IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2015-092-1026
[2016] NZHC 3006

UNDER	the Defamation Act 1992 section 35
BETWEEN	MELISSA JEAN OPAI Plaintiff
AND	LAURIE CULPAN First Defendant
	ATTORNEY-GENERAL (sued on behalf of the COMMISSIONER OF POLICE) Second Defendant

Hearing:	On the papers
Counsel:	N W Woods and P Amaranathan for Plaintiff H Rennie QC for First Defendant M McClelland for Second Defendant
Judgment:	13 December 2016

JUDGMENT (No.3) OF ASSOCIATE JUDGE R M BELL
[Application by media for access to court file]

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*This judgment was delivered by me on **13 December 2016** at **3:00pm***
pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Solicitors:
Rice Craig (N W Woods/P Amaanathan), Papakura, for Plaintiff
Thomas Dewar Sziranyi Lettes (D Gerard Dewar), Wellington, for First Defendant
Crown Law Office (A Todd), Wellington, for Second Defendant

Copy for:
Hugh Rennie QC, Wellington, for First Defendant
M McClelland QC, Wellington, for Second Defendant
New Zealand Police (N Ridder0, Wellington, for Commissioner of Police

Kelly Dennett, Fairfax Media, Auckland

[1] Kelly Dennett of Fairfax Media has applied for access to documents in this proceeding. The particular documents are the "statement of claim, ruling in relation to application for costs and discovery". The reasons given are:

> The case involves a senior police officer and some aspects of this case have already been published on-line by the way of formal rulings of the court. Neither of the parties has sought name suppression. The documents will allow Fairfax to see if it should dedicate resources to follow up the case.

[2] The request was made on 31 October 2016. The parties made prompt submissions in response. I have deferred dealing with the request until delivery of my reserved decisions on the interlocutory applications heard on 6 September 2016 and 31 October 2016.

[3] The plaintiff consents to the request. The first defendant proposes that access to court documents be limited. The second defendant agrees that copies of decisions made in this proceeding are in the public domain and can be made available but submits that access to pleadings should be declined.

[4] This is a workplace defamation proceeding. It is still in its interlocutory stages. The pleadings are not yet complete. As a result of my decision on the pleadings, the plaintiff and the Attorney-General will be required to file and serve amended pleadings.

[5] Associate Judge Sargisson's decision on jurisdiction,[1] and my decisions on the pleadings and discovery[2] are part of the formal court record. Under r 3.5, Ms Dennett is entitled to access as of right unless the court directs otherwise. There are no reasons to direct otherwise.

[6] As for copies of the pleadings, the request comes under r 3.13 of the High Court Rules 2016. The case has not yet reached its substantive hearing stage. The court considers the matters under r 3.16 of the High Court Rules:

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1 *Opai v Culpan* [2015] NZHC 2010.
2 *Opai v Culpan No.1* [2016] NZHC 3004 and *Opai v Culpan No.2* [2016] NZHC 3005.

3.16 Matters to be taken into account

In determining an application under rule 3.13, or a request for permission under rule 3.9, or the determination of an objection under that rule, the Judge or Registrar must consider the nature of, and the reasons for, the application or request and take into account each of the following matters that is relevant to the application, request, or objection:

(a) the orderly and fair administration of justice:

(b) the protection of confidentiality, privacy interests (including those of children and other vulnerable members of the community), and any privilege held by, or available to, any person:

(c) the principle of open justice, namely, encouraging fair and accurate reporting of, and comment on, court hearings and decisions:

(d) the freedom to seek, receive, and impart information:

(e) whether a document to which the application or request relates is subject to any restriction under rule 3.12:

(f) any other matter that the Judge or Registrar thinks just.

[7] The reason for the request is to assess whether this proceeding is worth reporting. That is a legitimate reason for requesting access. It is not the function of the court to tell the news media what is and is not newsworthy. That is for the media to assess.

[8] While Ms Dennett has not said so, no doubt she would invoke the principle of open justice under r 3.16(c). It is necessary, however, to note that the law places limits on the reporting of legal proceedings before they reach the substantive hearing stage. That can be seen in the ways in which qualified privilege applies to the report of court proceedings. Schedule 1, Part 1 of the Defamation Act 1992 includes the following publications as subject to qualified privilege:

(5) The publication of a fair and accurate report of the pleadings of the parties in any proceedings before any court in New Zealand, at any time after:

(a) in the case of proceedings before the High Court, a *praecipe* has been filed in those proceedings:

(b) in the case of proceedings before a District Court, the filing of an application for a fixture for the hearing of those proceedings.

(6) The publication of a fair and accurate report of the proceedings of any court in New Zealand (whether those proceedings are preliminary, interlocutory, or final, and whether in open court or not), or of the result of those proceedings.

The point to note is that qualified privilege does not apply to a report of pleadings until the substantive hearing stage is approaching.[3] The statute uses the old terminology "praecipe". Under current practice that is the close of pleadings date.[4] News media cannot have a proper interest in reporting the pleadings to a proceeding before the close of pleadings date, as qualified privilege for defamation will not attach to any report they may make.

[9] In a similar way, on requests for access, the courts have recognised that it is appropriate to limit access to the court file during interlocutory stages. The basis for that is the orderly and fair administration of justice. It allows the parties to prepare their cases up to the close of pleadings date outside the public gaze. That provides greater assurance that the parties will attend diligently and conscientiously to discovery. They will not be inhibited from making comprehensive disclosure of documents from fear of outsiders viewing their affidavits. It also allows parties to explore settlement ahead of a defended hearing.

[10] In this case there are also additional privacy interests that require recognition. This proceeding arises out of employment disputes which involve other staff in the plaintiff's workplace. Some of them are identified in the documents. It is generally unhelpful to broadcast their involvement in the dispute between the plaintiff and her employer.

[11] Mr Rennie QC for the first defendant notes that there is a common practice that disclosure in a defamation case before hearing is not normally made, because a

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3 See also *R Lucas & Son (Nelson Mail) Ltd v O'Brien* [1978] 2 NZLR 289 (CA).

4 High Court Rules, r 7.6.

plaintiff invariably seeks to restrain disclosure ahead of trial, lest the disclosure of statements adverse to their interest is extended. Notwithstanding that, the plaintiff seeks disclosure on the grounds that allegations of dysfunction in the Police should be reported. Mr Rennie advises that the plaintiff may wish to reconsider her position.

[12] While the Police is a public body, this case is essentially an employment dispute. There are no pressing reasons in the circumstances of this case that require a departure from the normal practice of not allowing access to documents on the court file (other than copies of judgments) ahead of the substantive hearing stage.

[13] My decision is that Ms Dennett may have copies of the decisions I have referred to, but that she should not have access to other documents on the court file before the substantive hearing stage. Once the case reaches its substantive hearing stage, she may have access to the final pleadings (but not earlier versions).

[14] The Registrar is to advise Ms Dennett when the case reaches its close of pleadings date.

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Associate Judge R M Bell