further order in respect of interrogatories "save as to compliance with the existing notice stipulated with regard to sources". Mr Slater's argument that there should be no order to disclose sources because he was a journalist in terms of s 68(5) of the Evidence Act 2006 was rejected.

[4] On 1 November 2013 Mr Slater filed a "notice of application for leave to appeal" in the District Court at Manukau. The appeal was against Judge Blackie's decision. This document appears to have been regarded as erroneous in form by the

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1 *Blomfield v Salter* DC Manukau CIV-2012-092-001969, 26 September 2013.
2 At [7].

District Court and was not actioned. It was not filed in the High Court, and was not therefore an appeal.[3]

[5] Mr Blomfield then applied for orders that Mr Slater's assets be attached and that Mr Slater be imprisoned for contempt of court on the basis that he had not complied with Judge Blackie's directions. In an oral decision of 25 November 2013 Judge Gittos considered that application and referred to Mr Slater's challenge to Judge Blackie's decision. He stated "…leave is granted for him to file an appeal by way of case stated".[4] He set out various directions which he stated had to be "scrupulously complied with" by Mr Slater.[5] I will discuss Mr Slater's compliance with those directions later in this judgment.

[6] On 19 December 2013, Mr Slater filed with this court a "notice of application for leave to appeal from District Court interim judgment" seeking leave to appeal the judgment of 26 September 2013, and an order setting aside the decision of Judge Blackie. Mr Blomfield filed a protest to jurisdiction. These came before Ellis J of this Court in the appeals list and Her Honour set down both Mr Slater's application for leave and Mr Blomfield's protest for hearing, and they must now be determined.

Different challenges

[7] As set out, there have been different challenges or attempted challenges to Judge Blackie's decision. The first was the notice of appeal filed in the District Court at Manukau on 1 November 2013 that was not taken any further. That was an application filed in error in that an appeal must be filed in the High Court.[6]

[8] There was then the minute of the District Court of 25 November 2013 in which Judge Gittos stated that he granted leave to Mr Slater to appeal. He also gave the various directions including the following:[7]

> (d) In that respect, Mr Slater is to file in Court within 28 days that is to say by 16 December, a draft case stated on appeal identifying the

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3 A notice of appeal must be filed in the High Court, r 20.6 of the High Court Rules.
4 *Blomfield v Slater* DC Manukau CIV-2012-092-001969, 25 November 2013 at [8].
5 At [10].
6 High Court Rules, r 20.6.
7 At [10](d).

> issue of law that he considers to be wrongly expressed or decided in Judge Blackie's decision of 26 September so that the Judge may settle a case stated in law on that matter to be promptly resolved by the High Court. In default of compliance with this direction, any appeal will be deemed to be abandoned.

[9] It is common ground between Mr Blomfield and Mr Slater that the reference to 16 December was an error, and I am informed that the Court notified Mr Slater that the date should have been 23 December 2013, consistent with the allowed 28 days. In fact, an application for leave to appeal the judgment was filed by Mr Slater on 18 December 2013 and that is the application presently before the Court, together with Mr Blomfield's "protest to jurisdiction".

[10] Unfortunately these procedures and directions required by Judge Gittos were incorrect. The filing of a notice of appeal solely in the District Court could not initiate an appeal. There is no jurisdiction for leave to be granted to appeal to the High Court by the District Court. It can only be granted by the High Court.[8] This was not a case where a case stated had to be filed and approved by a District Court Judge. Nor indeed was it a case where leave to appeal had to be obtained for an appeal filed in time within 20 working days.

The appeal process

[11] There is a right of appeal from decisions of the District Court in s 72 of the District Courts Act 1947. Section 72 provides:

> **72 General right of appeal**
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> (1) This subsection applies to every decision made by a District Court other than a decision of a kind in respect of which an enactment other than this Act—
>
> (a) expressly confers a right of appeal; or
>
> (b) provides expressly that there is no right of appeal.
>
> (2) A party to proceedings in a District Court may appeal to the High Court against the whole or any part of any decision to which subsection (1)applies made by the District Court in or in relation to the proceedings.

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8 High Court Rules, r 20.4(3).

[12] A decision includes interlocutory decisions of the type made by Judge Blackie.[9] Leave is not required. There is no requirement for the approval of a case stated. However, any appeal must be filed in accordance with the High Court Rules in the High Court.[10]

[13] Rule 20.4 of the High Court Rules provides that if a party has a right of appeal, the appeal must be brought within 20 working days after the decision appealed against is given.[11] It is then stated:

> **20.4 Time for appeal if there is right of appeal**
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> …
>
> (3) By special leave, the court may extend the time prescribed for appealing if the enactment that confers the right of appeal—
>
> (a) permits the extension; or
>
> (b) does not limit the time prescribed for bringing the appeal.
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> (4) An application for an extension—
>
> (a) must be made by an interlocutory application on notice to every other party affected by the appeal; and
>
> (b) may be made before or after the expiry of the time for appealing.

[14] It is clear that Mr Slater did not file any appeal in the High Court within 20 working days after Judge Blackie's decision. What is therefore sought is effectively an extension for the time to file the appeal, a matter that I clarified in the course of the hearing. The application for leave to appeal should have in fact been an application to extend the time for filing an appeal. The application can be made after the expiry of the time for appealing.[12] I am prepared to treat Mr Slater's application for leave to appeal as an application to extend time to file an appeal applying the discretion referred to in rr 1.5 and 1.6 of the High Court Rules. It was on the basis that the question was whether the appeal should be allowed to proceed that the

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9 District Courts Act 1947, s 71 defines "decision" as including "a judgment and an interim or final order (other than an order under section 112)". An interlocutory order is an order and no constriction should be placed on the plain meaning. See *Siemer v Heron* [2011] NZSC 133, [2012] 1 NZLR 309 at [31] for a similar discussion relating to s 66 of the Judicature Act 1908.

10 High Court Rules, r 20.6.

11 High Court Rules, r 20.4(2).

12 Rule 20.4(4)(b).

parties made submissions to me, and I am satisfied that there is no prejudice to Mr Blomfield if the application is treated this way.

[15] The Court may extend the time for filing an appeal only if the statute conferring the appeal right permits the extension, or does not limit the time prescribed for bringing the appeal.[13] The statute in question here is the District Courts Act. It does not permit an extension of time, but also does not limit the time prescribed for bringing the appeal.

[16] It was held in *Inglis Enterprises Ltd v Race Relations Conciliator* that "some authorisation, express or implied, must be found in the constating legislation".[14] However, this was in the context of the statute in question (the Human Rights Commission Act 1977) stipulating a 30 day filing period for appeals. There is no such period stipulated in the District Courts Act.[15]

[17] Rule 20.4(3) uses "or" in the usual way as a conjunction between alternatives. Special leave may be given in two situations: first, if the enactment that confers the right of appeal permits the extension of time; or, second, if the enactment that confers the right of appeal does not limit the time prescribed for bringing the appeal. In this case the enactment that confers the right of appeal is the District Courts Act. It contains no limit to the time prescribed for bringing the appeal and (b) applies. I see no basis in the context for construing "or" to mean "and".

[18] To impose a higher threshold would be to put a real constraint on appeals and effectively create a draconian cut off point for appellants, who might have an explanation for the delay and an appeal which on its merits deserves to be heard. Such an inflexible cut-off would be inconsistent with the objective of the Rules to achieve a "just, speedy and inexpensive determination of court proceedings".[16] In cases like this it could be unjust and add little to speed. It would also be inconsistent with r 1.5 which provides that a failure to comply with the requirements of a High

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13 Rule 20.4(3).

14 *Inglis Enterprises Ltd v Race Relations Conciliator* (1994) 7 PRNZ 404 (HC) at 407. See also *Ta'ase v Victoria University of Wellington* (1999) 14 PRNZ 406 (HC) at 407.

15 This has not always been the position: see *Gilgen v Hatcher* HC Auckland M302/90, 3 October 1990.

16 Rule 1.2.

Court Rule "must" be treated as an irregularity. As I see it, r 20.4(3) gives the Court a discretionary power to take such steps as are just to cure a failure to observe the appeal time limit, although this must be done in a principled way. I refer to the applicable principles later in this decision. I do not construe the statement in *Inglis Enterprises Ltd v Race Relations Conciliator* as an expression of the view that there must always be an authorisation for an extension of time in the relevant legislative provision that grants the right of appeal.

[19] Therefore, because s 72 of the District Courts Act is silent as to whether an extension can be granted, I determine that r 20.4(3)(b) applies and this Court has the discretion to extend the time for appealing the District Court decision.[17]

Should an extension of time be granted?

[20] In deciding whether to grant special leave, the overall test the Court has to apply is whether granting an extension would "meet the overall interests of justice".[18] Leave is not given lightly.[19] In determining whether to grant leave the Court has a wide discretion and should take into account all of the circumstances.[20] In particular, the Court should take the following considerations into account:[21]

(a) The reason for the delay;

(b) The length of the delay;

(c) The extent of any prejudice caused by the delay;

(d) Any other features of the parties' conduct in proceedings;

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17 A similar conclusion was reached without reference to *Inglis Enterprises Ltd v Race Relations Conciliator* in *Ike v New Zealand Couriers Ltd* HC Auckland CIV-2011-404-648, 14 March 2011 at [18].

18 *Havanaco Ltd v Stewart* (2005) 17 PRNZ 622 (CA) at [5]; and *My Noodle Ltd v Queenstown Lakes District Council* [2009] NZCA 224, (2009) 19 PRNZ 518 at [19].

19 *New Plymouth District Council v Waitara Leaseholders Assn Inc* [2007] NZCA 80 at [22].

20 *New Plymouth District Council v Waitara Leaseholders Assn Inc*, above n 19, at [22].

21 *New Plymouth District Council v Waitara Leaseholders Assn Inc*, above n 19, at [22]; *My Noodle Ltd v Queenstown Lakes District Council*, above n 18, at [19]; and *Whaanga v Smith* [2013] NZCA 606 at [6]. These decisions relate to r 29A of the Court of Appeal (Civil) Rules 2005 but are seen as authority in the High Court and for r 20.4. See *McGechan on Procedure* at [HR20.4.02].

(e) The prospective merits of the appeal; and

(f) Whether the appeal raises any issue of public importance.

[21] If the delay is caused by a genuine mistake, Courts are generally sympathetic to an extension of time. This is especially so if the party has promptly attempted to remedy the problem.[22] In such a case, even a significant delay of three and a half months, will not prevent the Court from granting special leave.[23] The merits of the appeal are also relevant. Courts will be reluctant to grant an extension of time where the proposed appeal appears to be hopeless.[24]

Delay by conduct

[22] The notice of appeal should have been filed by 26 October 2013. The notice of appeal was filed in fact five days later on 1 November 2013 (although it was filed in the wrong Court).

[23] Mr Slater informed the Court that he had in October been obliged to terminate his instructions to his solicitor because he could no longer afford to pay legal costs. Certainly he was represented until October 2013, and now represents himself. He has filed no affidavit explaining the delay, but in the circumstances it could be regarded as a short delay, of the type a Court would be prepared to excuse if the appeal on its merits did not appear to be hopeless.

[24] The fact that the notice of appeal was filed in the wrong Court can also be viewed in the context that Mr Slater was now acting for himself. He states that he was not informed by the Court that his appeal would not be actioned.

[25] When the matter came before Judge Gittos on Mr Blomfield's contempt application, Mr Slater attended the court and clearly wished to pursue the appeal. Judge Gittos, correctly in my view, was sympathetic to his position, although not to

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22 *Grey v Elders Pastoral Holdings* (1999) 13 PRNZ 353 (CA) at [15]; and *Havanaco Ltd v Stewart*, above n 18, at [7].

23 *My Noodle Ltd v Queenstown Lakes District Council*, above n 18, at [21].

24 *Ngati Tahinga & Ngati Karewa Trust v Attorney–General* CA73/02, 27 June 2002 at [3]; and *My Noodle Ltd v Queenstown Lakes District Council*, above n 18, at [22].

any further delays. As I have said, the Judge did not in fact have jurisdiction to grant leave to appeal, or to direct that there be a draft case on appeal filed. What is of more importance is the directions that were made by Judge Gittos. He directed:[25]

> So the following directions are made which must be scrupulously complied with by Mr Slater:
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> (a) Firstly, he is to file in Court a full list of documents which is to be verified by affidavit. For the sake of clarity I direct that all documents which are on the hard drive to which he has referred may simply be referred to en bloc by a reference to the electronic hard drive which is held by both parties.
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> (b) Mr Slater however is to list individually all other items of correspondence, electronic or otherwise, between himself and other parties relevant to the issues of defamation alleged against him.
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> (c) He is also to file a formal answer on oath to the outstanding interrogatory question as to his sources, as directed by Judge Blackie. That list of documents and the answer to the interrogatories is to be held on the Court file until the issue of privilege, which Mr Slater wishes to take on appeal, has been resolved or the time for appeal has been exhausted without any appeal having been commenced.
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> (d) In that respect, Mr Slater is to file in Court within 28 days that is to say by 16 December, a draft case stated on appeal identifying the issue of law that he considers to be wrongly expressed or decided in Judge Blackie's decision of 26 September so that the Judge may settle a case stated in law on that matter to be promptly resolved by the High Court. In default of compliance with this direction, any appeal will be deemed to be abandoned.
>
> (e) The other list of documents which he is to file and which, for reasons of preserving the identity of the sources until a ruling of the High Court on the matter has been made, it is also to be filed and held in Court by 16 December and is to be a verified list, verified on affidavit. That will not be disclosed to the plaintiff until the issue of law around this matter, whether Mr Slater is entitled to anonymity so far as sources are concerned, has been resolved by his case stated on appeal.

[26] Judge Gittos declined to impose any sanctions, but he directed in default of compliance with those directions strictly in accordance with the timetable, "… the defendant will be barred from defending these proceedings unless the Court otherwise so orders and if that situation arises then the plaintiff may proceed to

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[25] *Blomfield v Slater*, above n 1, at [10](a), (b), (c), (d) and (e).

hearing of a substantive case on formal proof."[26] There has not at this point been any appeal or application for leave to appeal Judge Gittos' decision.

[27] By 23 December 2013 and within the 28 day period Mr Slater had:

(a) Filed the list of documents as directed;

(b) Done that on an unredacted basis for the Court as directed in (e);

(c) Sent a redacted version to Mr Blomfield as directed; and

(d) Filed an application for leave to appeal in the High Court.

[28] Mr Slater did not file a draft case stated but that is understandable given that such a document was not required under the High Court Rules, and given that earlier in the directions leave had been granted for him to file an appeal. He did not file a formal answer on oath to what was referred to in (c) as "the outstanding interrogatory question as to his sources", but in fact that interrogatory question, if it is question 7 that Judge Gittos was referring to, did not require the disclosure of a source but only a "yes" or "no" answer.[27] Therefore it cannot be said that there was a lack of compliance with that part of the directions.

[29] It is my view, looking at Mr Slater's conduct in the round, that he was not setting out to defy Judge Gittos' directions, and indeed could be seen as endeavouring to act within the spirit of them. Thus, there is some explanation for the delay in filing the appeal, and the length of the delay has not been great. I am unable to see any particular prejudice to Mr Blomfield save for the effluxion of the days in question, which may have delayed the determination of the appeal by a matter of weeks.

[30] As to the parties' conduct, I have sympathy for Mr Blomfield, who is highly frustrated with the delays and the ongoing lengthy interlocutory processes. However, now that the list of documents has been filed the case could be set down

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[26] *Blomfield v Slater*, above n 4, at [11].
[27] High Court Rules, r 8.39(2).

for hearing, subject to the issue of sources being determined. It is Mr Blomfield's wish to obtain information as to Mr Slater's sources that is now preventing the case being set down. That is the contentious issue raised on the merits by this appeal, which I now proceed to consider.

The prospective merits of the appeal and its public importance

[31] There is in my view a real question to be argued in this appeal. That is the issue of whether Mr Slater is a journalist in terms of s 68(5) of the Evidence Act 2006, and whether his website can be regarded as a "news medium" within that section. If he is a journalist and his blog can be regarded as a news medium, then he is entitled to the protection afforded to journalists' sources by s 68(1).

[32] It seems likely that he now does indeed publish news items, as Mr Blomfield appeared to concede in submissions. Whether he was doing so in 2012 may well be a contentious issue. However, there is enough material before me for me to conclude that the appeal is not hopeless.

[33] The point is one of some public importance. The Press Council has just started a process whereby bloggers may become members. The role of bloggers as purveyors of the news and observations on the news is new, and the dissemination of news through this medium appears to be increasing. Thus the status of bloggers under s 68(3) is topical and of interest to various sections of our community.

Conclusion

[34] For the reasons that I have set out I do not regard Mr Slater's delays as inexcusable. He has emphasised his intention to abide by the Court's processes, and has expressly observed that he has "changed his ways".

[35] While Mr Blomfield's opposition to an extension of time being granted is entirely understandable. I am unable to discern any specific prejudice to him that will be caused by the delay. The appeal cannot be said to be without merit and the issue raised is of some public importance.

[36] I therefore extend the time for filing the appeal to Thursday, 3 April 2014.

The way forward

[37] I discussed with Mr Slater and Mr Blomfield what might happen should an extension of time be granted. Clearly from Mr Blomfield's perspective a hearing of the substantive appeal as soon as possible is desirable.

[38] Thursday, 3 April 2014 is available for the hearing of the appeal, and when I raised this possibility with Mr Blomfield he indicated that he would be able to prepare in time. So did Mr Slater.

[39] I will therefore direct that the substantive appeal be heard on that date, with directions that any further submissions be filed by midday on Wednesday, 2 April 2014. Mr Slater must file a notice of appeal document before the Thursday hearing.

Result

[40] An extension of time for the filing of the appeal against the decision of the District Court at Manukau of 26 September 2013 is extended to Thursday, 3 April 2014.

[41] The parties are to file and serve on each other any further submissions that they wish to file by midday on Wednesday, 2 April 2014.

[42] A formal notice of appeal document complying with the requirements in r 20.9 is to be filed by Thursday, 3 April 2014.

[43] I reserve costs, and I will hear argument at the hearing on Thursday, 3 April 2014.

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Asher J