IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2013-404-5218
[2017] NZHC 1654

UNDER	the Defamation Act 1992
BETWEEN	MATTHEW JOHN BLOMFIELD Plaintiff
AND	CAMERON JOHN SLATER Defendant

Hearing: 6 July 2017

Counsel: F Geiringer for Plaintiff
C J Slater, in person, Defendant
(D Nottingham as McKenzie Friend for Mr Slater)

Judgment: 18 July 2017

JUDGMENT OF HEATH J

This judgment was delivered by me on 18 July 2017 at 4.00pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors:
Bytalus Law, Auckland (S Gloyn)
Counsel:
F Geiringer, Wellington
Copy to:
Defendant in person

The applications

[1] Mr Blomfield and Mr Slater are locked in battle over defamation proceedings that were issued by Mr Blomfield, in the District Court at Manukau, as long ago as 15 June 2012. They were transferred to this Court on 19 December 2014.[1] No hearing date has yet been allocated. A series of procedural skirmishes have conspired against that.

[2] Mr Slater has applied to strike out Mr Blomfield's proceeding on grounds of delay. Mr Blomfield applies for further discovery, on an "unless" basis. Both applications are opposed. Mr Blomfield contends that the delay in prosecuting his claim to hearing has largely been caused by Mr Slater's own actions.

Background

[3] Until 9 April 2008, Mr Blomfield was a director of Hell Zenjiro Ltd. That company owned several outlets for the Hell Pizza franchise. During the same period, Mr Blomfield also provided marketing services to Hell Pizza.

[4] On 9 April 2008, Hell Zenjiro was put into liquidation. In 2010, Mr Blomfield was adjudged bankrupt. Subsequently, an order was made prohibiting him from being involved as a director, or in the management, of a company. Mr Blomfield has since been discharged from bankruptcy.

[5] In 2012, Mr Slater operated a website known as "Whale Oil", and published regular blogs from its domain, www.whaleoil.co.nz In May 2012, Mr Slater wrote and published on that website a blog linking Mr Blomfield with a charity known as "KidsCan". It was entitled "Who really ripped off KidsCan?" Mr Blomfield claims that statements contained in that publication were defamatory of him.

[6] A second blog was published on the Whale Oil website on the same day. It was entitled: "Knowing Me, Knowing You – Matt Blomfield". A further 13 articles

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1 *Slater v Blomfield* [2014] NZHC 3272.

were published between 3 May and 6 June 2012, all of which Mr Blomfield alleges were defamatory.

[7] Mr Blomfield claims that these articles allege that he had conspired to steal charitable funds, was a thief, dishonest, dishonourable, a party to fraud, involved in criminal conspiracy, bribery, deceit, perjury, conversion, had laid false complaints, drug dealer and had made pornography. Mr Blomfield also takes issue with being described as a psychopath, a criminal and a "cock smoker".[2]

[8] Wide-ranging submissions were made by both Mr Geiringer, for Mr Blomfield, and Mr Slater, in person. With no disrespect to either of them, I do not consider that an extensive analysis of the issues is required to deal with the present applications. For that reason, I shall express my views and my reasons for them without a full analysis of the submissions presented.

Mr Blomfield's application for further discovery

[9] Mr Geiringer seeks further discovery on the grounds that Mr Slater has failed to comply with existing discovery orders and further documents exist that must be disclosed. Two orders are sought:

(a) The first is an order requiring Mr Slater to remedy alleged defects in his affidavit of documents of 30 June 2016; and

(b) The second is an order to compel Mr Slater to file and serve a further affidavit in relation to specific additional documents to which the application refers.

[10] These orders are sought on an "unless" basis, so that Mr Slater's defence would be struck out if he were not to comply with the orders within a stipulated time.

[11] The application is made against the background of Mr Slater's affidavit of 16 March 2017, in the course of which he gave evidence about deleting certain

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2 This summary is taken from Asher J's judgment in *Slater v Blomfield* [2014] NZHC 2221, [2014] 3 NZLR 835 at para [7].

communications that might have been relevant to issues in dispute in this proceeding. Mr Slater stated:

> …
>
> 2. [Mr Blomfield] has applied for further and better discovery for documents that either do not exist, no longer exist, or are no longer in my power and control.
>
> 3. I have discovered all of the relevant documents to this proceeding, and I have nothing more to discover. …
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> …
>
> 7. The latest publication involved in these proceedings is dated 2012. These proceedings have been afoot since 2012. …
>
> 8. When Whaleoil was hacked in February 2014, I began to permanently erase all text messages and other forms of communication on my cellphone and computers so as to protect myself and Whaleoil from another hacking attempt. This data is irretrievable and there are no backups or hard copies.

[12] Mr Blomfield's evidence is that he has had an opportunity to view correspondence on a device of one of Mr Slater's associates, Mr Price. He says that he saw about 200 relevant emails involving four other associates. Mr Price has made an affidavit with a sample of 40 emails, while Mr Slater has disclosed only five that he exchanged with Mr Price.

[13] Rule 8.16 of the High Court Rules states:

> **8.16 Schedule appended to affidavit of documents**
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> (1) The schedule referred to in rule 8.15(2)(e) must, in accordance with that discovery order, list or otherwise identify documents that—
>
> (a) are in the control of the party giving discovery and for which the party does not claim privilege or confidentiality:
>
> (b) are in the control of the party giving discovery for which privilege is claimed, stating the nature of the privilege claimed:
>
> (c) are in the control of the party giving discovery for which confidentiality is claimed, stating the nature and extent of the confidentiality:

(d) have been, but are no longer, in the control of the party giving discovery, stating when the documents ceased to be in that control, and the person who now has control of them:

(e) have not been in the control of the party giving discovery but which that party knows would be discoverable if that party had control of them.

(2) Subject to Part 2 of Schedule 9, documents of the same nature falling within subclause (1)(b), (d), or (e) may be described as a group or groups.

(3) The description of documents for which privilege is claimed under subclause (1)(b) must be sufficient to inform the other parties of the basis on which each document is included in a group under subclause (2).

(4) The schedule must include documents that have previously been disclosed under rule 8.4.

(5) The schedule need not include—

(a) documents filed in court; or

(b) correspondence that may reasonably be assumed to be in the possession of all parties.

[14] The circumstances in which an order for further discovery may be made are set out in r 8.19:

8.19 Order for particular discovery against party after proceeding commenced

If at any stage of the proceeding it appears to a Judge, from evidence or from the nature or circumstances of the case or from any document filed in the proceeding, that there are grounds for believing that a party has not discovered 1 or more documents or a group of documents that should have been discovered, the Judge may order that party—

(a) to file an affidavit stating—

(i) whether the documents are or have been in the party's control; and

(ii) if they have been but are no longer in the party's control, the party's best knowledge and belief as to when the documents ceased to be in the party's control and who now has control of them; and

(b) to serve the affidavit on the other party or parties; and

(c) if the documents are in the person's control, to make those documents available for inspection, in accordance with rule 8.27, to the other party or parties.

[15] The presumptive position is that an affidavit of documents sets out all discoverable documents in the form required by r 8.16 or in accordance with any order of the Court. If no further order were made, it would be open to the opposing party to cross-examine the deponent as to veracity or reliability if subsequently more relevant documents were discovered.

[16] A party seeking further discovery must establish that an existing affidavit of documents is incomplete.[3] In determining whether an order is required the Court will consider (among other things) whether it is unlikely that further documents may come to light and, having regard to the nature of the particular claim, whether any disproportionate obligation may be cast on the party from whom discovery is sought. Asher J identified a four-step approach in *Assa Abloy New Zealand Ltd v Allegion (New Zealand) Ltd*:[4]

> [14] I will follow therefore a four stage approach in considering this r 8.19 application:
>
> (a) Are the documents sought relevant, and if so how important will they be?
>
> (b) Are there grounds for belief that the documents sought exist? This will often be a matter of inference. How strong is that evidence?
>
> (c) Is discovery proportionate, assessing proportionality in accordance with Part 1 of the Discovery Checklist in the High Court Rules?
>
> (d) Weighing and balancing these matters, in the Court's discretion applying r 8.19, is an order appropriate?

[17] Asher J's approach must be tailored to the circumstances of other cases. In the context of the present application, I am satisfied that the documents may have some relevance to questions of damages. Subject to any conditions I might attach to the form in which any additional affidavit should be sworn and the question whether an "unless" order is required, I am inclined to make orders to reflect what Mr Blomfield seeks.

[18] The discovery issue is complicated by earlier orders made in the District Court. An order for discovery was made by Judge Gittos on 25 November 2013. A

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3 *McCullagh v Robt Jones Holdings Ltd* [2015] NZHC 1462, (2015) 22 PRNZ 615 at para [7] (Associate Judge Bell).

4 *Assa Abloy New Zealand Ltd v Allegion (New Zealand) Ltd* [2015] NZHC 2760 at para [14].

verified list was filed but some of the documents (particularly those on a memory stick) were sealed pending determination of an appeal on about whether Mr Slater was entitled to invoke a privilege to prevent disclosure of journalists' sources.[5]

[19] That appeal was determined on 12 September 2014.[6] The upshot of the High Court decision was that the journalist protections set out in s 68(1) of the Evidence Act 2006 did not apply to Mr Slater.

[20] Unfortunately, by the time the proceeding was transferred to this Court, the affidavit of documents and memory stick lodged by Mr Slater had gone missing. As a result of an agreement reached at a case management conference before Asher J on 14 June 2016, an order was made that Mr Slater would file and serve a replacement affidavit of documents on or before 30 June 2016.

[21] Mr Slater's existing affidavit of documents was sworn on 30 June 2016. In his affidavit of 16 March 2017, in opposition to the present application, Mr Slater stated that he began to delete documents in response to a hack of the Whaleoil website in early 2014.[7] On that basis, documents that had been deleted by the time the affidavit of documents may not have been included in the list of documents then held by Mr Slater. The question is whether there is any need for Mr Slater to file and serve a further affidavit to clarify the existing position.

[22] I am prepared to assume that the documents disclosed in the affidavit of documents of 30 June 2016 represent those documents over which Mr Slater had possession or control as at the date that he swore the affidavit. There is a need, however, to go further when documents have been in the possession of a party but are no longer.[8] In light of Mr Slater's acknowledgement that some electronic communications have been irretrievably deleted, I consider a further affidavit is required to provide greater clarity as to the present position.

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5 Evidence Act 2006, s 68.
6 *Slater v Blomfield* [2014] NZHC 2221, [2014] 3 NZLR 835.
7 See para 8 of Mr Slater's affidavit of 16 March 2017, set out at para [12] above.
8 High Court Rules, r 8.16(1)(d) and (e), set out at para [14] above.

[23] I order that Mr Slater file and serve a further affidavit, on or before 4 August 2017, which shall contain:

(a) Clarification of the date on which the "hack" of the Whaleoil website occurred;[9]

(b) Clarification of the period over which text messages and other forms of communication on Mr Slater's cellphone and computers were "permanently erased";

(c) A list (by group) of those documents sought by Mr Blomfield in para 1(b) of the application for further and better discovery of 19 December 2016 that have been "permanently erased" as a result of Mr Slater's response to the hack of the Whaleoil website; and

(d) A list (by group) of those documents sought by Mr Blomfield in para 1(b) of the application for further and better discovery of 19 December 2016 that were in Mr Slater's possession or control prior to the "February 2014" hack, or have not been in his control but which he knows would be discoverable if he had control of them.[10]

[24] I am not presently prepared to make an "unless" order. The position has not yet been reached whereby such an order is required.[11] That issue may be considered further at the case management conference that will be held after 18 August 2017, if Mr Slater has not complied with the order I have made.

Mr Slater's application to strike out the proceeding

[25] Mr Slater's application to strike out the proceeding is, I accept, borne of frustration at the time it has taken for this proceeding to get to trial. Ordinarily,

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9 That is presently said to have taken place in "February 2014".

10 High Court Rules, r 8.16(1)(d) and (e), set out at para [12] above.

11 Generally, see *SM v LFDB* [2014] 3 NZLR 494 (CA). The Supreme Court gave leave to appeal: *LFDB v SM* [2014] NZSC 131 but leave was subsequently revoked because the applicant had made a further default in relation to payment of a costs award: *LFDB v SM* (2014) 22 PRNZ 262 (SC). That being so, the Supreme Court expressed no views on the approach that commended itself to the Court of Appeal. See also, *Brown v Sinclair* [2016] NZHC 3196, at paras [114]–[119].

defamation proceedings are dealt with promptly, as is evidenced by s 50(1) of the Defamation Act 1992 which creates a presumption that the Court should strike out a claim if no date has been fixed for the trial and no step taken within the previous 12 months before the application to strike out is made.

[26] The primary reason why the case has taken so long to get to trial is the need to resolve an important question of law about whether s 68(1) of the Evidence Act 2006 (protection of journalists' sources) applied to a blogger such as Mr Slater. That question was first addressed by the District Court in a judgment given on 26 September 2013 by Judge Blackie.[12] It was the subject of Asher J's judgment on appeal.[13] Subsequently, Mr Slater applied for leave to appeal to the Court of Appeal. An application to adduce further evidence was dismissed on 19 November 2015.[14] Ultimately, on 17 May 2016, the substantive application for leave to appeal was abandoned.

[27] In the meantime, there were also contempt applications brought by Mr Blomfield in respect of alleged breaches of an undertaking by Mr Slater not to publish certain material relevant to the proceeding. Those applications were dealt with in two judgments given by Asher J on 10 February and 18 February 2016.[15]

[28] In those circumstances, there is no basis on which Mr Slater can legitimately seek a strike out order on grounds of delay. While the Court's jurisdiction to consider his application is not ousted by s 50 of the Defamation Act,[16] the delay since the privilege issue was resolved and Mr Slater's additional affidavit of documents of 30 June 2016 is insufficient to justify the exercise of the discretion to strike out.

[29] Mr Slater also relied on an ability for this Court to strike out defamation proceedings as an abuse of process, where "the resources necessary to determine a

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12 *Blomfield v Slater* DC Manukau CIV-2012-092-1969, 26 September 2013.
13 *Slater v Blomfield* [2014] NZHC 2221, [2014] 3 NZLR 835.
14 *Slater v Blomfield* [2015] NZCA 562.
15 *Blomfield v Slater (No 3)* [2016] NZHC 149 and *Blomfield v Slater (No 4)* [2016] NZHC 210, (2016) 23 PRNZ 153.
16 Because s 50(4) expressly states that no "other power of a Court to order any proceedings to be struck out for want of prosecution" is affected by the additional jurisdiction conferred by s 50(1). See also para [25] above.

claim are likely to be out of all proportion to the interests at stake".[17] In *Opai v Culpan*,[18] Katz J held that the principle established in *Jameel v Dow Jones & Co Ltd*[19] did apply in New Zealand. Mr Geiringer did not contest Katz J's view on that topic.

[30] Mr Slater referred me to a wealth of information to suggest that Mr Blomfield may not have had any relevant business reputation at the time the articles were published on the Whaleoil site. He submitted that the Court's resources should not be deployed to deal with such an undeserving claim for defamation.

[31] I do not accept that this proceeding is of such a character as to justify invocation of the *Jameel* approach. A number of the allegations made against Mr Blomfield go beyond his business activities and/or practices; in particular, the suggestions that he might be a pornographer and/or a psychopath.[20] In my view, while there may be a question about the value of his claims based on business reputation, the same cannot be said about those other aspects of the claim.

[32] In those circumstances, the better course is to ensure the proceeding is readied for trial promptly. Mr Slater's application to strike out is dismissed.

Consequential directions

[33] On the basis that Mr Slater's further affidavit of documents is due to be filed no later than 4 August 2017, I direct the Registrar to set this proceeding down for a case management conference before me on the first available date after 18 August 2017.

[34] I make the following directions in anticipation of the case management conference:

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17 The jurisdiction is said to spring from a decision of the Court of Appeal of England and Wales in *Jameel v Dow Jones & Co Ltd* [2005] EWCA Civ 75, [2005] QB 946. The nature of the jurisdiction in the form quoted is taken from an interpretation of the *Jameel* principle in the judgment of Katz J in *Opai v Culpan* [2017] NZHC 1036 at para [1].

18 *Opai v Culpan* [2017] NZHC 1036.

19 *Jameel v Dow Jones & Co Ltd* [2005] EWCA Civ 75, [2005] QB 946.

20 See para [7] above.

(a) Any notice under s 19A(2) of the Judicature Act 1908 that a party requires the proceeding to be tried before a jury shall be filed and served on or before 4 August 2017.[21]

(b) If a notice were filed, any application under s 19A(5) to have the proceeding tried before a Judge alone shall be filed and served on or before 11 August 2017.

(c) Memoranda shall be filed and exchanged contemporaneously, on or before 18 August 2017, dealing with the following trial issues:

(i) The time for filing witness statements

(ii) The likely duration of the trial

(iii) Any consequential questions of discovery arising out of the affidavit of documents that Mr Slater is to file and serve on or before 4 August 2017

(iv) Any further interlocutory applications that may require resolution prior to trial.

[35] A trial date will be allocated at the case management conference, unless it is first necessary to determine any application under s 19A(5) of the Judicature Act 1908. The case management conference shall be held in Court for chambers.

Result

[36] For those reasons:

(a) I make an order on Mr Blomfield's application for further discovery in the form set out in para [23] above.

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[21] Generally, see *Craig v Slater (Mode of Trial)* [2017] NZHC 735; (2017) NZAR 637. The provisions of the Judicature Act 1908 continue to apply because the proceeding was issued before the Senior Courts Act 2016 came into force.

(b) I dismiss Mr Slater's application to strike out the proceeding.

(c) I make directions for the next case management conference in terms set out in paras [33]–[35] above.

[37] As to costs, while Mr Blomfield has been successful and Mr Slater unsuccessful on the present applications, it is yet to be seen whether Mr Blomfield will procure an affidavit which goes beyond those currently filed by Mr Slater. In those circumstances, costs are reserved for further consideration at the next case management conference.

P R Heath J

Delivered at 4.00pm on 18 July 2017