IN THE COURT OF APPEAL OF NEW ZEALAND

CA678/2014
[2015] NZCA 240

BETWEEN	CAMERON JOHN SLATER Applicant
AND	MATTHEW JOHN BLOMFIELD Respondent

Hearing:	13 April 2015 (further submissions filed on 28 April 2015)
Court:	Stevens, Wild and Miller JJ
Counsel:	Applicant in person M G Beresford for Respondent
Judgment:	17 June 2015 at 3.00 pm

JUDGMENT OF THE COURT

A The application for an extension of time to appeal under r 29A of the Court of Appeal (Civil) Rules 2005 is granted.

B The applicant is directed to:

(a) file and serve the case on appeal no later than 31 July 2015;

(b) file and serve any affidavits in support of the application for leave to adduce fresh evidence by no later than 14 August 2015; and

(c) pay security for costs and any filing fees, as well as apply for a fixture by no later than 28 August 2015.

C Immediately following 28 August 2015, the Registrar is to arrange a telephone conference with the Civil List Judge to discuss any outstanding timetabling or other issues.

D The applicant must pay the respondent the costs of a standard application on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Stevens J)

Introduction

[1] The applicant, Cameron Slater, applies for an extension of time to file an appeal under r 29A of the Court of Appeal (Civil) Rules 2005 (the Rules). He wishes to appeal a judgment of Asher J given on 12 September 2014.[1] Asher J ordered under s 68(2) of the Evidence Act 2006 (the Act) that Mr Slater (and his sources) were not protected by s 68(1). That provision, which prevents a journalist from being compelled to disclose an informant's identity when the journalist has promised to keep their identity secret, applies to journalists who publish information in a news medium, unless a judge orders otherwise.

[2] Mr Slater is being sued for defamation in the District Court by Matthew Blomfield, the respondent. The alleged defamation relates to stories Mr Slater published in 13 articles on his Whale Oil blog about Mr Blomfield. One such blog post, entitled "Who really ripped off KidsCan?", alleged business interests with which Mr Blomfield was associated had defrauded a charitable trust for children. Other relevant articles contain extracts of emails to which Mr Blomfield is alleged to be a party. Mr Blomfield says some of the information comes from a hard drive of his. Mr Slater admits publishing the articles in question, but says they are not defamatory. He seeks to raise the defences of truth and honest opinion.

[3] Mr Blomfield filed interlocutory applications in the District Court for orders requiring discovery and the answering of interrogatories. Mr Slater opposed those applications, on the basis he should not be compelled to disclose the information under s 68(1) of the Act. Judge Blackie rejected that claim, holding that a blog, and therefore Whale Oil, was not a news medium within the definition of s 68(5) of the

---

1 *Slater v Blomfield* [2014] NZHC 2221, [2014] 3 NZLR 835 [High Court judgment].

Act.[2] Mr Slater appealed to the High Court. After the appeal was filed, Mr Blomfield made an originating application to the High Court seeking an order under s 68(2) of the Act, should he be unsuccessful in opposing the appeal relating to s 68(1). Asher J found that Mr Slater was a journalist and the Whale Oil blog was a news medium for the purposes of s 68(1) (as defined in s 68(5)). However, he allowed Mr Blomfield's application for an order under s 68(2), so that the protection of s 68(1) is not to apply to Mr Slater in the proceeding.

[4] Mr Slater seeks to appeal the s 68(2) order.

High Court judgment

[5] Asher J held the "newspaper rule" which protected newspapers from being required in defamation cases to disclose their sources of information was subsumed by s 68 of the Evidence Act.[3] The old common law rule concerned disclosures to journalists in circumstances of confidence. Section 68 focuses on disclosures to journalists in circumstances where the journalist has promised to keep the informant's identity secret.[4] Any person seeking protection under that provision has to meet certain minimum requirements.[5]

[6] Asher J concluded Mr Slater was a "journalist" within the definition in s 68(5). He further held Judge Blackie was wrong to consider a blog could not be a news medium.[6] Provided it disseminates news involving provision of new information to the public about recent events of public interest or observations about the same and there was some regular commitment to the publication of news, it fell within the definition of "news medium" in s 68(2). After examining the content and nature of the Whale Oil blog run by Mr Slater, the Judge held Mr Slater was engaged in reporting genuine new information of interest over a wide range of topics.[7] He found further he was receiving information from informants, of the kind s 68(1)

---

2 *Blomfield v Slater* DC Manukau CIV-2012-092-1969, 26 September 2013 [District Court judgment].
3 High Court judgment, above n 1, at [20]–[30].
4 At [25]; Evidence Act 2006, s 68(1).
5 Section 68(5). See District Court Judgment, above n 2, at [15]–[17] for Judge Blackie's findings in respect of the definition of news medium, excluding blogs.
6 High Court judgment, above n 1, at [43]–[54].
7 At [62].

protects, in the normal course of this work as a journalist.[8] Asher J also found, during the material time, Mr Slater had promised to individuals not to disclose their identity. The relevant elements of 68(1) being satisfied, the Judge determined Mr Slater was entitled to invoke the protection in s 68(1) in relation to his sources. Sources whose identity had already been disclosed, being one particular source before Asher J, did not attract the protection.[9]

[7] Judge Blackie had determined r 8.46 of the High Court Rules did not apply.[10] Justice Asher determined r 8.46 properly governed the requirements for the honest opinion defence (previously, the fair comment defence).[11] But it had no application to the present circumstances because of the provisions of the Defamation Act 1992. Accordingly, for different reasons he dismissed the appeal in respect of the determination in the District Court that r 8.46 of the Rules does not apply.

[8] The Judge then discussed the factors to be considered in deciding under s 68(2) of the Act whether an order should to be made that s 68(1) not apply. The Judge held that disclosure of evidence of the identity of informants was appropriate in this case.[12] There was a public interest in allowing all information that might assist in refuting defences of truth and honest opinion, and in persons who claimed to have been defamed being able to explore the circumstances and what sources were reporting to and informing the publisher. There would be no significant adverse effect arising from disclosure.[13] The public interest considerations affecting communication of facts and opinion to the public by the news media and its ability to access sources of facts was not implicated by the current case.[14]

[9] The Judge therefore made an order that s 68(1) is not to apply to the disclosures sought in this defamation proceeding. The result was that Mr Slater was required to comply with interrogatories and discovery obligations, including those relating to his sources.

---

8 At [75]–[84].
9 At [88].
10 District Court judgment, above n 2, at [18].
11 High Court judgment, above n 1, at [96]–[97].
12 At [112]–[120].
13 At [121]–[126].
14 At [128]–[132].

Steps prior to filing of application

[10] Mr Slater initially filed an application in the High Court for leave to appeal. He wrongly assumed that leave of the High Court was required. Despite the initial proceedings commencing in the District Court, as the issue under s 68(2) arose only by way of originating application in the High Court, there is an appeal to this Court as of right in respect of that issue.[15] All other questions, if appeal was sought, would have required leave.

[11] Asher J noted Mr Slater had been informed of that position in a minute and Mr Slater had indicated he intended to appeal to the Court of Appeal. He also understood his appeal was out of time so an application for leave to appeal out of time would be required. Mr Slater confirmed he could do this "within two weeks". The Judge made a direction recording Mr Slater's indication of his intention to file an application for leave.

Application for leave filed

[12] Mr Slater filed the application for extension of time on 21 November 2014. This was two days outside the time referred to in the directions timetable of Asher J. The application is opposed by Mr Blomfield.

Grounds

[13] Mr Slater submits this Court should grant an extension of time first, because there is no prejudice to the respondent. Mr Blomfield was aware of his desire to appeal the s 68(2) decision when he filed the application for leave to appeal in the High Court.[16] Second, the matter is one of public or general importance. The issues of law are important and the matters contained in the judgment of Asher J should be clarified.

---

[15] As opposed to under s 67 of the Judicature Act 1908, which requires leave to be filed first in the High Court for matters determined on appeal in that Court. If this were to be incorrect, we would nonetheless have interpreted Asher J's Minute as declining leave, and we would grant leave in accordance with the terms set out in this decision.

[16] *Slater v Blomfield* HC Auckland CIV-2013-404-5218, 5 November 2014 (Minute No 12 of Asher J).

[14] The s 68(2) application in the High Court was the first time the issue was considered.[17] Protection of sources in relation to internet news media is a question of significant public importance. Mr Slater submits the specific issues concerning the protection bloggers' sources under s 68(2) have not yet been canvassed by this Court.

[15] Mr Slater contends his sources are genuinely concerned as to their safety. The protection offered to the fourth, and now fifth, estate needs to be addressed by this Court. As to the factual underpinning to the concerns of the unidentified sources, Mr Slater said he would file an application for leave to adduce fresh evidence.[18] An application was filed by Mr Slater on 23 April 2015. It was not accompanied by any further affidavit, neither did it refer to any affidavit filed earlier.

Applicable legal principles

[16] There is no dispute that this Court has jurisdiction under r 29A to grant an extension of time. Neither is it disputed that the overall test is whether the grant of an extension would "meet the overall interests of justice".[19] As this Court said in *Robertson v Gilbert*, the overarching consideration in determining whether to grant an extension is where the interests of justice lie.[20] Relevant factors to be considered include:[21]

(a) the length of the delay and the reasons for it;

(b) the conduct of the parties;

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

(d) the prospective merits of the appeal; and

(e) whether the appeal raises any issue of public importance.

---

17 The judgment confirms Mr Slater consented to the application being dealt with at the same time as the s 68(1) appeal: High Court judgment, above n 1, at [104].

18 Under r 45(1)(b) of the Court of Appeal (Civil) Rules.

19 *Havanaco Ltd v Stewart* (2005) 17 PRNZ 622 (CA) at [5], citing *State Insurance Ltd v Brooker* (2001) 15 PRNZ 493 (CA) at [9] and *French v Public Trust* CA197/04, 25 November 2005 at [14].

20 *Robertson v Gilbert* [2010] NZCA 429 at [24].

21 *My Noodle Limited v Queenstown-Lakes District Council* [2009] NZCA 224, (2009) 19 PRNZ 518 (CA) at [19] and *Barber v Cottle* [2010] NZCA 31 at [6].

[17] With respect to the length of delay, this Court distinguishes between delay caused by mistake or oversight and delay resulting from a change of mind. Absent significant prejudice, and provided prompt action is taken once the mistake or oversight is discovered, the Court tends to extend time to enable an appeal to be brought, other than one that is hopeless. This Court is generally less receptive where there has merely been a change of mind.[22]

[18] Prejudice to the parties may be taken into account and will be viewed in the overall context of the proceeding. In terms of the merits, the interests of justice may require leave to be granted, not necessarily because the merits appear strong, but where there is insufficient material before the Court to exclude the possibility that there is merit.[23]

Opposition to extension

[19] Mr Blomfield opposes the granting of an extension of time. First, the proposed appeal is against a discretionary decision, against which appellate intervention is only available if the decision is shown to be plainly wrong.[24] Mr Slater has failed to show the decision could be criticised on those grounds.

[20] Second, Mr Blomfield submits that this is not an appeal of public or general importance. He refers to a comment in Asher J's judgment to the effect "no matters of public importance are at stake" and says the dispute has hallmarks of a private commercial dispute.[25] Mr Blomfield says the Judge's decision to exercise the discretion in s 68(2) of the Act turns on facts which are unique to this case.

[21] Third, Mr Blomfield submits Mr Slater relies on mistakenly filing the appeal in the wrong Court to explain his delay. The Judge on 22 October 2014 first informed Mr Slater he could appeal to the Court of Appeal directly as of right.[26] Yet

---

22 *Donaldson v Green Juice Co Ltd (in receivership)* (1995) 8 PRNZ 409 (CA) at 411; *Williams v Allott* (2001) 15 PRNZ 684 (CA).

23 *Robertson v Gilbert*, above n 20, at [24].

24 *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [31]–[32]; *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [16].

25 High Court judgment, above n 1, at [129].

26 *Slater v Blomfield* HC Auckland CIV-2013-404-5218, 22 October 2014 (Minute No 11 of Asher J). The respondent also sent Mr Slater a letter on 23 October 2014 informing him of his appeal path.

the applicant did not file his application for leave until 21 November, almost a full month later.

[22] Finally, Mr Blomfield emphasises the cost and prejudice an appeal would cause. He is suffering ongoing delay (and hence prejudice) in having his defamation case determined by the District Court.

Our evaluation

[23] We accept the reason for the delay in appealing is that Mr Slater mistakenly filed an application for leave to appeal in the High Court. This is perhaps understandable, as Mr Slater is self-represented.

[24] As to the length of the delay, Mr Slater was advised by Asher J around 23 October 2014 that he could appeal as of right to this Court. This was confirmed in the Judge's minute on 5 November 2014. The application was not filed until 21 November 2014, some two days outside the timetable set by Asher J. We do not see the delay as significant in the overall context of this proceeding.

[25] In terms of prejudice, we do not consider the respondent has shown any particular prejudice beyond the delays an appeal will cause. Given the original publication occurred back in May and June 2012, considerable delays have already arisen. When considering prejudice to the respondent, we also take into account that the appeal directly raises important issues for persons who supply information to journalists and bloggers.

[26] The appeal is not hopeless. That said, the merits of the applicant's proposed grounds of appeal do not appear strong. While legal grounds will be raised, the essence of the ground of appeal is that Asher J did not have evidence of Mr Blomfield's intimidating and threatening behaviour. Mr Slater says the documents filed in this Court, the admissibility of which is currently contested, establish that behaviour. Those documents are mostly dated from before 2012. Mr Slater has not so far adequately explained why they should be admissible as fresh evidence in this Court.

Legal questions

[27] With respect to the legal issues, the judgment of Asher J deals comprehensively with the questions arising under s 68(2). In this regard the Judge applied principles discussed in an earlier High Court judgment of Randerson J in *Police v Campbell*.[27] However, none of these issues has previously been considered by this Court.

[28] There is another point that supports granting leave. The circumstances of this case raise the interrelationship between s 68(2) of the Act and r 8.46 of the High Court Rules. If Mr Slater were successful in his challenge to the findings of Asher J under s 68(2), he would need to address on appeal the implications of the Judge's adverse conclusions in respect of r 8.46.

[29] In the District Court, Judge Blackie ruled that it was not necessary to make a formal order in relation to interrogatories and none was made. In the High Court, Asher J considered the application of r 8.46 directly. He ruled that interrogatories seeking disclosure of the sources are necessary in the interests of justice and the protection provided by r 8.46 of the Rules cannot be invoked by Mr Slater.[28] In this respect, Mr Slater's appeal was unsuccessful.

[30] It follows that any appeal to this Court would inevitably raise issues involving r 8.46, for which leave to appeal would be required from the High Court. We see no reason why leave should not be granted.

Factual questions

[31] At the hearing it became apparent that the case supporting the application for leave did not include any of the evidence which Asher J had before him. This was relevant to the issue in s 68(2)(a) as to whether there is any likely adverse effect of the disclosure on the informant(s) or any other person. The Judge had considered this issue in the light of affidavits filed by Mr Slater and a Mr Spring.[29] The Judge

---

27 *Police v Campbell* [2010] 1 NZLR 483 (HC) at [83].
28 High Court judgment, above n 1, at [103].
29 At [121]–[127].

ruled, having considered the evidence, that no significant adverse effect that would result from the disclosure of the identity of the informant had been identified.

[32] Having reviewed the evidence provided by the parties, there appears to be an evidentiary basis supporting the Judge's views as to lack of likely adverse effects. What this means for Mr Slater is that if he were intending on appeal to seek to establish likely adverse effects of the disclosure on one or more informant, or on any other person, it would be necessary for him to seek leave to admit fresh evidence. Plainly any such evidence would need to meet the usual test for freshness, including why it was not available at the hearing. As noted, the application filed since the hearing was not accompanied by any additional affidavit evidence.

Conclusion

[33] Although the merits of the appeal do not appear strong, we accept the delay in filing the appeal was not lengthy. This was attributable to Mr Slater acting for himself. Any prejudice to Mr Blomfield is within a limited compass. On the other hand the issues raised under s 68(2) of the Act are important. There is a strong public interest in this Court considering the issues under s 68(2).

Result

[34] The application for an extension of time under r 29A of the Rules is granted. Leave to appeal is also granted in order that issues arising under r 8.46 of the High Court Rules may also be considered on appeal.

[35] Mr Slater is directed to:

(a) file and serve the case on appeal no later than 31 July 2015;

(b) file and serve any affidavits in support of the application for leave to adduce fresh evidence by no later than 14 August 2015;

(c) pay security for costs and any filing fees, as well as apply for a fixture by no later than 28 August 2015.

[36] Immediately following 28 August 2015, the Registrar is to arrange a telephone conference with the Civil List Judge to discuss any outstanding timetabling or other issues. A joint memorandum should be filed by the parties before the conference. One of the issues to be addressed is whether an amicus should be appointed.

[37] Although Mr Slater has been successful in his application, he has been granted an indulgence. Accordingly he must pay the respondent the costs of a standard application on a band A basis and usual disbursements.

Solicitors:
Central Park Legal, Auckland for Respondent