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

**CIV-2014-404-000073**
**[2014] NZHC 813**

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| BETWEEN | RAZDAN RAFIQ<br>Plaintiff |
| AND | COMMISSIONER OF NEW ZEALAND POLICE<br>Defendant |

Hearing: 1 April 2014

Appearances: Plaintiff in person
S M Kinsler for Defendant

Judgment: 16 April 2014

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## JUDGMENT OF COURTNEY J

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This judgment was delivered by Justice Courtney
on 16 April 2014 at 4.30 pm
pursuant to R 11.5 of the High Court Rules

Registrar / Deputy Registrar

Date.....

## Introduction

[1] The plaintiff, Razdan Rafiq, has brought defamation proceedings against the Commissioner of Police. His third amended statement of claim dated 26 March 2014 alleges six instances of defamation. Mr Rafiq is seeking summary judgment in respect of each. Mr Rafiq must demonstrate the necessary ingredients of each cause of action and also satisfy the Court that the Commissioner has no defence to them.

[2] The Commissioner opposes the application for summary judgment on the grounds that, in respect of some of the causes of action, there are disputed facts that make it unsuitable for summary judgment and, on others there are tenable defences of either qualified or absolute privilege.

[3] In the event that the summary judgment application fails the Commissioner seeks to strike out parts of the third amended statement of claim. In addition he seeks security for costs against Mr Rafiq and an order consolidating this proceeding with the proceeding under CIV-2013-404-005202, in which Mr Rafiq has applied for leave to bring defamation proceedings against the Commissioner out of time.

## The summary judgment application

*Statement on 17 April 2012*

[4] The first complaint relates to a letter dated 17 April 2012 sent by Detective Stallworthy to Mr Rafiq. The letter referred to a complaint made to the Police regarding correspondence Mr Rafiq had sent to the Department of Labour. The impugned statement is:

> This matter has been investigated and it has been determined that the language used by you in this correspondence is inappropriate, offensive and threatening in manner.
>
> Furthermore, if you continue to correspond with any part of the Department of Labour in any way and you refuse to modify your language and behaviour you may be arrested and charged.
>
> I am urging you to reconsider your approach when dealing with government departments that you may have an issue otherwise further action may be taken against you in the future.

[5] Mr Rafiq pleads that Detective Stallworthy stored the allegation in the Police dossier information system for the data/information matching purposes with various other government departments and agencies and that the statement conveyed the following meanings: Mr Rafiq was a terrible person due to his language and inappropriate behaviour, should be approached with extreme caution or alert in respect to all dealings, was not of good character and is guilty of criminal and unethical conduct.

[6] The focus of the letter is on the language that Mr Rafiq has used in his correspondence with the Department of Labour. I do not consider that the letter can properly be read as conveying any of the meanings that Mr Rafiq attributes to it. There is no specific reference to Mr Rafiq's general character and none can be read into it. In any event, this cause of action must fail on the pleadings as they currently stand because there is no allegation of publication. The letter was sent by Detective Stallworthy to Mr Rafiq and received by him. There is no allegation as to the involvement of anyone else in that process.

*Statement 20 April 2012*

[7] Mr Rafiq alleges that on or about 20 April 2012 Detective Stallworthy spoke to Mr Rafiq's mother by telephone and "behest ... not to keep him [Mr Rafiq] in her house alleging that he is suffering from mental problems (illness)". Detective Stallworthy has given an affidavit in opposition to the summary judgment application. In relation to this alleged incident, he has deposed to attending Mrs Khan's residence to determine whether Mr Rafiq lived there. Mrs Khan confirmed that he did not but later that day phoned him to say that Mr Rafiq did in fact live at the address. Detective Stallworthy says that he is "clear that I would not have requested Mr Rafiq's mother not to keep him in her house or allege that he was suffering from any mental problems".

[8] This affidavit puts squarely in issue whether the statement sued on was even made. It is unnecessary for me to consider any other aspects because a sufficient factual dispute is clear on the basis of Detective Stallworthy's affidavit that precludes summary judgment being entered.

*Statement 10 May 2012*

[9] Mr Rafiq alleges that in a courtroom in the Auckland District Court a Police prosecutor accused him of "suffering from mental illness and accordingly he cannot self-represent himself at the hearing unless he sees a forensic nurse". Mr Rafiq asserts that the meaning of the statement which was made in the presence of defendants and witnesses in the courtroom meant that he was of unsound mind as a result of mental problems and could not represent himself, that he was not of good character and that he was guilty of criminal and unethical conduct.

[10] A Police prosecutor, Colin MacDonald, has sworn an affidavit dated 21 March 2014 in response to this allegation. Mr MacDonald attended the Auckland District Court on 10 May 2012 for the purposes of beginning a prosecution against Mr Rafiq for charges under the Postal Services Act and the Harassment Act. The subject matter of the prosecution was correspondence sent by Mr Rafiq to the Commissioner of Inland Revenue and the Privacy Commissioner and subsequently resulted in convictions under both Acts. Mr MacDonald was sufficiently concerned about the tenor of the correspondence that was the subject of the charges as to consider the possibility that Mr Rafiq would not be in a position to conduct his defence. A consequence of that, which also concerned Mr MacDonald, was the possibility of doubt over any conviction entered. Mr MacDonald deposed that:

> I raised this issue with the plaintiff at the back of the courtroom and outside in the passageway of the Court House before the proceedings commenced. I do not recall whether anyone else was present or within earshot when I spoke to the plaintiff. I did not accuse the plaintiff of having a mental illness. I asked whether the plaintiff felt fit to represent himself at the trial. The plaintiff insisted that he was. I said that on the basis of what I had read I was concerned about his ability to represent himself and I would be recommending to the Judge prior to the hearing commencing that the plaintiff be seen by a forensic nurse. I subsequently made a verbal submission to Judge D A Burns setting out my concerns. He agreed. He stood the matter down to allow a forensic nurse to examine the plaintiff.

[11] A forensic nurse did later examine the plaintiff and the plaintiff went on to conduct his defence.

[12] Given the assertion that this discussion took place in the presence of others and Mr MacDonald's lack of memory on that aspect means that publication is not an

issue. I also accept that the discussion would have conveyed that Mr Rafiq was of unsound mind due to mental problems. I do not consider that the other meanings ascribed to the statement were conveyed.

[13] Mr Kinsler, for the Commissioner, argued, however, that the discussion was covered by the immunity relating to things said or done in the ordinary course of proceedings. The most readily recognised aspect of this immunity is the protection of witnesses in respect of statements made in evidence. However, the immunity is not so strictly confined. It was described by Lord Hope of Craighead in *Darker v Chief Constable of West Midlands* as:[1]

> This immunity, which is regarded as necessary in the interests of the administration of justice and is granted [to a police officer giving evidence] as a matter of public policy, is shared by all witnesses in regard to the evidence which they give when they are in the witness box. It extends to anything said or done by them in the ordinary course of any proceeding in a court of justice. The same immunity is given to the parties, their advocates, jurors and the Judge. They are all immune from any action that may be brought against them on the grounds that things said or done by them in the ordinary course of the proceedings were said or done falsely and maliciously and without reasonable and probable cause: *Dawkins v Lord Rokeby* (1873) LR 8 QB 255, 264 per Kelly CB.

[14] In New Zealand the position is similar.[2] In *New Zealand Defence Force v Berryman* William Young J described the immunity:[3]

> [67] Those who give evidence or make submissions to a court enjoy immunity from suit. The purpose of this immunity is not to discourage dishonest or defamatory submissions or perjury; rather it is to protect parties from litigation along with their counsel and witnesses, from vexatious litigation ...
>
> [68] We recognise that the immunity is limited. It is confined to what is said in court and to necessary preliminaries to that ... In marginal cases where there is uncertainty as to which side of the line a particular claim falls the courts should be slow to resort to the strike out or the summary judgment jurisdiction.
>
> [69] That said, where the claim is clearly within the immunity, summary judgment is appropriate.

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1 *Darker v Chief Constable of West Midlands* [2001] 1 AC 435 at 445-446.

2 Following *Chamberlains v Lai* [2007] 2 NZLR 7 (SC) a barrister is no longer protected from negligence suits.

3 *New Zealand Defence Force v Berryman* [2008] NZCA 392 at [67] – [69].

[15] The circumstances described by Mr MacDonald are, arguably, within the scope of the immunity. There can be no question that submissions he made to the Judge are protected. I think it arguable that the discussions he had with Mr Rafiq immediately prior to the hearing commencing are protected. I do not need to decide that now. I am, however, satisfied that it would be inappropriate to grant summary judgment.

*Statement 3 September 2012*

[16] This allegation relates to a question posed to Mr Rafiq by a Police prosecutor in the context of a defended hearing. The evidence of the statement being made was the extract of the Court transcript annexed to the third amended statement of claim. It was not annexed to Mr Rafiq's affidavit filed in support of the summary judgment application, though Mr Kinsler did not raise any objection on the basis of a lack of evidence.

[17] It is unnecessary to canvass the actual statement in issue. Suffice to say that it was the beginning of a hypothetical proposition which was not completed because the Court intervened. More relevant is the fact that this statement was made by a Police prosecutor in the course of cross-examination while Mr Rafiq was in the witness box. There is no question that this exchange is the subject of witness immunity.

*Statement 20 March 2014*

[18] The allegation is that Detective Stallworthy said to Crown Law:

> Mr Rafiq is a terrible litigant due to his past litigation adduced in a completely inappropriate manner and extremely offensive languages and has failed in various civil proceedings and costs been awarded against him eventually leading to bankruptcy status.

[19] It is said that this statement conveyed that Mr Rafiq was a person of low income status, a "lose [sic] character" resulting in failures in civil litigation and not of good character.

[20] Mr Kinsler did not deny that this statement was made. However, evidence contained in Detective Stallworthy's affidavit in opposition plainly raises the potential defences of truth and honest opinion. Detective Stallworthy has deposed to the fact that Mr Rafiq has brought several cases against the Police, not paid costs awarded against him and been bankrupted. The Detective did add that Mr Rafiq is subsequently appealing, among other things, the bankruptcy order. However, in the circumstances it would be entirely wrong to proceed by way of summary judgment. The purpose of summary judgment is to enable a plaintiff to obtain judgment on a claim where there is no tenable defence.[4] This is not such a case.

**Application to strike out**

[21] The Commissioner's application to strike out the substantive claim was filed prior to the third amended statement of claim being filed and changes made to the pleadings mean that the entire proceeding is no longer subject to the strike-out application. However, the application is pursued in respect of the statements on 20 April and 3 September 2012 on the ground that they constitute an abuse of process, being based on the same subject matter Mr Rafiq has raised in previous proceedings and which have been struck out.

[22] It will be recalled that the statement on 20 April 2012 related to an alleged telephone discussion between Detective Stallworthy and Mr Rafiq's mother, Ms Khan. The statement on 3 September 2012 related to the question asked by the Police prosecutor during cross-examination of Mr Rafiq. In proceedings brought in this Court under CIV-2013-404-002407 Mr Rafiq made exactly the same allegation in relation to the 20 April 2012 statement and the same allegation (along with other allegations). These allegations were made in the context of a claim which Venning J described as being styled as an application for judicial review in relation to actions by the Police when dealing with Mr Rafiq in relation to the prosecution of charges under the Postal Services Act 1998 and the Harassment Act 1997.[5]

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4 *Pemberton v Chappell* [1987] 1 NZLR 1, (1986) 1 PRNZ 183.

5 *Rafiq v The Chief Executive of the Ministry of Business Innovation and Employment and The Commissioner of the New Zealand Police* [2013] NZHC 3138.

[23] The Judge concluded that with the exception of the assault complaint the claim either failed to disclose a reasonably arguable cause of action to support discretionary relief of judicial review or was frivolous, vexatious and an abuse of process.

> Vexatious and an abuse of process to the extent it represents, in substance, a collateral attack on Mr Rafiq's convictions under the Postal Services Act 1998.

[24] Mr Kinsler submitted that Mr Rafiq's pleading of these very same allegations in the context of a defamation action is an abuse of process, being allegations based on the same facts as matters already dealt with in the earlier proceedings.

[25] It is recognised that parties should not be permitted to litigate the same facts over and over. In *Hoystead v Commissioner of Taxation* the House of Lords observed that:[6]

> Parties are not permitted to begin fresh litigations because of new views they may entertain of the law or the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted.

[26] More recently, Elias CJ summarised the rationale for the principle in *Z v Dental Complaints Assessment Committee*:[7]

> Two purposes are served by discouraging relitigation. The first is protective of the interests of litigants who have obtained final judgment … The second is concerned with the public interests in stilling controversies …

[27] Mr Rafiq, in response to this issue, submitted that in the earlier litigation the allegations were simply included as examples of conduct complained of. The specific allegations were not recorded in Venning J's judgment. However, Mr Kinsler provided a copy of the amended statement of claim that was the subject of Venning J's decision. It is apparent to me that the true nature of the allegations in that pleading were as grounds for the relief being sought.

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6 *Hoystead v Commissioner of Taxation* [1926] AC 155 at 165.

7 *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1, [2008] NZSC 55 at [58].

[28] I agree that the allegations made at paragraphs 2 and 4 of the third amended statement of claim are an abuse of process, being the very same allegations that have been the subject of previous litigation and struck out by Venning J. There will be an order that paragraphs 2 and 4 of the third amended statement of claim be struck out.

**Security for costs**

[29] Under r 5.45(1)(b) the threshold for ordering security for costs is reason to believe that a plaintiff will be unable to pay the defendant's costs if unsuccessful. Mr Rafiq is an undischarged bankrupt and therefore meets that threshold. However, under r 5.45(2) an order may only be made if the Judge thinks it is just in all the circumstances to order the giving of security.

[30] In considering whether it is just in the current circumstances to order security for costs I have regard to the fact that, as a bankrupt, Mr Rafiq will find it difficult and may not be able to find security for costs. On the other hand, he has failed to pay costs on previous proceedings, which has led to his bankruptcy. The Commissioner ought not to be put in the position unnecessarily of incurring costs without the prospect of being able to secure payment in the event of a successful defence.

[31] Secondly, I have some regard to the apparent merits of Mr Rafiq's claim. I have declined to enter summary judgment because there are obvious factual disputes in respect of some of the causes of action. Nevertheless, my impression is that many, if not all of the statements sued on, will ultimately be found to have been made in circumstances that attract privilege or in respect of which the defence of truth or honest opinion will be made out.

[32] Having regard to all of the factors, including Mr Rafiq's history of bringing proceedings against the Commissioner, I consider it proper to require security for costs. Mr Kinsler indicated a calculation of approximately $30,000 on a 2B basis in the event of the Commissioner prevailing at trial and sought security of $10,000. I accept that that is a reasonable amount and therefore grant the application for security for costs in the sum of $10,000.

**Consolidation with CIV-2013-404-005202**

[33] In proceeding CIV-2013-404-005202 Mr Rafiq sought leave to bring defamation proceedings against the Commissioner out of time. I have declined to grant that leave, though one of the causes of action does not require leave to the extent that it seeks declaratory relief. Given the similarity of the subject matter I think it best to consolidate these proceedings. There is therefore an order that the proceedings under CIV-2014-404-000073 and CIV-2013-404-005202 be consolidated under CIV-2014-404-000073.

P Courtney J