IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2012-404-001701
[2016] NZHC 3131

BETWEEN	IAN WISHART Plaintiff
AND	CHRISTOPHER ROBERT MURRAY First Defendant
	KERRI MAREE MURRAY Second Defendant
	DIMENSION DATA NEW ZEALAND LIMITED Third Defendant

Hearing:	4 August 2016
Appearances:	Plaintiff in person D M Salmon and E D Nilsson for First and Second Defendants H B Rennie QC for Third Defendants
Judgment:	19 December 2016

JUDGMENT OF COURTNEY J
[Application to set aside stay]

This judgment was delivered by Justice Courtney
on 19 December 2016 at 2.30 pm
pursuant to R 11.5 of the High Court Rules

Registrar / Deputy Registrar

Date……..

Introduction

[1] In this proceeding Ian Wishart sues Christopher Murray and Kerri Murray (the first and second defendants) and Dimension Data New Zealand Ltd (DDNZ) (the third defendant) in defamation. The claims arise from tweets made by Mr Murray and a Facebook page created by him on which he, Mrs Murray and various non-parties posted statements, all of which Mr Wishart says were defamatory of him.

[2] Mr Wishart has been largely unrepresented throughout. His efforts to produce a coherent statement of claim that complies with the High Court Rules, the Defamation Act 1992 and previous directions of this Court and the Court of Appeal have caused significant inconvenience and cost to the defendants. Last year I stayed the proceeding until Mr Wishart had obtained an order setting aside the stay on the ground that he had produced a draft fifth amended statement of claim (ASOC5) that complied with my judgment of 22 December 2015.[1] Mr Wishart has now filed a draft ASOC5 together with an application to set aside the stay. The defendants oppose the application.

Effect of my order

[3] Before I turn to consider the draft ASOC5 I deal with the submission made by Mr Rennie QC, for DDNZ, that my order staying the proceedings on terms operates as an "unless order" with the result that if the draft ASOC5 is not fully compliant the stay must remain permanent.

[4] The principles on which an unless order may be granted and the effect of such an order are summarised in *SM v LFDB*:[2]

> (a) As an unless order is an order of last resort, it is properly made only where there is a history of failure to comply with earlier orders.
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> (b) An unless order should be clear as to its terms. That is, it should specify clearly what is to be done, by when and what is the sanction

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1 *Wishart v Murray* [2015] NZHC 3363, [2016] 2 NZLR 565. Initially the requirement for the filing of a compliant ASOC5 was by 31 March 2016 but I subsequently varied that date to 24 June 2016.

2 *SM v LFDB* [2014] NZCA 326, [2014] 3 NZLR 494.

for non-compliance. That sanction should be proportionate to the default.

(c) The sanction will apply without further order if the party in default does not comply with the order by the time specified. However, the party in default may seek relief by application to the Court.

(d) Justice may require that the party in default be relieved of the consequences of the unless order where the Court is satisfied that the breach resulted from something for which that party should not be held responsible. The party should not assume that belated compliance will suffice.

(e) Where the unless order has been deliberately breached – that is, flouted – it is difficult to conceive of any situation where the interests of justice would require granting the flouter relief from the sanction imposed, notwithstanding belated compliance with the order.

(f) In deciding whether or not to excuse breach of an unless order the question for the Judge is: what does justice demand in the circumstances of this case? Considerations in answering that question include:

(i) The public interest in ensuring that justice is administered without unnecessary delays and costs.

(ii) The interests of the injured party, in particular in terms of delay and wasted cost.

(iii) Any injustice to the defaulting party, although that consideration is likely to carry much less weight in the circumstances than considerations (i) and (ii).

[5] The rationale for an unless order was explained in the UK Court of Appeal in *Re Jokai Tea Holding Ltd*:[3]

> The basis of the principle is that orders of the court must be obeyed and that a litigant who deliberately and without proper excuse disobeys such an order is not allowed to proceed. The rationale of such a penalty being that it is contumelious to flout the order of court, if a party can explain convincingly that outside circumstances account for the failure to obey the peremptory order and that there was no deliberate flouting of the court's order, his conduct is not contumelious and therefore the consequences of contumely do not flow.

[6] In this case the stay order was made under r 15.1 of the High Court Rules which allows the granting of a stay on such conditions "as are considered just". In comparison, the Court of Appeal affirmed in *SM v LFBD* that the power to make an

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[3] *Re Jokai Tea Holding Ltd* [1992] 1 WLR 1196 (EWCA Civ) at 1202 cited with approval in *Anderson v Mainland Beverages Ltd* CA 137/04, 14 September 2005 at [44].

unless order arises under r 7.48.[4] Moreover, the order was not made on the basis of a history of deliberate failure to comply with earlier orders.

[7] I therefore do not accept that the stay was in the form of an unless order. In any event, whether the statement of claim is compliant must, obviously, be subject to the usual di minimus rule. If it is substantially compliant then I will consider it appropriate to lift the stay.

The draft ASOC5

[8] The draft ASOC5 pleads eight causes of action.

[9] The first three causes of action are against Mr Murray as the first defendant:

(a) The first cause of action is based on the tweets and the information statement pleaded as a single publication;

(b) The second cause of action is based on the information statement and six specified Facebook posts by Mr Murray himself pleaded as a single publication;

(c) The third cause of action is based on ten specified non-party posts pleaded as a single publication;

[10] The fourth cause of action is pleaded only against Mrs Murray as the second defendant and is based on specified Facebook posts that Mrs Murray herself made;

[11] The fifth – eighth causes of action are all directed towards DDNZ as the third defendant:

(a) The sixth cause of action alleges vicarious liability for the information statement and Facebook posts which are the subject of the second cause of action;

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4 *SM v LFBD*, above at n 2, at [29].

(b) The seventh cause of action alleges vicarious liability for the non-party posts;

(c) The eighth cause of action alleges direct liability through the endorsement and/or adoption by DDNZ of the information statement and post by linking the Facebook page from its intranet.

[12] Because of the number of statements in issue which appeared either as tweets or as posts on the Facebook page Mr Wishart has sought to treat groups of them as single publications for pleading purposes, even though, strictly, they would usually be treated as separate publications and be required to be pleaded separately.

[13] At [90] of my decision of 22 December 2015 I gave Mr Wishart direction regarding some aspects of his proposed pleading. These included that:

(a) Mr Wishart is entitled to plead each of the following groups of online posts as a single publication and single cause of action:

(i) the tweets authored by Mr Murray;

(ii) the specified Facebook posts made by Mr Murray; and

(iii) the thread of third party comments posted on Facebook between 3.39 pm and 3.59 pm on 28 June 2011, although he must make it clear that he does not plead the particularised posts as being "representative" of any other alleged defamatory posts.

Multiple statements pleaded as a single publication

First cause of action

[14] The first objection to the draft ASOC5 relates to the pleading at paragraph 13 in which Mr Wishart pleads the tweets and information statement together as a single publication ("the Facebook Tweets"). Mr Rennie QC objected to the pleading at

paragraph 13 on the basis that the pleading of the tweets together with the information statement as a single publication is contrary to my summary at [90](a)(i).

[15] I agree that [90] I does not refer to the information statement. But nor does it preclude it and in its decision the Court of Appeal considered that permissible on the basis that the tweets were closely connected (via hyperlink) to the information statement.[5] In the circumstances I do not treat paragraph 13 as non-compliant on that ground.

Second cause of action

[16] The second objection was made in relation to paragraph 18 of the draft ASOC5. Mr Salmon, for the first and second defendants, submitted that the information statement was substantially amended on 29 June 2011 so that it was not possible for readers of the Facebook page to have read the same information statement and all seven of the pleaded posts together. It is the amended information statement that was pleaded in both in ASOC4 and the draft ASOC5. This point appears not to have emerged at the previous hearing.

[17] I do not agree that the amendment to the information sheet was substantial; it added only the following sentence: "I am trying to organize a boycott of this book and until such time as it is pulled from the shelves, all other Ian Wishart books and all books by the publisher". The remainder of the information statement, which contained the words said by Mr Wishart to have defamed him, was unchanged. Mr Salmon is, however, correct that readers seeing the 28 June 2011 post would have read it in conjunction with the original information statement rather than the amended information statement that is pleaded.

[18] I therefore agree that the post of 28 June 2011 cannot be pleaded in conjunction with information statement in the form pleaded. That post would need to be pleaded alone. The proper course would be for the second cause of action to be split so that the 28 June 2011 post is pleaded as a single publication and the amended

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5 *Murray v Wishart* [2014] NZCA 461, [2014] 3 NZLR 722, at [25]–[32].

information statement and 4 July 2011 posts are pleaded together as a separate publication.

[19] Mr Salmon also objected to paragraph 18 on the basis that the seven posts pleaded could not have been read together; three were posted on 28 August 2011 and the remaining four on 4 July 2011. Moreover, for the 17 days that the Facebook page was live some 250,000 comments were posted. As a result, it is not tenable to suggest that the seven pleaded posts exclusively comprise the relevant content of the alleged publication.

[20] Mr Salmon's complaint was that Mr Wishart had "cherry-picked" individual posts, making it difficult for the defendants to plead defences such as honest opinion which may be sensitive to context. He essentially submitted that Mr Wishart has misunderstood what I said at [90] and that the intervening posts must be pleaded so that comments, including responses from Mr Wishart himself could be taken into account in settling the tenable meanings.

[21] For this submission, Mr Salmon relied on the statement in *McGrath v Dawkins*, which I cited in my 22 December 2015 judgment in relation to the importance of the context and the solution of pleading an entire thread as a single publication even though it might comprise statements by different authors:[6]

> The only practicable course … is to adopt the general approach of treating the final thread as a publication for context and meaning purposes (albeit with several authors of distinct parts) while carefully avoiding the injustice of holding an individual liable for any material changes in the meaning of his contribution brought about by later contributions from others.

[22] Mr Salmon also relied on the statement in *Gatley on Libel and Slander* that a plaintiff:[7]

> Cannot confine the material of which he complains to an extract from a single publication when it is obvious that no reasonable reader would have read that extract in isolation.

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6 *McGrath v Dawkins* [2012] EWHC B3 (QB) at [53].

7 Alastair Mullis and Richard Parkes (ed) *Gatley on Libel and Slander* (12th ed Sweet & Maxwell, London, 2013) at [26.12].

[23] It is, of course, right that context may be significant to the meaning of the words complained of. But neither of the passages that Mr Salmon relies on purport to lay down any rigid rule. In particular, *McGrath v Dawkins* identifies the pleading of an entire thread as a general approach. Every case must turn on its facts. In relation to this part of the pleading, there is an obvious difficulty with that approach; Mr Wishart asserted (without challenge) that he does not have access to the full history of the Facebook page posts, not even his own posts.

[24] I consider that, in the circumstances of this case, Mr Wishart is entitled to plead the posts said to be defamatory without intervening posts. It is for the defendants, if they wish, to either disclose the files they hold to enable the other posts to be pleaded or to plead the context they rely on.

Third cause of action

[25] Mr Salmon and Mr Wishart make the same complaint and response respectively in relation to the third statement of claim. I make the same direction.

Republication of the first defendant's statements by non-parties

[26] In ASOC4 Mr Wishart pleaded that a statement posted by a non-party, Prue Fothergill, on the Facebook page of Paper Plus on 28 June 2011 was the republication of the (amended) information statement and a natural and probable consequence of that statement.

[27] In the first and second causes of action (paragraphs 17.3 and 23 and schedule 1) of the draft ASOC5 Mr Wishart has pleaded that the "Facebook Tweets" (i.e. the amended information statement and tweets combined) and the amended information statement alone were republished by non-parties on the Facebook pages of Paper Plus, The Warehouse, Might Ape, Whitcoulls and Booksellers NZ and that the republications were the natural and probable consequence of the original statements. One of the non-parties was Prue Fothergill, whose post had been pleaded in ASOC4. The other posts were new.

[28] Mr Salmon submitted that the allegations of republication were untenable because they were not, in fact, republications and, in any event, were now time-barred.

[29] Mr Salmon argued that the amended information statement alone could not form the basis of a pleading of republication because it is no longer being sued on alone, having being abandoned as a stand-alone cause of action after ASOC4. That is not correct. ASOC4 has not been struck out, merely stayed and the draft ASOC5 is just a draft. As a result I do not think it is right to say that reliance on the information statement as a stand-alone cause of action has been abandoned. It is, however, true that the pleading of republication in the draft ASOC5 relates only to posts made on 28 June 2011. Because the information statement in the form pleaded was not published until 29 June 2011, it follows that the posts could not be republications of that statement.

[30] At [90](f) of my December 2015 judgment I directed that any amended pleading must not introduce a fresh cause of action. Apart from the allegation regarding the Prue Fothergill post, the allegations of republication are new. Mr Salmon asserts that they are time-barred. In schedule 1 to the draft ASOC5 Mr Wishart has pleaded that the non-party republications were accessible as at 21 June 2016, suggesting reliance on the "multiple publication rule" that I discussed at [74]–[76] of my 2015 judgment.

[31] That approach was described by Chisholm and Gendall JJ in *Solicitor General v Siemer* as being that publication occurs whenever the offending statement is downloaded and read and, slightly differently by the Court of Appeal in *Solicitor General v Siemer* as being that there is a new publication every time access to the item is permitted. Mr Wishart's pleading implicitly adopts the Supreme Court's description in a literal sense. But even on that description there must actually have been access by a person other than the plaintiff in order to show publication for the purposes of defamation. I agree that the non-party republications pleaded are time-barred, other than the Prue Fothergill post (which is untenable for the reason already discussed).

Lack of particulars

[32] Mr Salmon raised several concerns about the level of particularisation of the draft ASOC5.

Complete threads not pleaded

[33] The first was the lack of complete threads being pleaded. I have already dealt with that complaint; the current circumstances of the case mean that complete threads are not required to be pleaded.

Times, dates and extent of publication not pleaded

[34] The second point was that the dates, times and extent of the alleged publication were not pleaded. I accept Mr Wishart's response that the pleading of the times at which the tweets and Facebook page statements were posted and the period for which the Facebook page was live is sufficient particularisation of the times and dates of publication.

[35] I am satisfied that the pleading at paragraph 8 of non-party posts that included the ten that were set out in full constitutes a pleading of publication to, at least, those non-parties who had posted statements themselves, since they could not have done so without visiting the Facebook page on which the first defendant had posted statements. The actual extent of publication will likely be a matter of inference to be drawn from evidence at trial.

No particulars of loss

[36] Mr Salmon's third criticism was that no particulars of loss had been pleaded, merely the assertion of loss. The prayer for relief seeks "compensatory damages" and, given the nature of the alleged defamation, it seems inevitable that the pleaded loss is damage to Mr Wishart's reputation, for which general damages are the

remedy.[8] I agree, however, that Mr Wishart should specify the nature of the loss that he claims to have suffered.

No particulars of actual knowledge

[37] Mr Salmon submitted that the draft ASOC5 is not properly particularised because it does not plead details of the first defendant's alleged actual knowledge of:

(a) the truth or otherwise of the tweets, information statement and the other Facebook page posts;

(b) the third party statements (paragraph 28 of draft ASOC5); and

(c) the truth or otherwise of the third party statements (paragraph 30.2 of draft ASOC5).

[38] On this point I accept Mr Wishart's submission that further particularisation of these allegations is not required. It is for Mr Wishart to prove the allegations at trial but unnecessary to plead the evidence on which he will rely. Nor do I accept that Mr Wishart is required to plead (or prove) the truth of the alleged statements.

No particulars as to amount of punitive damages

[39] Mr Salmon also submitted that there were no particulars of the level of punitive damages sought. Mr Salmon did not cite any basis on which Mr Wishart should be required to specify the amount of punitive damages sought. Such a pleading is not required by the High Court Rules or the Defamation Act 1992, s 44 of which requires particulars only of the facts or circumstances that are alleged to justify punitive damages. Mr Wishart's pleading satisfies that requirement.

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8 *Siemer v Stiassny* [2011] NZCA 106, [2011] 2 NZLR 361.

Conclusion and result

[40] I am satisfied that the draft ASOC5 is substantially compliant with the High Court Rules and the Defamation Act 1992. It requires only some very minor changes.

[41] As a result, I make an order lifting the stay of proceeding on the condition that, by 23 January 2017 Mr Wishart files a fifth amended statement of claim in the form of the draft ASOC5 subject to:

(a) the second cause of action being split into two separate causes of action so that the 28 June 2011 Facebook post is pleaded as a single publication with the amended information statement and the 4 July 2011 Facebook posts pleaded together as a separate publication;

(b) the pleading of the re-publication of the information statement by non-parties is removed;

(c) the assertion of loss is particularised to identify the nature of the loss suffered.

[42] I deal with the issue of costs on this application in my separate costs decision.

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P Courtney J