IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2013-404-5218
[2018] NZHC 1101

BETWEEN	MATTHEW JOHN BLOMFIELD Plaintiff
AND	CAMERON JOHN SLATER Defendant

Hearing: 15 May 2018

Appearances: F Geiringer for Plaintiff
Defendant in person

Judgment: 18 May 2018

JUDGMENT OF LANG J
[on interlocutory issues]

This judgment was delivered by me on 18 May 2018 at 3.30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

[1] In this proceeding Mr Blomfield sues Mr Slater in defamation. The claims relate to allegedly defamatory remarks Mr Slater made about Mr Blomfield in blogs posted on a website commonly known as Whaleoil.[1]

[2] The proceeding was commenced in the District Court in 2012. It was subsequently transferred to this Court in 2013. It is due to be the subject of a trial of four weeks duration before a Judge sitting without a jury in October 2018.

[3] The purpose of this judgment is to deal with four outstanding interlocutory matters. They are:

(i) The costs categorisation of the proceeding.

(ii) The fixing of costs on applications by Mr Blomfield for orders adding a second defendant and requiring the plaintiff to provide further and better particulars.

(iii) An application by Mr Blomfield for the trial to proceed in two stages.

(iv) An application by Mr Slater for an order requiring Mr Blomfield to provide security for Mr Slater's costs.

(v) An application by Mr Blomfield for "unless orders" to compel compliance by Mr Slater with directions for discovery.

The costs categorisation of the proceeding

[4] It is difficult to ascertain from the file whether any formal order has been made allocating a costs categorisation to this proceeding. At least one earlier judgment has proceeded, however, on the basis that this is a Category 2 proceeding for costs purposes.[2]

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1 Whale Oil Beef Hooked <www.whaleoil.co.nz.>

2 *Slater v Blomfield* [2014] NZHC 3272 at [19].

[5] I take the view that the proceeding should remain a Category 2 proceeding at least until trial. It will be for the trial Judge to determine whether it should be re-categorised as a Category 3 proceeding for the purposes of preparation for trial and the trial itself.

Costs in relation to applications by Mr Blomfield for further and better particulars and joinder of second defendant

[6] In late 2017 Mr Blomfield applied for an order joining the second defendant, Social Media Consultants Limited, as a party to the proceeding. He took this step after Mr Slater pointed out that the publications forming the basis of Mr Blomfield's claims are posted on a website operated by that company. It was therefore necessary for the company to be joined as a party.

[7] Mr Blomfield also applied for an order requiring Mr Slater to provide further and better particulars of his defences. This followed correspondence between Mr Blomfield's solicitors and Mr Slater during November 2017.

[8] Both applications were called before Brewer J in a Duty Judge List on 7 December 2017. Having discussed the applications with Mr Slater and counsel for Mr Blomfield, Brewer J made an order joining Social Media Consultants Limited as second defendant and making timetable directions for Mr Slater to file an amended pleading. He reserved costs on both applications and directed that these were to be fixed once other outstanding interlocutory matters had been resolved.

[9] The application for further and better particulars was subsequently overtaken by applications in which Mr Blomfield sought summary judgment against Mr Slater and/or strike-out of Mr Slater's defences. I have determined those applications in Mr Slater's favour in a judgment being delivered contemporaneously with this judgment.[3]

[10] Mr Blomfield now seeks an order for costs in relation to both applications.

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3 *Slater v Blomfield* [2018] NZHC 1099.

[11] Mr Slater considers Mr Blomfield ought to have been aware from the outset that the website in question was operated by Social Medial Consultants Limited, but I disagree. Mr Blomfield has adduced evidence showing that the existence of Social Media Consultants Limited is not greatly publicised. There is certainly little if anything in the public domain to suggest it is the operator of the Whaleoil website. I therefore consider Mr Blomfield was entitled to make the application for joinder and he was ultimately the successful party in relation to it.

[12] In the judgment relating to the application for strike-out, I have found that the particulars of Mr Slater's defences of truth and honest opinion need to be re-pleaded with much greater specificity. Mr Blomfield was therefore entitled to file the application seeking further and better particulars. For that reason he is entitled to costs on filing that application.

[13] Mr Blomfield is also entitled to costs on a Category 2B basis in respect of the appearance before Brewer J on 7 December 2017.

Application for split trial

[14] Mr Geiringer sought what he described as a split trial. He submitted the Court should first hear and give judgment on one of Mr Blomfield's claims. It should then, if necessary, hear the remaining claims. Mr Geiringer based this argument on the approach he said had been taken recently in defamation cases before the High Court in England. Unfortunately, however, Mr Geiringer was unable to provide me with any authority relating to this practice.

[15] Mr Geiringer submitted that the proposal would have the considerable advantage in the present case of determining Mr Slater's defences of honest opinion and truth. This would make it much easier for the remaining claims to be heard.

[16] I do not accept this submission. Each of the claims will need to be considered separately, as will the affirmative defences. There is no reason to suppose a positive outcome for Mr Blomfield on one claim will have any material bearing on the remainder. Furthermore, it is difficult to see how the Court would assess damages on a single claim when Mr Blomfield is asking the Court to infer the emails are part of a

plan by Mr Slater to maintain a sustained attack on Mr Blomfield's reputation. If Mr Blomfield can establish that this is the case, damages will need to be assessed on a global basis.

[17] I therefore decline to direct that the claims be tried separately.

Application by Mr Slater for security for costs

[18] Mr Slater applied to the District Court in an early stage of this proceeding for an order requiring Mr Blomfield to provide security for his costs. That application was declined, in large part I understand because Mr Blomfield was an undischarged bankrupt at that time.

[19] Mr Slater now renews his application for security. The first difficulty Mr Slater faces is that he requires leave to make a second application[4] and he has not yet been granted leave. A more fundamental problem lies in the fact that Mr Slater intends to represent himself at trial. This means he will not be entitled to costs if he successfully defends Mr Blomfield's claims.

[20] It is therefore pointless considering an application for security at this stage. Mr Slater may renew the application if he engages counsel to act on his behalf at trial. Any renewed application would obviously be dealt with on its merits at that time.

[21] I award Mr Blomfield costs on a Category 2B basis in relation to the documents filed in opposition to the application. The hearing of the application for security took place at the conclusion of Mr Blomfield's applications for summary judgment and/or strike-out. It also occupied very little time. I therefore make no order for costs in relation to the hearing on 15 May 2018.

Application by Mr Blomfield for "unless orders" in relation to discovery

[22] This application has its genesis in the fact that Mr Blomfield believes other persons may have funded or provided Mr Slater with financial incentives to publish

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4 High Court Rules 2016, r 7.52.

the blogs that form the basis of this proceeding. If so, Mr Blomfield contends there is no basis for any defence of honest opinion.

[23] Mr Blomfield has therefore sought discovery from Mr Slater of documents that might disclose his dealings with other named persons who may have provided him with inducements to post the blogs. Mr Slater has responded by saying that much of his electronic database has now been deleted because it was subject to invasion by hackers for a period of approximately a week during February 2014.

[24] In 2017 Mr Blomfield sought "unless orders" requiring Mr Slater to provide such information as he was able regarding material he continues to hold or formerly held regarding these issues. On 18 July 2017 Heath J delivered a judgment in which he declined to make "unless orders", but directed Mr Slater to file and serve a further affidavit no later than 4 August 2017 dealing with the following issues:[5]

> [23] …
>
> (a) Clarification of the date on which the "hack" of the Whaleoil website occurred;
>
> (b) Clarification of the period over which text messages and other forms of communications 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.

[25] On 4 August 2017 Mr Slater filed an affidavit in which he responded to these directions as follows:

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5 *Slater v Blomfield* [2017] NZHC 1654 at [23].

[A]

3.1 The "hack" [to the best of my knowledge] occurred in or around February 2014. The duration of the illegal access is unknown but the DDoS attack lasted for a period of 3 week days. I cannot remember the exact days.

[B]

3.2 After the publication of the Nicky Hager book "Dirty Politics" in or around August 2014, it became apparent that vast quantities of my private, and otherwise privileged, communications had been hacked and were passed onto Mr Hager, other media, and the likes of the plaintiff.

3.3 As a result, I was advised to put in place systems and processes to insure [sic] that any such further attack would be limited as what information could be obtained. These systems and processes are automatic, and handled mostly by software or third parties such as Google.

3.4 Relating to email communications, I delete emails after 30 days, and Googles automated mail system deletes all trace of those emails after a further 30 days. … On my mobile phone, I have software [branded iShredder Enterprise] which uses 'military grade' data deletion algorithms to delete messages irrecoverably.

3.5 Discovery for trial, under normal expedient circumstances, saw the relevant communications [inclusive of sources], placed onto the court file at the District Court Manukau. The defendants position was discovery was all that was relevant for trial. Due to the appeal to the High Court, and the successful application of the plaintiff, the trial was transferred to the High Court at Auckland. That discovery file was "lost". Naturally the defendant had a backup file, which was kept separate from any deletion processes. That file is now with the Court and discovered to the plaintiff.

[C]

3.6 Due to the above content answering [B], the defendant did not keep a list of information that he thought worthwhile deleting permanently. This would be against the very reason for the adoption of the irrecoverable processes. The two documents that the plaintiff "hangs his hat on" were located and discovered. The defendant cannot remember when this occurred, but relates that this evidences his good intentions, rather than any form of duplicity.

3.7 Relating to "listings by Group". Suffice to say that this information is no longer available, or otherwise under the control of the defendant. However, of what the plaintiff seeks relating to the alleged 160 [circa] missing emails, these will be in the control of Mr Price…

[26] Mr Geiringer confirmed on Mr Blomfield's behalf that he accepts the affidavit satisfies [23](a) of Heath J's directions but not [23] (b), (c) or (d). Mr Blomfield

therefore renews his application for "unless orders" on the basis that Mr Slater has failed in large part to comply with the requirements imposed by Heath J.

[27] During the hearing before me, Mr Slater advised that the hacking occurred over a period of approximately one week during February 2014. This would appear to satisfy the requirement of [23](b), thereby leaving Mr Slater arguably in breach of the directions given at [23](b) and (c).

[28] Mr Slater's principal point in response was that he cannot provide any more documents than he has already provided. He says he holds no more documents and cannot say with any precision what documents have been deleted. He also points out that his position was irretrievably compromised when a discovery file was lost in transit between the District Court and this Court. This included a memory stick containing Mr Slater's discovery.

[29] Mr Slater also made the point that further directions would inevitably require him to repeat what he has already said in his affidavit sworn on 4 August 2017, and this would inevitably prompt Mr Blomfield to file a further application to have him debarred from defending the proceeding.

[30] I understand Mr Blomfield's frustration but I am not prepared at this late stage to make an order that Mr Slater may not be able to comply with and thereby place him at risk of being unable to defend Mr Blomfield's claims. Although this provides Mr Blomfield with no satisfaction I consider a greater injustice may be done if unless orders were made and implemented in circumstances where Mr Slater had no ability to comply with them. I am also concerned that such orders may divert the parties' attentions from their primary task at this stage, which is to devote their energies to preparing for trial. I therefore decline Mr Blomfield's application for unless orders.

Lang J

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Copy to C J Slater