IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-001988
[2014] NZHC 2064

UNDER	the Defamation Act 1992
BETWEEN	RAZDAN RAFIQ Plaintiff
AND	THE SECRETARY FOR THE DEPARTMENT OF INTERNAL AFFAIRS OF NEW ZEALAND Defendant

Hearing:	25 August 2014
Counsel:	Plaintiff in person AR Longdill and O Klaassen for Defendant
Judgment:	29 August 2014

JUDGMENT OF ASHER J

This judgment was delivered by me on Friday, 29 August 2014 at 11am pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
Meredith Connell, Auckland.

Copy to:
Plaintiff.

Introduction

[1] In this proceeding the plaintiff, Razdan Rafiq, applies to bring defamation proceedings out of time. The defendant, the Secretary for the Department of Internal Affairs of New Zealand, applies to strike out the proceeding. The matter has proceeded today after the Duty Judge list with the agreement of both parties.

[2] The proceedings relate to statements in a communication made within the Department of Labour on 10 March 2008, over six years ago. Mr Rafiq claims that he only became aware of the information which is the basis for the claim on 14 July 2014.

[3] Mr Rafiq has not been declared a vexatious litigant. However, he was described as having issued a vexatious proceeding by Associate Judge Bell in *Rafiq v Meredith Connell*.[1] In that judgment Associate Judge Bell set out 25 decisions that have been delivered in proceedings filed by Mr Rafiq since 1 November 2012, largely against Government institutions or personnel. These proceedings have included Court of Appeal and Supreme Court appeals.

[4] In an earlier proceeding *Rafiq v The Secretary for the Department of Internal Affairs of New Zealand* (the 1385 proceeding),[2] Mr Rafiq brought a claim in defamation against the present defendant. He stated that a large number of internal emails and memoranda issued in 2008 and 2009, copies of which he had obtained, defamed him. Mr Rafiq was claiming damages of $1 million and exemplary damages of $1 million. He also had other claims against other Government entities and persons.

[5] The 1385 proceedings referred to documents which had originated from departmental personnel, including one listed at exhibit C which contained the following information:

> This client has been using a fictional "twin brother" called Mohammed Razdan KHAN to attempt to avoid various criminal charges made against

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1 *Rafiq v Meredith Connell* [2014] NZHC 1597 at [47] and [53].

2 *Rafiq v The Secretary for the Department of Internal Affairs of New Zealand* HC Auckland CIV-2014-404-1385.

> him. When caught, his MO has been to claim, later, that his "twin brother" had done it and was giving his details to the police instead of his own. His police record includes three separate driving offences and disorderly behaviour. He has admitted to the police that he did not hold a driving licence despite driving to his flying school for the last year and a half.

[6] In the present proceeding the alleged defamatory statement is pleaded as follows:

> We plan to interview RAFIQ at the Auckland Office concerning his undeclared names changes and ask him to provide an explanation concerning his 'evil twin brother'.
>
> I wonder whether he has racked up any unpaid loans or finance. We have found that people who have multiple name changes tend to do this.

Strike out

[7] Rule 15.1(1) of the High Court Rules provides:

> **15.1 Dismissing or staying all or part of proceeding**
>
> (1) The court may strike out all or part of a pleading if it—
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> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
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> (b) is likely to cause prejudice or delay; or
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> (c) is frivolous or vexatious; or
>
> (d) is otherwise an abuse of the process of the court.

[8] The key issue that arises in this application is whether Mr Rafiq's proceeding is an abuse of the process of the Court. In this regard it was stated by Richardson J in *Moevao v Department of Labour* in relation to the Court's inherent jurisdiction to stay or dismiss a procedure for the abuse of the process of the Court:[3]

> The concern is with conduct on the part of a litigant in relation to the case which unchecked would strike at the public confidence in the Court's processes and so diminish the Court's ability to fulfil its function as a Court of law. As it was put by Frankfurter J in *Sherman v United States* 356 US 369, 380 (1958):
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> > Public confidence in the fair and honourable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake.

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3 *Moevao v Department of Labour* [1980] 1 NZLR 464 (CA) at 482.

[9] In my assessment the issue of abuse of procedure arises in two respects, of re-litigating the same issue and improper or collateral purpose.

Abuse of procedure – re-litigating the same issue

[10] The 1385 proceeding was specifically directed to material that circulated in the Department of Labour concerning Mr Rafiq in 2008 and 2009, as well as other material relating to the Inland Revenue Department in 2011. The claim was expressed to be a defamation claim.

[11] The particular communication that is the subject of these proceedings was not specified in the 1385 proceedings. However, the statement quoted at [6] above concerned similar issues and was sent on 3 March 2008. The statement the subject of these proceedings was sent on 10 March 2008.

[12] There is a difference in the statements. One refers to Mr Rafiq using a fictional twin brother and the other to seeking an explanation concerning his "evil twin brother". The 10 March 2008 email also refers to the issue of whether Mr Rafiq has "racked up any unpaid loans or finance". This question is not asked in the 3 March 2008 communication.

[13] There is no suggestion that Mr Rafiq did not have a copy of the 10 March 2008 email when he issued the present proceedings on 11 August 2014. The 1385 proceedings were issued on 10 June 2014.

[14] The 1385 proceedings were struck out on 5 August 2014, and these proceedings filed six days later. Venning J struck the 1385 proceeding out because Mr Rafiq had blatantly failed to comply with orders of the Court with full knowledge of the consequences. Venning J had stated:[4]

> The unless order was plain in its terms. In the circumstances the unless order took effect. It remains in effect. The current proceedings are stuck out. The Registry is not to accept any documents of a similar nature from Mr Rafiq relating to the purported claim raised in these proceedings.

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[4] *Rafiq v The Secretary for the Department of Internal Affairs of New Zealand* HC Auckland CIV-2014-404-1385, 5 August 2014 (Minute) at [9].

[15] Mr Rafiq proceeded to file a claim of a similar nature. That has happened, and I do not consider it fruitful to examine why or how, although I note that the claim does not appear to have been referred to Venning J. If Mr Rafiq had wished to claim in relation to the email of 10 March 2008, he should have made that complaint when he filed the 1385 proceeding. He could be reasonably expected to put forward his whole case in the 1385 proceedings. He cannot now, having been struck out in the original proceedings, produce another document arising from the same context, and make another attempt to litigate what is in essence the same issue.

[16] In this respect what is known in the United Kingdom as *Henderson v Henderson* abuse of process arises. In *Henderson v Henderson* Sir James Wigram VC stated:[5]

> [W]here a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, *the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case.* The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.
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> (emphasis added)

[17] The rule in *Henderson v Henderson* was explained in this way by the English Court of Appeal in *Barrow v Bankside Agency Ltd*:[6]

> The rule in *Henderson v Henderson* 3 Hare 100 is very well known. It requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the Court so that all aspects of it may be finally decided (subject, of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the Court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not

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5 *Henderson v Henderson* (1843) 3 Hare 100, 67 ER 319 (Ch) at 115, 319.

6 *Barrow v Bankside Agency Ltd* [1996] 1 WLR 257 (CA).

> drag on for ever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed.

[18] What was stated in *Henderson v Henderson* is now seen as different from res judicata or issue estoppel. As was stated by Lord Bingham in *Johnson v Gore Wood & Co*:[7]

> It may very well be … that what is now taken to be the rule in *Henderson v Henderson* has diverged from the ruling which Wigram VC made which was addressed to res judicata. But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the Court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all.

[19] Lord Bingham made it clear that what is involved is a broad merits based judgment which takes into account the public and private interests involved, and the facts of the case. The crucial question is whether the party is misusing or abusing the process of the Court by seeking to raise an issue that could have been raised before. *Henderson v Henderson* is still relied on by New Zealand Courts.[8]

[20] This approach is adopted in Australia. As Murphy J put it in *Port of Melbourne Authority v Anshun Pty Ltd*:[9]

> The issue now sought to be raised was plainly open to be agitated in the previous litigation. The judgment in that case is inconsistent with a judgment now sought by the plaintiff.

[21] While the alleged defamatory statements in the two proceedings do not exactly correspond, they arise out of the same period of time and dealings with the defendant. The present claim should have been raised in the 1385 proceedings. Mr Rafiq returns to Court to advance arguments that he could have put forward for

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7 *Johnson v Gore Wood & Co* [2001] 1 All ER 481 at 498–499.

8 *Beattie v Premier Events Group Ltd* [2014] NZCA 184 at [43]; *Contact Energy Ltd v Attorney-General* [2009] NZCA 351 at [85]–[87]; *Commissioner of Inland Revenue v Bhanabhai* [2007] NZLR 478 (CA) at [58]–[60]; *Lai v Chamberlains* [2007] 2 NZLR 7 (SC) at [59].

9 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 605.

decision in the 1385 proceedings, but failed to raise. A party cannot bring a case relating to a certain party, certain sequences of conduct, and a certain timeframe, and then when it fails bring another case raising another similar complaint relating to the same party, the same sequence and the same timeframe. Parties must bring their whole case to the Court so there can be finality of litigation.

[22] I am satisfied that Mr Rafiq is deliberately misusing the process of the Court by raising an issue that he could have raised before in the 1385 proceeding. This view is reinforced by other indicia as to his motives, to which I will now refer.

Abuse of procedure – improper / collateral purpose

[23] It was stated in the High Court of Australia in *Williams v Spautz*:[10]

> … court proceedings may not be used or threatened for the purpose of obtaining for the person so using or threatening them some collateral advantage to himself, and not for the purpose for which such restraining orders are properly designed and exist; and a party so using or threatening proceedings will be liable to be held guilty of abusing the process of the court and therefore disqualified from invoking the powers of the court by proceedings he has abused.

[24] Proceedings brought with an improper motive which seek a collateral advantage beyond that which could legitimately be expected from a court proceeding may be an abuse of process.[11] Nevertheless I accept that a stay will not be granted to debar a litigant from pursuing a genuine cause of action that it seeks to have determined where there is also an ulterior purpose as a desired by-product. The ulterior purpose must dominate to a degree where the proper conduct of the litigation is subsumed. The onus is on the party seeking to show that the proceeding is brought from improper purpose.

[25] In this case there is the clearest possible evidence of Mr Rafiq's improper purpose, being the statements that he has made in his application for leave. In the application for leave he stated after having set out his grounds:

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10 *Williams v Spautz* (1992) 174 CLR 509.

11 *Goldsmith v Sperrings Ltd* [1977] [1977] 1 WLR 478 (CA); *Wallersteiner v Moir* [1974] 1 WLR 991 (CA).

> Further the applicant shall file multiple litigations against the respondent. The litigations shall also encompass the Internal Affairs Minister and the Prime Minister and appeal shall follow right to the Supreme Court. The process shall be repeated multiple times until and unless justice is secured. Those who shall resist any proceedings and or stand in the path of the applicant shall face series of litigations.

[26] Mr Rafiq had also, in the copies of the documents that he served (which were a very faded photocopy that could not be easily read, and missing various attachments), stated:

> If you resist these proceedings then I shall feed your department with multiple litigation including the Minister.

[27] These statements explicitly show an intention on Mr Rafiq's part to litigate against the Secretary and other government entities, not because he wishes to have a cause of action determined, but because he wishes to harass those persons. This becomes all the more clear when it is considered against the background of the 25 decisions in relation to hopeless proceedings issued since 2012. Mr Rafiq has confirmed that he is presently a bankrupt. He is in my assessment issuing proceedings because they will vex and inconvenience various government persons. He also referred in his oral submissions to a motive to through these proceedings ultimately obtain a reversal of a Supreme Court judgment with which he disagrees.

[28] It is clear that Mr Rafiq, having had his earlier proceedings struck out, has gone through the same set of documents and timeframe that led to the 1385 proceedings, found an email not previously referred to and used this as the basis of a new proceeding to maintain his campaign. The court processes were not designed for this purpose. To use them to harass and achieve a collateral gain in this way is an abuse of procedure.

Conclusion

[29] I conclude that this proceeding is an attempt to re-litigate complaints that have already been determined in the 1385 proceedings. They are not brought to determine a civil claim, but to vex and harass. They are an abuse of procedure.

Result

[30] The proceeding is struck out.

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Asher J