IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2013-485-009708
[2016] NZHC 871

UNDER	the Law of Contract, the Contractual Remedies Act 1979 and the Defamation Act 1992
IN THE MATTER OF	a breach of contract and defamatory statements
BETWEEN	HARRY MEMELINK Plaintiff
AND	MALCOLM GRINDLAY First Defendant
	ROBYN GRINDLAY Second Defendant

Hearing: 2 May 2016

Counsel: Plaintiff in person
J D Haig and K I Jefferies for Second Defendant

Judgment: 3 May 2016

JUDGMENT OF COLLINS J

Introduction

[1] On 2 May 2016 I heard Mrs Grindlay's application to strike out Mr Memelink's proceeding because of his consistent failure to comply with timetable orders.

[2] This judgment explains why I have decided to adjourn the proceeding, and impose strict terms on the adjournment in the form of an "unless" order.[1] Failure to comply with the new timetable orders will result in the proceeding being struck out.

[1] An "unless" order is an order requiring a party to take an interlocutory step by a specified date.

Background

The dispute

[3] The proceeding relates to a contractual dispute between Mr Memelink and Mrs Grindlay. Mr Memelink also has a claim in defamation against Mrs Grindlay.

[4] Mr Memelink alleges that in April 2013 he entered into a contract with Mr and Mrs Grindlay for the sale and purchase of his shares in a company called D M Recyclink Ltd (DMR). The purchase price was $200,000 with interest calculated at a rate of 6.5 per cent per annum on any unpaid amount from the time it was due under the contract. The Grindlays paid $15,000 of the deposit on 12 April 2013 but defaulted on further payments.

[5] Mrs Grindlay denies entering into the alleged contract. The Grindlays have also on previous occasion purported to have cancelled the agreement.[2]

[6] The defamation claim relates to a Facebook post in November 2013 where Mrs Grindlay alleged Mr Memelink rips people off, is a liar and had threatened her. Mrs Grindlay admits making the comments but states that they represent the truth.

Previous court decisions

[7] On 19 February 2014, a default judgment was entered in favour of Mr Memelink. As a consequence he was entitled to recover the sum of $185,000 plus 6.5 per cent per annum interest on any portion not paid after judgment, and costs. On 12 March 2014, a charging order on 79 Karamu Crescent, Wainuiomata, Wellington, was issued against the Grindlays.

[8] The default judgment was subsequently set aside by Clifford J on 22 August 2014. This was because Mr Memelink's default judgment was not entered strictly in terms of his pleading.[3]

If the party fails to take that step, the proceeding will be dismissed or stayed or the defence struck out (as the case may be), without the need for a further application to the court: *SM v LFDB* [2014] NZCA 326, [2014] 3 NZLR 494.

2 Case management conference 9 December 2014 in front of Associate Judge Smith.

3 *Memelink v Grindlay* [2014] NZHC 2009 at [21].

[9] On 10 December 2014, Associate Judge Smith declared the pleadings were not in a satisfactory state and outlined deficiencies for both parties to address.

[10] On 23 April 2015, Associate Judge Smith examined deficiencies in the Grindlays' amended statement of defence and issued further directions for the filing of interlocutory applications. He also made an order removing Mr Memelink's lawyer from the proceeding.

[11] On 13 July 2015, Associate Judge Smith ordered that the proceeding was to continue only against Mrs Grindlay because Mr Grindlay had been adjudicated bankrupt.

[12] Associate Judge Smith made final timetable directions on 24 September 2015. Mr Memelink complied with the direction to file a third amended statement of claim by 15 October 2015. A statement of defence was filed in response by Mrs Grindlay on 30 October 2015.

[13] Mr Memelink subsequently failed to serve:

(1) a reply to any affirmative allegations in Mrs Grindlay's amended defence by 12 November 2015;

(2) briefs of evidence and an index of documents, including a common bundle of documents for trial by 17 December 2015;

(3) a common bundle of documents for trial by 12 February 2016;

(4) a chronology by 26 February 2016; and

(5) a synopsis of opening submissions three days before the trial.

[14] Mr Memelink in a memorandum dated 11 April 2016 explained his reasons for failing to comply with the timetabling orders.

Strike-out application

[15] Mrs Grindlay applied to strike out Mr Memelink's claim in an interlocutory application on 18 April 2016, which was amended on 27 April 2016.

[16] The application to strike out relies on rr 15.1 and 15.2 of the High Court Rules. At the hearing, Mr Haig, counsel for Mrs Grindlay, delivered a synopsis of his submissions. The primary submission was that Mr Memelink had failed to prosecute his claim through non-compliance with the timetable orders. In addition, Mr Memelink's actions were alleged to have caused prejudice to Mrs Grindlay because she remains subject to the proceeding and is subject to the charging order over her residential property. Mr Haig also alleged there was no reasonably arguable cause of action because Mrs Grindlay did not actually sign the contract and therefore should not be liable for any of the payment obligations asserted by Mr Memelink.

[17] In the alternative, Mrs Grindlay requested an "unless" order and Mr Memelink to pay security for costs. The unless order suggested would direct Mr Memelink to put forward briefs of evidence in two weeks, absent which, the proceeding will be struck out.

[18] Pursuant to r 5.45, security for costs may be ordered if:[4]

> … [t]here is reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the plaintiff's proceeding.

[19] Mrs Grindlay submits that the threshold requirement under r 5.45 for security for costs is met due to Mr Memelink being engaged in substantial volumes of civil litigation, including as judgment debtor in bankruptcy proceedings. In addition, Mr Haig noted Mr Memelink has failed to pay costs awards in the past.

Mr Memelink's case

[20] Mr Memelink opposes the orders sought by Mrs Grindlay. He relies on his memorandum dated 11 April 2016 outlining the reasons for delay, including:

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4 High Court Rules, r 5.45(1)(b).

(1) unforeseen family related deaths;

(2) ongoing treatment;

(3) a hospital incident January 2016;

(4) a number of summary judgments and ongoing cases in both the District and High Courts;

(5) delay getting material from the Official Assignee and the amount of material regarding Mr Grindlay's bankruptcy; and

(6) an "outstanding false police complaint" made by Mr Jefferies secretary causing significant stress.

[21] In his notice of opposition Mr Memelink makes the following points:

(1) Mrs Grindlay was contractually and personally connected to "the purchase, takeover running and subsequent conversion of DMR".

(2) There is "substantial evidence" proving Mr Memelink's claim.

(3) Mr Jefferies, acting for Mrs Grindlay has, on many occasions, caused ongoing issues and delays with the result that Mr Memelink has had to forego counsel assistance.

(4) The Grindlays and their counsel are responsible for current cases against Mr Memelink.

[22] At the hearing, Mr Memelink's "McKenzie friend" Ms Terpstra, highlighted the difficulties of Mr Memelink being without a lawyer and apologised for the failure to comply with timetabling orders on Mr Memelink's behalf. She also noted that hearing fees had been paid to the Court.

Outcome

[23] Striking out a proceeding is a step of last resort and the Court normally take a benevolent approach to a party's failure to comply with interlocutory orders.[5] The Supreme Court in *Couch v Attorney-General* has noted that the strike-out jurisdiction is to be exercised sparingly and only in clear cases.[6] The strike-out threshold is deliberately set high.

[24] The three main requirements for a dismissal under r 15.2 due to a failure to prosecute the plaintiff's proceeding are well settled. The principles were set out by Eichelbaum CJ in *Lovie v Medical Assurance Society New Zealand Ltd*:[7]

> The applicant must show the plaintiff has been guilty of inordinate delay, that such delay is inexcusable, and that it has seriously prejudiced the defendant.

[25] There are three reasons why I am satisfied that a strike-out order would be inappropriate in these circumstances.

[26] First, I am not convinced that Mr Memelink's cause of action is untenable.[8] At the hearing, Mr Memelink put forward numerous issues with Mrs Grindlay's actions in relation to the purchase of DMR. There is no evidence to suggest that Mrs Grindlay was not party to the agreement, even if it is accepted that she did not sign the contract. The defamation claim also requires exploration.

[27] Second, the Grindlays and their counsel have failed to comply with court orders on occasions. In particular, the failure to file a statement of defence led to the default judgment for Mr Memelink which was subsequently set aside. In addition, the statement of defence to Mr Memelink's first amended statement of claim was filed nearly a month after Associate Judge Smith's directions.[9] There have been delays from both parties throughout this proceeding.

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5 *Lees Trading Co Ltd v Loveday* HC Christchurch C70/86, 3 June 1998.

6 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33] per Elias CJ and Anderson J.

7 *Lovie v Medical Assurance Society New Zealand Ltd* [1992] 2 NZLR 244 (HC) at 248.

8 In *Couch v Attorney-General* Elias CJ and Anderson J at [33] said: "it is inappropriate to strike out a claim summarily unless the court can be certain that it cannot succeed".

9 The statement of defence to the first amended statement of claim was filed on 23 February 2015. Associate Judge Smith had directed the statement of defence to be filed by 27 January 2015.

[28] Third, the high threshold for a strike-out order has not been met in these circumstances. Although Mr Memelink was late to put forward reasons for his actions, the delay is not wholly inexcusable and he has acknowledged the prejudice caused by his actions.

[29] Nevertheless, Mr Memelink's actions have placed a massive strain on court resources and have caused prejudice to Mrs Grindlay. A three day fixture has had to be adjourned. In these circumstances, an "unless order" is justified.[10] In making this order, I note the principles set out by the Court of Appeal in *SM v LFDB*,[11] including that the order is one of last resort and the requirement for clear terms. Failure to comply with the following timetable orders will result in the proceeding being struck out.

[30] I make the following timetable orders:

(1) Mr Memelink is to file and serve any amended statement of claim by **16 May 2016**.

(2) Mrs Grindlay is to file and serve any amended statement of defence to Mr Memelink's amended statement of claim, by **30 May 2016**. By the same date, Mrs Grindlay is to file and serve a verified supplementary list of documents, listing any additional documents relevant to any new allegations which may be included in Mr Memelink's amended statement of claim.

(3) Mr Memelink is to file and serve a reply to any affirmative allegations in Mrs Grindlay's amended defence by **13 June 2016**.

(4) The close of pleadings date is fixed at **27 June 2016**.

(5) Mr Memelink is to serve briefs of evidence, and an index of documents he proposes to include in a common bundle of documents for the hearing, by **11 July 2016**.

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10 High Court Rules, r 7.48(2).
11 *SM v LFDB*, above n 1, at [29].

(6) Mrs Grindlay is to serve her briefs of evidence, and an index of any additional documents she requires to have included in the common bundle of documents for the hearing by **25 July 2016**.

(7) Mr Memelink is to file and serve an indexed and paginated common bundle of documents for the hearing, by **8 August 2016**.

(8) Mr Memelink is to file and serve his chronology, complying with r 9.9(1) and (2), by **22 August 2016**.

(9) Mrs Grindlay is to file and serve her chronology, complying with r 9.9(3) and (4) by **5 September 2016**.

(10) A new hearing date and allocation of one day is set for **26 September 2016**.

(11) Mr Memelink is to file and serve his synopsis of opening submissions **no later than three working days** before the hearing date.

[31] At the hearing on 2 May 2016, I asked both parties how many days would be required. Mr Memelink suggested a half day and Mr Haig said three days. I will take a cautious approach. Three days have been allocated.

[32] Finally, I have refused Mrs Grindlay's claim for security for costs. This is on the basis that hearing fees were in fact paid and there is insufficient evidence to believe Mr Memelink will be unable to pay the costs if he is unsuccessful.

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D B Collins J

Solicitors:
Jefferies Law, Wellington for Second Defendant