IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTEPOTI ROHE

CIV-2018-404-000530
[2018] NZHC 2278

BETWEEN	ZAINULABIDIN SYED Plaintiff/Applicant
AND	AMIR FAZAL MALIK First Defendant/Respondent
	TRINITY JOAN WILSON Second Defendant/Respondent

Hearing:	29 August 2018
Appearances:	D Jaques for the Plaintiff/Applicant A F Malik, First Defendant/Respondent, in Person No appearance by or for the Second Defendant/Respondent, T J Wilson
Judgment:	30 August 2018

JUDGMENT OF CHURCHMAN J

This judgment was delivered by me on 30 August 2018 at 4 pm pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Solicitors:
Legal Associates, Auckland

Parties:
A Malik
T Wilson

[1] The plaintiff, in these defamation proceedings, has made an interlocutory application for a number of orders:

(a) Giving judgment against the first and second defendants in relation to the causes of action set out in paragraphs 14 to 170 of the amended statement of claim dated 17 April 2018.

(b) An order that the first and second defendants immediately remove all the defamatory statements complained of and not publish those statements again in the future.

(c) An order for judgment in the sum of $12 million, or alternatively an order setting the matter down for a hearing as to damages.

(d) An order striking out the statement of counter-claim, dated 2 May 2018, or alternatively an order extending the time for filing a statement of defence to the statement of counter-claim.

(e) An order for costs.

History of proceedings

[2] The plaintiff initially applied without notice for orders prohibiting the defendants from making further publication about the plaintiff. Lang J, on 28 March 2018, directed that the application be served.

[3] On 12 April 2018, Palmer J issued a Minute transferring the proceedings to Dunedin. His Minute also contained a statement that defamation law can be a technical subject and that the defendants would be well advised to get legal representation.

[4] Palmer J adjourned the matter so that the parties could attempt to agree a suitable interim order. By consent, the Court made an order that "... until the trial, the defendants will not say anything defamatory (which makes others think worse of the plaintiff) unless it is true." His Honour noted that if, notwithstanding that consent

order, the defendants continued to make defamatory statements which were found to be untrue, that may bear on damages.

[5] The plaintiff filed an amended statement of claim containing 170 paragraphs and comprising 20 causes of action. The statement of claim had obvious deficiencies and it was not clear whether the plaintiff was seeking $12 million damages for each of the first 19 causes of action, or $12 million in total. The amount sought in respect of the twentieth cause of action was $350,000.

[6] When the matter came before Osborne AJ on 2 May 2018, he drew to the defendants' attention the fact that the statement of defence was unsatisfactory and did not comply with the requirements of the High Court Rules.

[7] At [18],[1] the Court noted the defendants' intention to say that some or all of the publications about which the plaintiff complained were true. The Court noted that truth was an affirmative defence which was required to be pleaded under r 5.48(4).

[8] In relation to the requirements of the statement of defence, Osborne AJ said:[2]

> In pleading their statement of defence the defendants are required in each case to admit or deny the meaning and to identify in each case whether the affirmative defence of truth is relied on.

[9] Osborne AJ also drew to the defendants' attention r 5.48(3) which provides that an allegation in a statement of claim which is not denied by the defendants is treated as being admitted. He noted that, as things stood at that time:[3]

> ... virtually all the allegations in the statement of claim from paragraphs 13 to 170 are to be treated as being admitted.

[10] Osborne AJ emphasised the great benefit that would accrue to the defendants if they were able to obtain legal advice, at least in relation to the drafting of their defence.

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1 *Syed v Malik & Wilson* HC Dunedin CIV-2018-404-530, 2 May 2018.
2 At [18].
3 At [20].

[11] On 22 May 2018, the defendants filed an undated amended statement of defence.

[12] It is obvious from the content of the amended statement of defence that it has not been drafted by a lawyer.

[13] Notwithstanding the clear observations by Osborne AJ as to the requirements of rr 5.48(4) and 5.48(3), there has been no attempt to admit or deny the meaning pleaded in the various allegations in the statement of claim or to identify in each case whether the affirmative defence of truth is relied on.

[14] In relation to the causes of action in paragraphs 13 to 170 of the amended statement of claim, the amended statement of defence states that the defendant admits defaming the plaintiff. A representative example of the pleading is that in [13] where the defendants say:

> As to paragraph 13, Defendants accept the responsibility of defaming the Plaintiff because the whole campaign done to do "public awareness" about the fraudster and his gang.

[15] Although it appears evident from comments in the amended statement of defence that the defendants believe that the plaintiff has acted unlawfully and fraudulently, they have not specifically pleaded the defence of truth to any of the pleadings in the amended statement of claim, as Osborne AJ had indicated they were required to do.

[16] The defendants filed a "statement of counter-claim" dated 2 May 2018. This document sets out, in narrative form, a history of the business relationship between the plaintiff and defendants. However, it is not possible to identify the specific cause of action relied upon in support of the claim for $5 million of damages. The counter-claim has been drafted without any obvious legal assistance.

Relevant facts

[17] The plaintiff and defendants were engaged in various business activities between about 2009 and 2015. There is a dispute as to the precise nature of the

business relationship, as to whether it was one of a partnership or employment or a combination of both. The nature of that business relationship is not a matter for this Court to resolve on this application.

[18] By January 2016, their relationship had broken down. The plaintiff sought and obtained an order for possession of the property that the defendants and their two children had been living in.

[19] On 18 May 2017, Woodhouse J issued a decision refusing Mr Malik's application to sustain a caveat.[4]

[20] The issuing of the Court decision seems to have been the catalyst for the defendants, and in particular Mr Malik, to embark upon a campaign through social media and other means of embarrassing Mr Syed by making statements of wrongdoing and/or unethical behaviour about him.

[21] Mr Malik has also embarked on a campaign of complaining to various regulatory authorities, such as the Police and the Serious Fraud Office, both in New Zealand and Australia (in an endeavour to convince them to commence proceedings against Mr Syed).

[22] Notwithstanding the consent order made by Palmer J, the defendants have continued their campaign of statements about the plaintiff unabated.

[23] In the submissions filed on behalf of the defendants, they sought orders that were not mentioned in the counter-claim. The defendants asked the Court to freeze the plaintiff's assets in New Zealand, including assets of the Syed Family Trust; they sought disclosure of "all relevant companies' financials and loan details"; that the Court "make orders to the NZ Police on serious criminal allegations"; they requested that the Court "... stop Liquidation process of NZ Corporate Finance Ltd and Cytop Services Ltd".

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4 *Syed Family Ltd v Malik & Wilson* [2017] NZHC 1022 and *Malik v Syed Family Ltd* [2017] NZHC 1022.

[24] These claims for relief, which are clearly beyond the jurisdiction of this Court in these proceedings, confirm that the defendants have not obtained any legal advice.

Strike-out

[25] I will address the plaintiff's application for a strike-out of the counter-claim first.

[26] Pursuant to High Court Rule 15.1, the Court may strike out all or part of a pleading if it discloses no reasonable cause of action or defence, is likely to cause prejudice or delay, is frivolous or vexatious, or is otherwise an abuse of process.

[27] The established criteria for striking out are as follows:[5]

(a) Pleaded facts, whether or not admitted, are assumed to be true. This does not extend to pleaded allegations which are entirely speculative and without foundation.

(b) The cause of action or defence must be clearly untenable.

(c) The jurisdiction is one to be exercised sparingly, and only in a clear case.

(d) The jurisdiction is not excluded by the need to decide difficult questions of law requiring extensive argument.

(e) The Court should be particularly slow to strike out a claim in any developing area of the law.

[28] Statements of claim by way of counter-claim are subject to the same pleading requirements as statements of claim.

[29] High Court Rule 5.26 stipulates that a statement of claim must show the general nature of the plaintiff's claim to the relief sought and must give sufficient particulars of time, place, amounts, names of persons, nature and dates of instruments, and other circumstances to inform the Court and the party or parties against whom relief is sought of the plaintiff's cause of action.

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5 *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at [267] and endorsed by the Supreme Court in *Couch v Attorney-General* [2008] NZSC 45 at [33].

[30] In the present case, the counter-claim does not identify the cause of action upon which the counter-claim plaintiffs rely or explain the legal basis upon which damages of $5 million are sought.

[31] There is also an issue arising under High Court Rule 5.57. This rule permits a defendant who has a counter-claim against the plaintiff "for any relief relating to or connected with the original subject matter of the proceeding" to file a counter-claim.

[32] The claim in these proceedings is one of defamation. Whatever the nature of the cause of action that the defendants intended to plead, it is not directly connected with the defamation proceedings. At best, for the defendants, it could be said that there is a connection between some of the events referred to in the counter-claim and the allegations which are said to be defamatory.

[33] Even if the defendants could re-plead the counter-claim so as to comply with the requirement to identify a cause of action and a proper basis for a claim for damages, it must be doubtful as to whether or not the requirements of High Court Rule 5.57 are met. To that extent, it may be appropriate for the defendants to commence separate proceedings where the statement of claim complies with the requirements of the rules set out above and then to seek to stay any judgment in the defamation case that may be obtained against them on the basis that they have a set-off. It is not for this Court to predict whether such an application would be successful.

[34] I am conscious of the fact that the defendants are litigants in person and clearly have no legal expertise.

[35] Mr Malik claimed that he had consulted some 25 lawyers over this matter. He did not explain why, having consulted so widely, he did not enlist the assistance of a lawyer to draft the statement of counter-claim.

[36] He acknowledged that in relation to the defamation proceedings, the Court had previously encouraged him to seek legal assistance but claimed that he had not received any such advice in relation to the counter-claim, as this was the first time it had been before the Court.

[37] I have considered whether I should simply strike out the clearly defective statement of counter-claim, but have decided that in the interests of doing justice to self-represented litigants who clearly have no understanding of the law, that I can adequately do justice by making an unless order.

[38] Accordingly, pursuant to High Court Rule 7.48, I grant the defendants leave to file an amended statement of counter-claim which complies with the High Court Rules and identifies the cause or causes of action upon which the defendants are relying and adequately particularises the basis upon which damages are sought.

[39] It is apparent that the defendants are unlikely to be able to draft such a document themselves and will need to retain the services of a lawyer.

[40] I therefore direct that the defendants have 21 days within which to file an amended statement of counter-claim complying with the rules, failing which the counter-claim will be struck out.

[41] The defendants have been granted an indulgence and it is appropriate that they make a modest contribution to the plaintiff's costs of bringing the strike-out application. Accordingly, I award costs of $750 against the defendants in relation to the strike-out application. Once again, I make an unless order which is that, unless the costs of $750 are paid by the defendants to the plaintiff within 21 days of the date of this decision, the counter-claim is to be struck-out.

The plaintiff's claim for judgment

[42] The plaintiff seeks judgment on both liability and quantum on the basis that the defendants, in their statement of defence to the amended statement of claim, have specifically admitted to defaming the plaintiff. The plaintiff also relies on High Court Rule 5.48(3), which provides that an allegation not denied in the statement of defence is treated as being admitted.

[43] Had the defendants complied with the observations clearly set out by Osborne AJ in his Minute of 2 May 2018, they would have filed a statement of defence which

specifically pleaded the positive defence of truth in relation to each instance where they allege the meaning which the plaintiff identifies in the publications is true. They did not do that.

[44] Having expressly admitted in their statement of defence that the allegations complained of by the plaintiff were defamatory and having failed completely to formally plead the defence of truth, notwithstanding the fact that they were put on notice of the need to do so, I have no confidence that, if the defendants are allowed further time to amend the pleadings, that they will obtain legal advice and do so.

[45] Accordingly, given the express admissions that the statements were defamatory, it is appropriate for judgment to be entered on the basis of liability.

[46] In coming to this conclusion, I have not overlooked the fact that where an admission to plead to an allegation has arisen through inadvertence, the approach generally taken by the Courts is to require particulars or an amended statement of defence. Here, it cannot be said that the failure to plead truth as a defence to any, or all of, the allegations in the amended statement of claim was inadvertent. The defendants have simply chosen to ignore the observations made by the Court as to what was required of them in order to be able to advance a defence of truth.

Judgment on quantum

[47] The plaintiff seeks judgment against the defendants in the sum of $12 million. The plaintiff submits that at paragraphs 11 and 12 of the amended statement of claim, the plaintiff alleges losses caused by the defamation of $4.2 million and $6.7 million, making a total of $10.9 million. The plaintiff says that because the defendants did not deny the allegations in paragraphs 11 and 12, they are therefore deemed to be admitted.

[48] In this case, the defendants' omission appears to be one of inadvertence. In any event, even in circumstances where a statement of defence is struck out, the plaintiff can be required to prove the alleged losses.[6]

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6 *Chen v Zhong* HC Auckland CIV-2010-404-1995, 14 October 2011, Wylie J.

[49] In the present case, the plaintiff faces a formidable challenge in convincing the Court that, as a result of defamatory statements made by one or both of the defendants, two property developments that he was involved in in Australia failed causing him losses totalling $10.9 million. No causal connection between any of the defamatory statements and the alleged losses is pleaded. The amended statement of claim is clearly deficient in that regard and if there was an application to have the relevant passages in it struck out for failure to comply with the High Court Rules relating to the contents of a statement of claim that are referred to above, such an application would be likely to be successful. While it is possible to recover damages for material loss consequent upon a defamation, High Court Rule 5.33 requires the plaintiff to support such a claim with particulars. The plaintiff has made no attempt to do this.

[50] Mr Jaques, for the plaintiff, informed the Court from the Bar that the plaintiff did not intend calling any witnesses from Australia to support the defamation proceedings and that the only witness was likely to be the plaintiff himself. This is likely to make the task of the plaintiff in relation to establishing that the defamation caused these losses impossible. That is because it would be necessary for the plaintiff to show that those involved in the development projects were aware of one or more of the defamatory statements; that they thought the less of the plaintiff as a result of those statements and for that reason failed to proceed with whatever their involvement in the project was. All of this seems inherently improbable.

[51] The plaintiff also appears to misconceive the purpose of damages in a defamation proceeding. A successful plaintiff is entitled to recover compensatory damages that compensate him or her for the damage done to his or her reputation. The nature and extent of the publication on relevant awards of damages in New Zealand have generally been modest. They bear no relation to the extravagant sums claimed in this case.

[52] In his oral submissions, Mr Jaques appeared to acknowledge the improbability, if not impossibility, of the plaintiff being able to recover from the defendants the $10.9 million relating to the alleged loss of profits from a claimed failed property development. I expressed the view that it would be appropriate for him to amend the pleadings to delete this claim. It is obviously up to Mr Jaques whether he chooses to

do that. However, a plaintiff proceeding with a claim for a very large sum of money, when the plaintiff knows that significant aspects of that claim are hopeless, renders himself at risk in relation to costs should they persist with the claim after having been put on notice.

Removal/non-publication orders

[53] The plaintiff sought orders that the defendants "immediately remove all the defamatory statements complained of … and not publish those statements again in the future."

[54] The plaintiff had originally sought a similar order on an interim basis. However, Palmer J in his Minute of 12 April 2018,[7] had refused such an order saying:[8]

> I indicated that the Court would not make an order which would breach the defendants' rights to freedom of speech under the New Zealand Bill of Rights Act 1990.

[55] Palmer J adjourned the matter for the parties to confer and made the consent order referred to above after that adjournment.

[56] During the hearing of this matter, I adjourned the proceedings for half-an-hour to allow Mr Jaques to discuss with Mr Malik to see whether there might be any agreement about removal or non-publication.

[57] The parties were unable to come to any agreement and Mr Malik indicated to the Court that he was insisting on his right of freedom of speech and intended to continue the campaign of publications that he embarked on in 2016.

[58] While it was entirely appropriate for Palmer J to refuse to make the interim order sought, on the basis that it would be a breach of the defendants' rights of freedom of speech, that situation has now changed with the Court having found that, on the basis of the admissions in the statement of defence, that the statements were defamatory, that the defendants are liable to the plaintiff.

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7 *Syed v Malik & Wilson* CIV-2018-404-530, 12 April 2018.
8 At [6].

[59] Given that the Court has made such a liability finding, it is no longer open for the defendants to assert they are exercising their rights of freedom of speech. No one has a right to repeat a statement which the Courts have found to be defamatory.

[60] Accordingly, I make an order that the defendants not publish any further such statements. If the defendants ignore that order, then they will be in contempt of Court. Being found to be in contempt of Court is a potentially very serious matter, with outcomes up to and including imprisonment. I would strongly encourage the defendants to take legal advice on this point.

[61] In terms of the application by the plaintiff for a direction that the defendants shall immediately remove all the defamatory statements complained of, Mr Malik indicated that he was not inclined to do that either and also asserted that it might not be possible to do so in relation to some statements that had made their way onto the internet.

[62] Acknowledging that there may be some practical difficulties in achieving complete rescission of all the defamatory statements, I direct that the defendants are required to use their best endeavours to delete all such statements presently appearing in any social media or on the internet.

[63] As indicated by Palmer J in his 12 April 2018 Minute, any repetition of the defamatory statements or any failure to delete or remove them (to the extent that it is within the control of the defendants), is likely to aggravate the amount of damages that might be awarded to the plaintiff.

Position of second defendant

[64] The second defendant, Ms Trinity Wilson, did not appear at this hearing. When I enquired of Mr Malik why she was not here, he informed me that their domestic relationship had broken down and that the two were living apart.

[65] As Mr Malik is not a lawyer, he is not able to represent the interests of Ms Wilson in proceedings in the High Court. It is not clear to me what, if any,

involvement Ms Wilson had in the preparation and filing either of the statement of defence to the amended statement of claim or the counter-claim. It is important that she appreciates how serious her position is and how important it is for her to obtain legal advice and representation. I encourage her to do so. I also direct that Mr Malik ensure that a copy of this decision is provided to her, given that there is presently only one address for service provided for both defendants.

[66] I also indicate to the plaintiff that, to the extent that the plaintiff seeks to recover damages from the second defendant, it will be necessary for him to identify precisely what publications it is alleged that the second defendant is responsible for and the basis of any claim against her in respect of such publications. That will require a further amendment of the statement of claim.

Security for costs

[67] Counsel for the plaintiff orally made a request for an order for security for costs against the defendants in the sum of $8,000. The defendants had no advance warning that such an application would be made. That was particularly prejudicial to Ms Wilson, who was not present at the hearing. In these circumstances, I am not prepared to make such an order.

[68] In any event, as Mr Jaques acknowledged, such an application could only be in respect of the counter-claim.

[69] Should such an application formally be made, the defendants may well raise the defence that their impecuniosity arose from the actions of the plaintiff. As the plaintiff appears to be ordinarily resident in Australia, there may be a cross-application. The plaintiff would be wise to consider these matters.

[70] I decline to make any order for costs in relation to the application for judgment. While the plaintiff has been successful in relation to the application on liability, he has failed in relation to the application on quantum and it was never realistic to expect that, in the circumstances of this particular case, the Court give judgment against the defendants in the sum of $12 million.

Outcome

[71] The defendants are given 21 days within which to file an amended statement of counter-claim complying with the High Court Rules and to pay to the plaintiff costs in the sum of $750. Unless both orders are complied with, the counter-claim is to be struck out.

[72] Judgment for the plaintiff on liability for defamation is granted. Judgment on quantum is refused. Costs lie where they fall in respect of that application.

[73] The plaintiff has 21 days to file a further amended statement of claim providing full particulars of the claims against each of the defendants.

[74] The defendants are restrained from publishing further defamatory statements about the plaintiff and are directed to use their best efforts to retract and delete the defamatory statements, which they have caused to be published.

[75] This matter is adjourned to be called again in two months' time.

Churchman J