IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2019-485-132
[2019] NZHC 1711

BETWEEN	MAUI ASHLEY SOLOMON Plaintiff/Applicant
AND	DAVID JAMES PRATER Defendant/Respondent

Hearing: 15 July 2019

Appearances: A Romanos for plaintiff/applicant
No appearance by or for defendant/respondent

Judgment: 19 July 2019

JUDGMENT OF ASSOCIATE JUDGE JOHNSTON

This judgment was delivered by me on 19 July 2019 at 4.00 pm,
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Introduction

[1] The plaintiff, Mr Maui Solomon, sues the defendant, Mr David Prater, alleging that Mr Prater was a party to the publication of a letter dated 31 August 2018 that Mr Solomon alleges was defamatory of him. Mr Solomon commenced proceedings by filing and serving a notice of proceeding and statement of claim dated 8 March 2019. At the same time, he provided initial disclosure pursuant to r 8.4 of the High Court Rules 2016. Mr Prater filed and served a statement of defence, dated 14 April 2019, but did not provide initial disclosure. He then filed and served an amended statement of defence dated 10 May 2019. His amended statement of defence pleads two affirmative defences; truth and honest opinion.

[2] By application dated 1 July 2019, Mr Solomon seeks an order striking out these affirmative defences. Mr Solomon's solicitor, Mr John Langford, has sworn an affidavit in support dated 17 June 2019.

[3] Mr Prater has not filed a notice of opposition, and nor did he appear at the hearing of Mr Solomon's application. From the Court's file, it is apparent that Mr Prater attempted to file a document of some sort but that the Registrar declined to accept this for filing as it did not comply with the High Court Rules. The Registrar informed Mr Prater of the details of the hearing, and explained to him what he would need to do if he wished to oppose Mr Solomon's application. Mr Prater has taken no further steps.

[4] Relying on Palmer J's judgment in *Mihinui v Attorney-General,*[1] the authors of *McGechan on Procedure* explain that the failure to file a notice of opposition in compliance with r 7.24 of the High Court Rules:[2]

> … has no formal legal effect although, ordinarily, the failure to do so will be a factor counting in favour of the application being granted. The Court must still assess any application on its merits, according to law — failure to file a notice of opposition will not guarantee an application's success…

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1 *Mihinui v Attorney-General* [2017] NZHC 654 at [13].
2 *McGechan on Procedure* (online ed, Thompson Reuters) at [HR7.24.03].

[5] Accordingly, when the matter was called, Mr Romanos developed the argument in full.

Principles relating to the striking out of pleadings

[6] Rule 15.1 of the High Court Rules provides:

> The court may strike out all or part of a pleading if it—
>
> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
>
> (b) is likely to cause prejudice or delay; or
>
> (c) is frivolous or vexatious; or
>
> (d) is otherwise an abuse of the process of the court.

[7] Mr Romanos drew my attention to *Gatland v Fairfax New Zealand Ltd*, where Toogood J summarised the principles applying to the striking out of pleadings in terms with which I respectfully agree and which I adopt:[3]

(a) The defence must be so clearly untenable that it cannot possibly succeed.

(b) The jurisdiction to strike out should be exercised sparingly, and only in clear cases. In all other cases, the respondent to a strike-out application should not be deprived of having the case dealt with in the ordinary way.

(c) Where pleadings are defective but the challenged party is willing to make remedial amendments, the Court will prefer to order amendments rather than a strike-out.

(d) The facts pleaded in the statement of claim are assumed to be true, but the Court is not required to accept entirely speculative or untenable allegations.

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[3] *Gatland v Fairfax New Zealand Ltd* [2016] NZHC 970 at [25].

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

Pleadings

[8] In his statement of claim, Mr Solomon quotes verbatim the 31 August 2018 letter, which was addressed to the members of the Hokotehi Moriori Trust, a body representing the Moriori people of Rēkohu (the Chatham Islands), with which Mr Solomon has been heavily involved. He says the letter was sent not only to the addressees but to others including the Mayor of the Chatham Islands. He also says that copies were inevitably forwarded to members of the Ngāti Mutunga o Wharekauri Iwi Trust, a body representing the Ngāti Mutunga people on the Chatham Islands, with whom the Moriori have been in a longstanding dispute concerning ownership of the Islands, stemming back to the invasion by 900 members of Ngāti Mutunga and Ngāti Tama in 1835.[4] Mr Solomon pleads that on its natural and ordinary meaning the letter carries 19 defamatory meanings. These all relate to the propriety of Mr Solomon's actions in relation to the 2012 election of trustees for the Hokotehi Moriori Trust. It will provide enough of a flavour of the alleged meanings if I record that Mr Solomon's case is essentially that the letter alleged that he acted corruptly to bring about the outcome he desired.

[9] In his defence, Mr Prater:

(a) denies being a party to the publication of the 31 August 2018 letter;

(b) denies Mr Solomon's allegations as to the natural and ordinary meaning of the letter;

(c) denies that the letter was defamatory of Mr Solomon;

(d) pleads the affirmative defence of truth;[5] and

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4 See *Kamo v Minister of Conservation* [2018] NZHC 1983, [2018] NZAR 1334 for some general background.

5 Defamation Act 1992, s 8.

(e) pleads the affirmative defence of honest opinion.[6]

Truth

[10] At paragraph 13 of his defence, Mr Prater says "the factual statements in the letter are true in substance and fact". Then at paragraph 14, he purports to particularise that defence.

[11] Mr Romanos submitted that that pleading is fundamentally flawed. He referred me to s 8(3) of the Defamation Act, which provides:

> In proceedings for defamation, a defence of truth shall succeed if:
>
> (a) the defendant proves that the imputations contained in the matter that is the subject of the proceedings were true, or not materially different from the truth; or
>
> (b) where the proceedings are based on all or any of the matter contained in a publication, the defendant proves that the publication taken as a whole was in substance true, or was in substance not materially different from the truth.

[12] Mr Romanos submitted that Mr Prater's pleading is defective because it does not identify under which paragraph — (a) or (b) — the defence is pleaded. I am not convinced that that is necessarily fatal, provided that the pleading clearly expresses what the defendant's case will be.

[13] It seems to me that the real difficulty with this pleading is that it does not address Mr Solomon's allegations as to the natural and ordinary meaning of the letter.

[14] Mr Solomon has pleaded that the letter conveys certain things. Earlier in his defence, Mr Prater pleads a general denial of this. But, at paragraph 13, he pleads that "the factual statements" in the letter are accurate and then, at paragraph 14, seeks to verify selected factual matters that bear no necessary relation to the alleged meanings.

[15] Mr Romanos also took me through all of the particulars contained at paragraph 14 of the defence and was able to demonstrate that, to one extent or another, all are problematic.

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6 Sections 9–12.

[16] I do not think it would be helpful to recount his submission in relation to all 12 of these particulars, but some examples may be helpful:

(a) At paragraph 14.2, Mr Prater pleads that someone else — a Ms Shirley King — has said that Mr Solomon exercised undue influence over the election. This pleads irrelevant hearsay.

(b) At paragraph 14.4, Mr Prater pleads that there is no doubt that Mr Solomon had several trustees "in his pocket" because two named trustees supported him. The fact that Mr Solomon was supported by certain trustees does not meet the suggestion that he had trustees "in his pocket".

(c) At paragraph 14.5, Mr Prater pleads that in earlier litigation this Court concluded that Mr Solomon was manipulating the results of the election.[7] I have read Brown J's judgment. His Honour concluded nothing of the sort.

[17] If the defendant's case is that the letter of 31 August 2018 was not capable of bearing any of the meanings that the plaintiff attributes to it, then the defendant need go no further than pleading that, as he has done. In doing that, Mr Prater would not be relying on a defence of truth at all.

[18] If the defence is that the letter bears one or more of the meanings that the plaintiff alleges but that that meaning or those meanings is or are true, then Mr Prater should identify which of those he accepts as arising on the natural and ordinary meaning of the words, plead the defence of truth in relation to the same and provide proper particulars.

[19] If the defence is that the letter, taken as a whole, was in substance true, then he should plead that and provide proper particulars.

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7 Referring to *Solomon-Rehe v Hokotehi Moriori Trust* [2015] NZHC 46, [2015] NZAR 776 at [56].

[20] The current state of the defence is unsatisfactory and, in my view, the defence of truth as pleaded cannot succeed and is likely to prejudice the plaintiff in terms of r 15.1(1)(a) and (b).

Honest opinion

[21] Section 10(2) of the Defamation Act provides:

> In any proceedings for defamation in respect of matter that includes or consists of an expression of opinion, a defence of honest opinion by a defendant who is not the author of the matter containing the opinion shall fail unless,—
>
> (a) where the author of the matter containing the opinion was, at the time of the publication of that matter, an employee or agent of the defendant, the defendant proves that—
>
> (i) the opinion, in its context and in the circumstances of the publication of the matter that is the subject of the proceedings, did not purport to be the opinion of the defendant; and
>
> (ii) the defendant believed that the opinion was the genuine opinion of the author of the matter containing the opinion:
>
> (b) where the author of the matter containing the opinion was not an employee or agent of the defendant at the time of the publication of that matter, the defendant proves that—
>
> (i) the opinion, in its context and in the circumstances of the publication of the matter that is the subject of the proceedings, did not purport to be the opinion of the defendant or of any employee or agent of the defendant; and
>
> (ii) the defendant had no reasonable cause to believe that the opinion was not the genuine opinion of the author of the matter containing the opinion.

[22] Mr Romanos submits that Mr Prater:

> … is in a real tangle because whilst he wishes to raise the defence of honest opinion, he has also denied publishing the Letter. So on one hand, he says he was not the author of the Letter. But on the other hand, he wants to raise honest opinion: a defence predicated on the basis it will be raised by the author.

[23] I do not accept that submission.

[24] I can see no objection to a defendant contending that he was not a party to the publication of a document but, in the alternative, if he was, then the factual foundation of the document was accurate and the opinion expressed in it is protected on one or more of the bases set out in s 10.

[25] Further, as is clear from s 10(2), the defence is not predicated on the assumption that the defendant is the author of the publication.

[26] Again, if Mr Prater simply denies that the letter carries any of the meanings alleged (as it appears) then he does not need to rely on the defence of honest opinion.

[27] If, however, he accepts that it carries one or more of those meanings, then he may wish to rely on the defence of honest opinion in relation to that meaning or those meanings. In that case, he will need to identify which of the three categories of the defence provided for in s 10 he is seeking to invoke.

[28] If he is relying on s 10(1), he will need to plead that he was the (or an) author of the letter or the relevant portion of it, plead that it reflects his genuine opinion and provide particulars of the facts upon which his opinion was based and the truth of those facts.

[29] If he relies on s 10(2)(a), then he will need to plead that the author of the letter or the relevant portion of the letter was his employee or agent, that the opinion did not purport to be his opinion and that he believed that the opinion was the genuine opinion of the author.

[30] If he is relying on s 10(2)(b), then he will need to plead that the author of the letter or the relevant portion of the letter was not his employee or agent, that the opinion did not purport to be his opinion or that of any employee or agent of his and that he had no reasonable cause to believe that the opinion was not the genuine opinion of the author.

[31] For completeness, I mention that any pleading of honest opinion as a defence may be expressed in the alternative — for example, to a defence that the defendant

was not a party to the publishing of the letter, or to a defence that the letter is not capable of bearing any of the meanings that the plaintiff attributes to it.

[32] As it stands, the defendant's pleading does none of those things. Again, the conclusion I have reached is that this defence as pleaded cannot succeed and is likely to prejudice the plaintiff in terms of r 15.1(1)(a) and (b).

Conclusion

[33] As Toogood J said in *Gatland v Fairfax New Zealand Ltd*, the Court is always reluctant to strike out claims or defences if the party whose pleadings are under attack is prepared to re-plead and the claim or defence in question appears capable of being advanced in a coherent way.[8]

[34] In this case, if I were to make an order striking out Mr Prater's affirmative defences, that would leave him with two lines of defence; the first being that he was not a party to or responsible in any way for the publication of the 31 August 2018 letter, and the second being that that letter did not carry any of the meanings attributed to it by the plaintiff. Whilst the defendant may well be prepared to proceed on those bases, I am concerned to ensure that he at least has an opportunity to consider reformulating his affirmative defences.

[35] I reach that view notwithstanding Mr Prater's failure to oppose this application and his non-appearance at the hearing.

[36] Accordingly, as I indicated to Mr Romanos at the conclusion of the hearing, I now make the following orders:

(a) The defendant's affirmative defences as pleaded at paragraphs 13–14 (truth) and 15 (honest opinion) of his amended statement of defence dated 10 May 2019 will be struck out unless, by 9 August 2019, the defendant files a second amended statement of defence pleading those

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8 *Gatland v Fairfax New Zealand Ltd*, above n 3, at [25].

defences in a manner compliant both with the Defamation Act and the High Court Rules, as described in this judgment.

(b) Costs are reserved.

[37] The defendant may well wish to consider taking advice from his solicitors in relation to how properly to plead the affirmative defences, if indeed that is what he elects to do. If he were to file a second amended statement of defence that is non-compliant, and force the plaintiff to make a second application, he could hardly expect the Court to give him a further opportunity such as I am giving him in this judgment. There would likely also be cost implications of such a course.

Associate Judge Johnston

Solicitors:
Langford Law, Wellington for the plaintiff