IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2018-404-000530
[2020] NZHC 1303

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

Hearing: 3 June 2020

Appearances: D Jacques for Plaintiff
G A Paine for Defendants

Judgment: 11 June 2020

JUDGMENT OF ASSOCIATE JUDGE PAULSEN

This judgment was delivered by me on 11 June 2020 at 3.00 pm
pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

[1] The plaintiff sues the defendants in defamation. On 30 August 2018, Churchman J entered judgment against the defendants as to liability.[1] There has yet to be a hearing to assess damages.

[2] Since judgment was entered, there have been procedural skirmishes. This ruling concerns the most recent of those. The defendants apply for particular discovery of financial records of the plaintiff, companies with which the plaintiff is associated and his family trust. The application is advanced on the basis the discovery is required to prove instances of misconduct by the plaintiff in mitigation of damages in reliance upon s 30 of the Defamation Act 1992 (s 30).

[3] The application for particular discovery is misconceived. The discovery sought is not relevant to any inquiry the court may make under s 30 and is a collateral attack upon the judgment entered against the defendants. To order discovery in those circumstances would be oppressive and disproportionate and the application is an abuse of process.

Some background

[4] Zainulabidin Syed (Mr Syed) and Amir Malik (Mr Malik) had business dealings. Their relationship soured. There were court proceedings between Mr Malik and one of Mr Syed's companies, Syed Family Ltd.[2] Mr Malik was unsuccessful. Those proceedings were a catalyst for the defendants to begin a campaign to discredit Mr Syed.

[5] From around October 2016, the defendants began distributing defamatory material about Mr Syed on social media which caused him to issue this proceeding. Something of the scope and tenor of the defendants' campaign can be discerned from the fact the statement of claim comprised 20 causes of action in 170 paragraphs and sought damages of more than $12,000,000. The content of the material was extreme. It was plainly intended to damage Mr Syed's reputation as a businessman, family man, member of the community and follower of Islam.

---

1 *Syed v Malik* [2018] NZHC 2278.
2 *Syed Family Ltd v Malik* [2017] NZHC 1022.

[6] In their statement of defence, the defendants admitted their statements were defamatory of the plaintiff and did not plead the defence of truth. In a written judgment of 30 August 2018, Churchman J entered judgment for the plaintiff under High Court Rule 15.15 as to liability only.

[7] In the same judgment, Churchman J dismissed the plaintiff's application to strike out the defendants' counterclaim but required them to file an amended statement of counterclaim complying with the High Court Rules.[3] The defendants filed an amended statement of counterclaim on 1 November 2018, but it has since been discontinued.[4]

[8] On 13 November 2018, the defendants filed an application to set aside the judgment as to liability. After delays, the application was set down to be heard on 11 December 2019. The defendants chose not to pursue it and the application was dismissed by Associate Judge Lester on 9 December 2019.

[9] At a telephone conference on 5 March 2020, Mr Jacques sought directions for the hearing to determine the plaintiff's damages. Mr Nevell (who was then acting for the defendants) resisted because the defendants wanted discovery. I made a direction for the filing of an application for discovery. The defendants filed the application and it was opposed by the plaintiff.

The application and affidavits

[10] The scope of the defendants' application for further discovery is extremely broad. It seeks discovery of financial records spanning a period of 16 years, which I summarise as follows:

(a) All bank statements of NZ Corporate Finance Ltd or any other company controlled by Mr Syed between the years 2005-2016 showing payments of wages or contract payments to Mr Malik.

---

3 *Syed v Malik,* above n 1, at [38].
4 *Syed v Malik* [2019] NZHC 3210 at [12].

(b) All bank statements of any company or entity controlled by Mr Syed which supports the allegation made by Mr Malik in other High Court proceedings that $4.5 million dollars was loaned to Syed Family Limited by a company referred to as WWED or Austblue International in or around 2012.

(c) All bank statements and all financial statements for the period 2005-2020 of 16 named companies associated with Mr Syed, as well as the Syed Family Trust and Mr Syed.

(d) All GST returns for the period 2006-2020 of the same 16 named companies as well as the Syed Family Trust and Mr Syed.

(e) All records of transfers of funds from any of the 16 named companies as well as the Syed Family Trust and Mr Syed to friends, family members or associates of Mr Syed in Pakistan in the years 2005-2020.

[11] The single ground supporting the application is that the documents are relevant to the assessment of Mr Syed's reputation prior and subsequent to the making of the defamatory statements by the defendants. The documents are said to be relevant in four respects as follows:

a Whether or not the plaintiff:

(i) lied to or misled the High Court in previous proceedings,

(ii) Forged documents to support his lies,

b Whether the plaintiff or his corporate entities used a complex corporate structure of inter-related companies to syphon funds from the Australian government, before the contracting companies were liquidated and the profits moved offshore to NZ or Pakistan,

c Whether the plaintiff used this corporate structure to avoid or evade tax obligations in Australia or New Zealand.

d Whether there is sufficient information available to support the defendants' position that the plaintiff was well known, at the time the statements were made, to be a man of poor business ethics and reputation, and to have a poor reputation as a Muslim.

[12] The defendants also filed an amended statement of defence. At paragraphs 9 to 12, the defendants plead the statutory defence under s 30. The alleged specific instances of Mr Syed's misconduct are the same matters referred to in the application for particular discovery except in one respect.

[13] At paragraph 9(f) it is alleged that "[Mr Syed's] actions give rise to genuine concern that [Mr Syed] is involved in money laundering and the financing of terrorism." I asked Mr Paine, who was not responsible for that pleading, how it could have been made consistent with counsel's ethical obligations.[5] He advises me there is no basis for the allegation that he is aware of and it should not have been made and is withdrawn.

[14] Counsel referred me to three affidavits which are before the court. These are:

(a) an affidavit sworn by Mr Malik dated 4 December 2019. This is a lengthy affidavit extending to 119 paragraphs and 298 pages (with exhibits). It was filed in support of the defendants' application to set aside the judgment as to liability and in opposition to an application by Mr Syed to strike out Mr Malik's counterclaim;

(b) a photocopy of an affidavit sworn by Mr Malik marked as a "draft" dated 19 May 2020 in support of the application for discovery orders; and

(c) a scanned copy of an affidavit sworn by Mr Syed in Pakistan dated 14 April 2020 in opposition to the application for discovery orders.

[15] Counsel recognised the court would not ordinarily read facsimiles or what purport to be drafts of affidavits. They were agreed that for the purposes of this application the court should overlook these matters and read the affidavits in the interests of progressing the case without further delays.

---

[5] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 13.8.

Submissions

The defendants

[16] Mr Paine submits that s 30 is a statutory response to relax previous common law rules in defamation cases. It allows a defendant, in mitigation of damages, to prove specific instances of misconduct by the plaintiff and thereby establish the plaintiff is a person whose reputation is generally bad.

[17] He accepts the defendants' application is cast widely but relies upon Mr Malik's affidavit of 4 December 2019 which he says is specific as to the basis for the defendants' belief that Mr Syed has a bad reputation.

[18] The kernel of Mr Paine's submission is that this proceeding took an unusual turn when Churchman J entered judgment against the defendants on liability. The defamatory allegations made by the defendants have never been responded to and the defendants contend the allegations are true.[6] In those circumstances, he argues, the defendants should be allowed to prove their allegations and the documents necessary for them to do so are in the control of the plaintiff and are discoverable. Giving discovery will not be an onerous obligation, he contends, if, as Mr Syed has said, some of his companies are in liquidation and he does not have their records.

The plaintiff

[19] Mr Jacques submits that s 30 does not require a plaintiff to provide discovery. The defendants must, he argues, prove instances of misconduct in the best way they can from information already available to them or that is in the public realm. In the alternative, he contends this application is simply a "fishing expedition" as the defendants are searching for grounds to attribute a bad reputation to the plaintiff.

---

6 Defamation Act 1992, s 8(3)(a).

Jurisdiction

[20] Although not referred to by either counsel, the jurisdictional basis for making the order sought is High Court Rule 8.19 which provides:

> **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.

[21] The court tends to follow a four-stage approach when considering an application under r 8.19 as outlined in *Assa Abloy New Zealand Ltd v Allegion (New Zealand) Ltd* as follows:[7]

> (a) Are the documents sought relevant, and if so how important will they be?
>
> (b) Are there grounds for the belief that the documents sought exist?
>
> (c) Is discovery proportionate? and

---

7 *Assa Abloy New Zealand Ltd v Allegion (New Zealand) Ltd* [2015] NZHC 2760, [2018] NZAR 600 at [14]

(d) Weighing and balancing these matters, in the court's discretion applying r 8.19 is the order appropriate?

[22] Any document sought under r 8.19 must be relevant to the matters which will actually be in issue before the court and relevance is usually to be assessed according to the pleadings.[8] The court, however, retains an overriding discretion whether to make a discovery order and will not do so where to make an order would be oppressive. In this context, oppression may arise where it is obvious from the pleadings or circumstances that discovery will serve no useful purpose.[9] It would also be oppressive to order discovery when the application seeking it is an abuse of the court's processes.

The section 30 defence

[23] Section 30 reads as follows:

> **Misconduct of plaintiff in mitigation of damages**
>
> In any proceedings for defamation, the defendant may prove, in mitigation of damages, specific instances of misconduct by the plaintiff in order to establish that the plaintiff is a person whose reputation is generally bad in the aspect to which the proceedings relate.

[24] Traditionally, the position at common law was that a defendant could not in mitigation of damages allege and prove prior incidents of misconduct by the plaintiff because it was considered it was the plaintiff's reputation not their disposition that was relevant.[10] Section 30 represented a shift in the law allowing evidence to be given of specific instances of misconduct on the part of the plaintiff. The rationale is that if the plaintiff is shown by virtue of prior acts of misconduct to already have a bad reputation then the defendant's attack may have caused him or her less damage than might otherwise be the case, or, even no damage at all. The evidence must, however, relate to that aspect of the plaintiff's reputation which is at stake in the proceeding. It has

---

8 *Robert v Foxton Equities Ltd* [2014] NZHC 726, [2015] NZAR 1351 at [8]; *New Zealand Rail Ltd v Port Marlborough New Zealand Ltd* [1993] 2 NZLR 641 (CA) at 644.

9 *Dold v Murphy* [2018] NZHC 994 at [32].

10 Urusla Cheer (ed) *Tort – A to Z of New Zealand Law* (online ed, Thomson Reuters) at [59.16.6.01(3)(a)].

been held that evidence of misconduct subsequent to the making of the defamatory statements in issue can be relied upon for the purposes of s 30.[11]

[25] In *Hotchin v Sheppard*, the plaintiff sued the first defendant for allegedly defamatory statements that he made about them concerning their involvement in the collapse of Hanover Finance Ltd.[12] The first defendant sought to adduce evidence showing that the plaintiffs were persons of poor reputation.[13] The plaintiffs applied to strike out the particulars of misconduct asserting they were not proper particulars which could possibly establish the plaintiffs' reputation was generally bad in the aspect to which the proceeding related.[14] Associate Judge Doogue discussed the application of s 30 and said:[15]

> The question that needs to be asked is whether it can plausibly be argued that as a result of the share trading events the plaintiffs had acquired reputations which were so bad that publication of the defendant's statements could not have done them any damage or that the damage caused was limited by pre-existing poor reputation. If the Court can say with confidence that the pre-existing reputation could not possibly have any material effect on assessment of the overall harm done to the plaintiffs' reputation by the later defamation, then the pleadings ought to be corrected by striking out reference to the events that are said to have established the poor pre-existing reputation. In making that judgment, the court must take into account not only the question of whether there is any relevant overlap of the subject matter of the two separate episodes but also their separation in time. As to the last, the question that needs to be answered is whether the earlier events occurred so long ago that any tarnishing of the plaintiffs' reputations from that clause was now forgotten so that it was not a matter which could have any relevance to their contemporary standing.
>
> …
>
> However, the admissibility of a plaintiff's pre-existing tarnished reputation is not restricted to circumstances where the reputation has been damaged by more or less exactly the same allegations in the past. The assessment that has to be made is whether the latest damage to the plaintiffs' reputations is similar in character to the damage previously sustained. Both sequences of events that were adverse to the character of the plaintiffs affected their standing in the same societal sector – business and commercial groups – and have in common the probity of those plaintiffs as businessmen. No doubt, they affected the plaintiffs' standing in other circles as well, such as in social groups and perhaps in their families. But that does not negate the fact that they also affected their standing in business circles.

---

11 *Tipple v Buchanan* HC Christchurch CIV-2001-409-000801, 20 July 2005 at [25].
12 *Hotchin v Sheppard* [2012] NZHC 2527.
13 At [5].
14 At [9].
15 At [34] and [37].

[26] When considering particular instances of misconduct by the plaintiff under s 30 the assessment the court is making is between, on the one hand, the plaintiff's pre-existing reputation and, on the other, the plaintiff's reputation tarnished by the defamatory statement(s) made by the defendant. It is obvious, then, that a defendant cannot rely, as instances of misconduct by the plaintiff, upon the truth of the defamatory allegations that are the subject of the plaintiff's action. If the allegations can be proven as true, the defendant has the complete defence of truth. If the defence of truth is not available, the allegations cannot be proven.

[27] Here, there is an additional barrier for the defendants. In entering judgment against the defendants as to liability, Churchman J was necessarily making a finding that the defence of truth was not available to them. That finding is conclusive as between the parties and the defendants are estopped from challenging it. The court may prevent them from doing so on the basis that to allow them to raise those matters would be an abuse of the court's processes.[16]

[28] Mr Malik makes no pretence but that his intention is to prove the truth of his defamatory statements. At paragraph 6 of his affidavit, he notes the defamatory meanings of his statements. At paragraph 7, he states the purpose of his discovery application is to prove his statements are true. He says:

> If the court allows me to get discovery of these financial records of the plaintiff and his main businesses, many of the statements which I made will be proved to be true.

[29] At paragraph 8 he says:

> It is also my evidence that, because the statements I made were based in truth, the majority of the people who I sent the statements to, were aware of the plaintiff's dodgy business practices, and his dishonesty and the fact that he paid very little tax and used international fund transfers to avoid tax and get his money out of Australia, with much of it going to Pakistan, to his friends, family, and associates many of whom are religious fundamentalists.

[30] In presenting his submissions, Mr Paine accepted there are no matters relied upon by the defendants in support of the statutory defence which were not the subject of the plaintiff's claim in respect of which judgment for liability has been entered.

---

16 Mathew Downs (ed) *Cross on Evidence* (online ed, LexisNexis) at [4.4].

[31] The defendants argue that they have suffered an injustice. Mr Malik refers to the difficulties the defendants have had getting legal aid and, at paragraph 12 of his affidavit, Mr Malik says:

> If the court now refuses me the right to get orders for discovery of these relevant documents, and refuses to allow me to argue that the plaintiff's specific instances of misconduct are relevant to the assessment of damages that should be awarded, then I would have been denied the opportunity to ever put before the Court the evidence that is available, and in the plaintiff's possession and control, which shows that:
>
> (a) He is dishonest in his dealings with:
>
> (i) Me,
>
> (ii) Trinity Wilson,
>
> (iii) The Australian government,
>
> (iv) The Australian and New Zealand tax departments,
>
> (v) His business creditors and associates,
>
> (vi) The High Court
>
> (b) He is therefore not a man of good reputation,
>
> (c) He is therefore not a good Muslim,
>
> (d) He therefore suffered no damage to his reputation as a result of the statements Trinity and I made.

[32] Notwithstanding the defendants' issues with legal aid, I do not accept there has been an injustice. When entering judgment for the plaintiff, Churchman J noted the defendants had been advised about the need to plead truth as a defence and had failed to do so. He said he had no confidence that they would do so if given more time.[17] Even if he was wrong in that assessment, the defendants could apply to set aside the judgment and made an application to do so. They had counsel representing them at that time and withdrew the application before it was heard. They cannot now seek to challenge the judgment by a side-wind.

[33] For the reasons given, it is not now open to the defendants to allege their defamatory statements were true. The matters they rely on cannot be considered by

---

17 *Syed v Malik*, above n 1, at [44].

the court in support of their defence under s 30. Their application is an abuse of the court's processes. Furthermore, in the context of r 8.19, no purpose would be served in making the order for discovery. To do so would be both disproportionate and oppressive.

Result

[34] The defendants' application for particular discovery is dismissed.

[35] As the defendants are legally-aided, I reserve costs. If the plaintiff seeks costs pursuant to s 45 of the Legal Services Act 2011 then he may apply within 21 days, otherwise costs will remain reserved pending the final determination of the proceeding.

[36] The case will be called for mention at a teleconference at ***12pm on 8 July 2020***. I intend to then make orders setting the case down for hearing to assess the plaintiff's damages.

[37] Counsel should file memoranda by no later than 6 July 2020 addressing all of the Schedule 5 High Court Rules matters. One matter that will need to be considered is a timetable for the filing of a further amended statement of defence by the defendants to reflect the findings in this judgment.

_____

O G Paulsen
Associate Judge

Solicitors:
Legal Associates, Papatoetoe
Guest Carter Law Ltd (S M D Guest), Dunedin
(Counsel: G A Paine, Barrister, Dunedin)