IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-005218
[2016] NZHC 149

BETWEEN	MATTHEW JOHN BLOMFIELD Plaintiff
AND	CAMERON JOHN SLATER Defendant

Hearing: 10 February 2016

Counsel: MG Beresford for Plaintiff
Defendant in person

Judgment: 10 February 2016

JUDGMENT (No 3) OF ASHER J

Solicitors/Counsel:
MG Beresford, Auckland.

Copy to:
Defendant

Introduction

[1] I have before me an application by the plaintiff Matthew Blomfield for orders holding the defendant Cameron Slater in contempt of court, requiring him to remove certain material and stories from his Whale Oil website, and seeking costs. Mr Blomfield asks that Mr Slater be imprisoned for his contempt.

[2] Mr Slater, who appears for himself, opposes the application on the basis that he has not committed any contempt of court.

[3] The proceeding now has a long history. I do not propose traversing it, but it is covered in various judgments including *Slater v Blomfield*[1] and *Blomfield v Slater*.[2] In brief, Mr Slater is being sued for defamation by Mr Blomfield. The alleged defamation relates to 13 articles published on Mr Slater's Whale Oil blog that refer to Mr Blomfield. One such blog post was entitled "Who really ripped off KidsCan?" It was alleged that business interests with which Mr Blomfield was associated had defrauded a charitable trust for children. Mr Blomfield claims that the articles assert that he was a thief, as well as dishonest, dishonourable, a party to fraud, involved in criminal conspiracy, bribery, deceit, perjury, conversion, laying of false complaints, drug dealing and making pornography. He alleges that these assertions are entirely false.

[4] 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.

[5] In my judgment of 17 September 2015, I dealt with a number of detailed allegations of contempt where it was asserted that Mr Slater had published articles and comments in breach of an undertaking not to so publish. I held that number of articles and postings did breach the undertaking and were in contempt of court.[3] I ordered that the material posted in breach of the undertaking be removed.

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1 *Slater v Blomfield* [2014] NZHC 2221, [2014] 3 NZLR 835 at [1]–[16].
2 *Blomfield v Slater* [2015] NZHC 2239 at [1]–[6].
3 *Blomfield v Slater*, above n 2, at [12]–[34] and [62].

[6] The undertaking that forms the basis of the contempt application was an undertaking given to the Manukau District Court on 1 October 2012. At a conference on that date before Judge Charles Blackie, Mr Slater's counsel at the time, Mr Jordan Williams, provided the following oral undertaking on behalf of Mr Slater:[4]

> … that there would be no further publication concerning Mr Blomfield and/or his associates on the blog site or any other blog site under the control of Mr Slater or at the behest of Mr Slater, other than that might relate to information that is already in the public domain via a reputable media source, for example radio, television or radio or weekly newspapers.

[7] Mr Beresford, who presented the argument on behalf of Mr Blomfield, submitted that there were four articles that had been posted that constituted contempt. They were in two categories. The first was a single article that, Mr Beresford submitted, had been published in 2013, extant at the time of the earlier contempt proceeding, and which I in my previous judgment had found to be an article published in contempt and had directed be removed. In the second category there are three articles, all of which are more recent postings involving events that have arisen since proceedings were filed, relating primarily to third parties with whom Mr Blomfield has had an association.

The first article

[8] The first article was posted on Whale Oil on 1 December 2013 and was headed "Oh look I'm making the news again, HOS only tells half the story". I dealt with this article in this way in my judgment of 17 September 2015:[5]

> [20] The fourth complaint concerns the article entitled "Oh look I'm making the news again, HOS only tells half the story" dated 1 December 2013. The article is still online. In it Mr Slater makes derogatory statements about Mr Blomfield. These include, but are not limited to, referring in an oblique manner to Mr Blomfield as a ratbag and a dodgy businessman; claiming Mr Blomfield only pursued the defamation action because he knew it was costing Mr Slater money; and referring to him as a former bankrupt and disbarred director.
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> [21] Mr Slater prefaced his comments by referring to the directive from Judge Blackie cited at [4] above. He appeared to rely on the exception that he could publish material that related to information already available in the

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4 *Blomfield v Slater* DC Manukau CIV-2012-092-001969, 1 October 2012 at [6].

5 *Blomfield v* Slater, above n 2, at [20]–[22].

> public domain. The article itself was a response to a Herald on Sunday article which he considered to not state the whole story.
>
> [22] In my view the exception to the undertaking did not allow Mr Slater to publish defamatory material about Mr Blomfield. Mr Slater did not point to a reputable media source in the public domain that supports his accusations. Although Mr Slater may feel he is being gagged by the undertaking, he agreed to its terms. The article contains a disparaging reference to Mr Blomfield, although Mr Slater appears to be trying to limit this to matters in the public domain. I regard this as a breach of the undertaking. It is a minor contempt because it does not repeat the previous serious defamations, and the derogatory statements are oblique.

[9] At [62] of my judgment I said:

> … I order Mr Slater to remove the material that has been found to be in contempt of Court, and is still present, from Whale Oil as soon as reasonably possible.

[10] Mr Beresford submitted that, save for the deletion of a photograph of Mr Blomfield and the removal of one pejorative adjectival reference, the article had continued to be online unchanged despite my order of 17 September 2015.

[11] Mr Slater contested this. While he accepted that the article remained in place, it was his view that the changes he had made were sufficient to constitute compliance with the directions in the judgment of 17 September 2015. He noted that the information was already in the public domain and that he was responding to an article in the New Zealand Herald. He submitted that he must have a right to be able to reply to material in other publications that refer to his writings. He pointed out that the contempt was characterised in my judgment as "minor".

[12] I will refer in more detail to the wording of the undertaking later in this judgment. There is an exclusion in it for material that is already in the public domain via a reputable media source. The article in question went further than referring to material in the public domain published by a reputable media organisation. As I found in my judgment of 17 September 2015, there were derogatory statements about Mr Blomfield in the article. While it was in part a discussion about a court case, a number of particular references to Mr Blomfield meant that it fell within the definition of a publication "concerning" him, and was not covered by "the already published" exception. My judgment was unambiguous

in finding that article to be in contempt. The fact that I found it to be a "minor" contempt does not qualify the fact of contempt. My order at [62] was unambiguous that such material should be removed.

[13] I find therefore that the article should have been removed by Mr Slater if he was to comply with my judgment. The continued posting of the article even with the two changes constituted a contempt of court. I will return to the consequences of this later in the judgment.

The three articles

[14] The three remaining articles can be summarised briefly as follows. The first article was headed "IRD bribery and fraud scandal: a special investigation ctd". This was an article which is dated 12 August 2015 and is stated to be written by Stephen Cook. It concerns what is described as a "messy bribery scandal", and a particular man, who is not Mr Blomfield, is named as being at the centre of these allegations. I will refer to him as "A". The article sets out a number of short paragraphs which reflect badly on "A". In the third paragraph of the article the following statement is made:

> The allegations form part of the backdrop to a complex web of betrayal and deception implicating liquidators, lawyers, IRD staff and one other man, who for legal reasons cannot be named.

[15] Mr Beresford for Mr Blomfield submitted that this was clearly a reference to Mr Blomfield. Mr Slater did not deny that but he submitted that a reader would have no basis for assuming that the reference was to Mr Blomfield.

[16] The second article also has the same heading and was posted on 13 August 2015. It is on the same subject matter, and is very critical of the persons referred to, including an "unnamed business owner". However, there are five paragraphs which contain veiled references to Mr Blomfield, although his name is not stated. These five paragraphs are as follows:

> The company had tax liabilities of close to $300,000 but successfully negotiated a final settlement of $30,000 after involving a man who claimed at the time he was a "lawyer" with considerable influence over IRD.

> The man – who cannot be named for legal reasons – is not a lawyer, but rather a practised conman who is now facing the real possibility of jail time for his alleged criminal conduct, which is believed to extend far beyond just this one company.
>
> He allegedly told the businessman that for the sum of $30,000 he could significantly reduce the company's tax bill by bribing "liquidators and friends in the police and IRD.
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> The businessman agreed to the deal, meeting the man in a car park where he handed over the sum of $27,000 in $100 bills.
>
> Shortly after handing over the cash the business owner began to have second thoughts. He was unfamiliar with the liquidation process so spoke to friends who warned him "it's going to be a f****** nightmare". The liquidators would be relentless, he was told, in fulfilling their obligations to the creditors and wouldn't let up until they knew where every dollar from the sale of the business went.

[17] The third article is headed "Time to shoot [X] – a special investigation ctd". This article concerns a professional firm and the story concerns an alleged plot to "swindle hundreds of thousands of dollars from Inland Revenue". The person who I have shown as "X" in the title to the article is referred to a number of times. It also contains these two paragraphs which refer to Mr Blomfield but do not name him:

> The most damning allegations have been levelled against a man closely connected with that firm, who took $27,000 from the owner of the company to 'bribe' liquidators and IRD staff and then threatened violence if word every got out about the deal.
>
> The man, who cannot be named for legal reasons, advised the company over its $400,000 tax bill and played an integral part in negotiating the deal, which one group of concerned taxpayers say has compromised the integrity of the New Zealand tax system.

[18] Mr Beresford argues that insofar as the articles refer to Mr Blomfield, even without naming him, they are a breach of the undertaking. He also submits that the articles are referring to "associates" of Mr Blomfield and for that reason they constitute a breach of the explicit terms of the undertaking.

[19] Mr Slater contests this. He submits first that the undertaking should not be construed as applying to these articles or indeed at all. He submits that the undertaking was provided on a short term basis to cover the position up to a settlement conference that was pending. In effect he is submitting that it no longer has any force and effect. Alternatively he contests the interpretation of the

undertaking put forward by Mr Beresford, under which the undertaking extends to articles about third parties, such as the three articles. He relies also on Mr Blomfield not being named.

[20] It seems to me that as a first step it is necessary for me to interpret the meaning of the undertaking.

The words of the undertaking

[21] The undertaking that there will be "no further publication concerning Mr Blomfield and/or his associates …" is not qualified, other than the reservation about information already in the public domain. There is nothing in its words which support the qualification now proposed, which is that the undertaking should not inure past settlement conferences.

[22] There was indeed a settlement conference in the District Court, and there was one also in the High Court. Unfortunately neither was successful. Mr Slater yesterday filed an affidavit of Mr Williams, his lawyer at the time. Mr Williams gave the undertaking at a conference in the court before Judge Blackie. Mr Slater was not present at the time, having suffered a recent bereavement.

[23] Mr Williams states that he did not believe that the undertaking was intended to apply in the event of the parties being unable to resolve matters at a pending judicial settlement conference. He made some comments about Mr Slater's state of mind at the time and his unwillingness to be bound by a long term undertaking. Mr Slater in his oral submissions has reinforced that this was also his perception of the undertaking.

[24] Mr Beresford legitimately objected to the late filing of the affidavit, although he did not suggest that I should not read it. He stated that he had material on his file indicating that Mr Williams, after the judicial settlement conference, still regarded the undertaking as binding.

[25] I do not find Mr Willliams' affidavit to be of assistance in interpreting the undertaking and given that, do not need to consider the material that has been

referred to by Mr Beresford. The background to an undertaking can be relevant to its interpretation. That background must be objectively assessed, just as the commercial background to contracts is objectively assessed when they are interpreted. The individual beliefs and intentions of the parties subjectively expressed cannot assist in that process.

[26] The undertaking is not in any way qualified as to duration and on its face will continue until further order. It is always open to the parties to seek a further order or variation. There is no basis for implying a qualification to it in terms of time or event. I therefore do not accept Mr Slater's submission that the undertaking has no current force.

[27] It is next necessary to consider the meaning of the key words of the undertaking "no further publication concerning Mr Blomfield and/or his associates".

[28] In my view, publications by Mr Slater that were about Mr Blomfield were breaches of the undertaking regardless of whether Mr Blomfield was named. The word used in the undertaking is "concerning" and not "naming". The paragraphs that I have highlighted in the articles that refer to Mr Blomfield but do not name him undoubtedly "concern" him. Moreover, I accept Mr Beresford's submission that given the prolonged campaign that Mr Slater ran against Mr Blomfield, some readers would likely assume that the article was about Mr Blomfield. Those paragraphs are a breach of the undertaking.

[29] Mr Beresford's argument, however, went further than this. He submitted that the total publication offended because the articles concerned Mr Blomfield's "associates". The person "A" named in the first article was a lawyer and close professional associate of Mr Blomfield. The second person "X" is a person in an accountancy firm to whom Mr Blomfield was introduced in early 2014, and who works in a similar area to Mr Blomfield. It is Mr Beresford's argument that both "A" and "X" are associates and that any publication about them is a breach of the undertaking.

[30] Mr Beresford submitted that "associates" meant friends, family or colleagues of Mr Blomfield, no matter how close, or wherever the association began. It would be surprising if that interpretation were correct, as it would prohibit Mr Slater from writing about a very large group of people, simply on the random basis that they might know Mr Blomfield. Mr Beresford is unapologetic and says that the undertaking was intended to gag Mr Slater.

[31] The "associates" of a person include a very broad spectrum of acquaintances, and not just close friends or advisors. It is a word with a broad dictionary definition.[6] I accept Mr Beresford's submission that, on the face of the word, "A" and "X" might be fairly be called "associates" of Mr Blomfield. "A" perhaps could be seen as a close working associate and "X" a more distant working associate. Indeed, it could be expected that Mr Blomfield would have hundreds of such associates, being persons with whom he has developed an association in the course of his lifetime, and with whom he might still have contact.

[32] Undertakings as to damages are enforceable because they are received on faith that Court sanctions will follow breach. They have the same force as an injunction made by the Court.[7] Undertakings therefore are treated as having the same effect as Court orders and must be seen as relating back to the subject matter of the proceedings.[8] As stated in *Malavez v Knox*:[9]

> … the words … must be read against the background mentioned and with the ordinary meaning which I think they would be understood by commercial men ...

[33] Given that there is no clear cut-off in terms of the degree of contact required to make a person an associate there is ambiguity in the phrase "and associates". To interpret the phrase in the undertaking it is necessary to consider the background to the proceeding and the issues raised in the pleadings. It would be the same if it was an order that was being interpreted.

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6 Tony Deverson and Graeme Kennedy (eds) *The New Zealand Oxford Dictionary* (Oxford University Press, New Zealand, 2005).

7 *Halsbury's Laws of England* (4th ed, reissue, 2012, online ed) vol 22 Contempt at [75]; *Malevez v Knox* [1977] 1 NZLR 463 (SC) at 467.

8 *Queen Elizabeth the Second National Trust v Netherland Holdings Ltd* [2014] NZHC 291 at [28].

9 *Malevez v Knox* [1977] 1 NZLR 463 (SC) at 467.

[34] The background is that on 7 October 2012 Mr Blomfield issued a proceeding against Mr Slater, based on defamatory comments he claimed Mr Slater made about him concerning his various business activities prior to October 2012 and in particular in relation to one specific business. These all occurred prior to the issue of proceedings. It is not surprising that the undertaking, in addition to prohibiting publication about Mr Blomfield, referred also to his associates given the fact that through the numerous and detailed postings on the Whale Oil blog site specific associates of Mr Blomfield had been identified in a pejorative fashion.

[35] The inherent contempt jurisdiction of the Court must be exercised with caution. To make an order concerning third parties to the proceedings who were involved in events that had nothing to do with the proceedings goes beyond what the proceedings warranted. In my view, the undertaking should not be construed as applying to persons and events which had nothing to do with the proceeding. This is particularly so where there are specific "associates" to whom the undertaking validly and obviously applies.

[36] Thus, I do not accept Mr Beresford's submission that a broad interpretation of the words "his associates" should be adopted. I see the reference to "associates" in the undertaking as being to associates of Mr Blomfield who were connected to the subject matter of the defamatory articles referred to in the statement of claim.

[37] "A" and "X" are not persons referred to in the defamation proceedings and had nothing to do with the events covered in those proceedings. Their actions that were discussed in the articles were actions which took place after the proceedings were filed. In my view, neither "A" nor "X" nor any other third party referred to in those articles fall within the definition of "his associates" in the undertaking.

Conclusion on the three articles

[38] Thus, while I accept that the three articles are in breach of the undertaking insofar as they refer, without naming him, to Mr Blomfield, I do not accept that the balance of the articles referring to actions of third parties constitute a breach.

[39] Accordingly, Mr Slater should remove the paragraphs that I have identified that refer, without naming him, to Mr Blomfield.[10] He is not, however, required to remove the entire articles insofar as they relate to third party events that arose after the proceedings were issued.

Outcome

[40] It follows from these findings that Mr Slater may be in contempt of Court in relation to some of the paragraphs in the three articles. Certainly, those specific paragraphs that I have identified must be removed as they are in breach of the undertaking. Also, for the reasons I gave earlier, the first article should be removed from the Whale Oil blog site.

[41] I consider it would be premature to decide on what appropriate penalty for contempt (if any) should be imposed. I have only now set out my interpretation of the meaning of the undertaking, which was clearly a matter of contention between the parties. I therefore propose to adjourn this application until next week to give Mr Slater an opportunity to take action to make his publications comply with the undertaking as I have interpreted it. I will then, at that next hearing, give a final judgment on this contempt application. I will also, at that hearing, hear the parties on the question of costs.

[42] I record that Mr Slater has in this hearing indicated his intention to apply again to set aside the undertaking. Although he served an application to that effect, it was ultimately not properly filed and he accepts it cannot be heard at this point.

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Asher J

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[10] See the paragraphs of the articles quoted at [14], [16] and [17].