IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTEPOTI ROHE

CIV-2021-412-13
[2021] NZHC 1586

UNDER	the Defamation Act 1992
BETWEEN	MILES ROGER WISLANG Plaintiff
AND	THOMAS BRENDON MAKINSON Defendant

Hearing: 24 June 2021

Appearances: Plaintiff in person
D J More for Defendant

Judgment: 30 June 2021

JUDGMENT OF ASSOCIATE JUDGE LESTER

This judgment was delivered by me on 30 June 2021 at 3.30 pm

Pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

30 June 2021

[1] The defendant, Mr Makinson, applies to strike out this defamation proceeding on the ground that the statement of claim discloses no reasonably arguable cause of action against the defendant.

[2] The application relies both on limitation and on the basis that the pleading does not identify a publication by the defendant.

Strike out principles

[3] The application to strike out is brought in reliance of r 15.1 of the High Court Rules 2016 (the Rules). The principles are well known. Pleaded facts are assumed to be true. The cause of action must be clearly untenable before it will be struck out. The jurisdiction is to be exercised sparingly and only in clear cases and should not be exercised where a pleading can be saved by amendment.[1]

The plaintiff's claim

[4] In 2019 the plaintiff, Dr Wislang, and the defendant were flatmates, along with two other people.

[5] On 4 March 2019, Mr Makinson visited a Ms Christine Manning who was the manager of the real estate agency which managed the property rented by the parties.

[6] On 5 March 2019, Ms Manning sent Dr Wislang an email which features in Dr Wislang's statement of claim.

[7] Dr Wislang, in his statement of claim pleads:

> 3. Ms Manning's said email was addressed to Mr Wilson and me and had as its subject-line "Re Police Complaint". Its first paragraph claimed
>
> > "It has come to my attention through the police that there have been issues with the current tenancy in regards to a trespass notice and harassment of one of the current tenants friends and also intimidation towards other tenants".

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1 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33] per Elias CJ and Anderson J.

[8] Dr Wislang says the "other tenants" referred to by Ms Manning could only be the two other flatmates, that is, Mr Makinson and another person. Mr Makinson acknowledges meeting with Ms Manning on 4 March 2019. Mr Makinson does not detail what he said to Ms Manning during that meeting.

[9] The statement of claim later reads as follows::

> 6. Ms Manning's transmission to me by her said email, of Mr Makinson's so falsely and likely maliciously reporting to her concerning Mr Wilson and myself, was doubly dismaying and distressing for me.

[10] The statement of claim runs to some 12 pages but the cause of action is found at page 10.

[11] The cause of action against Mr Makinson is pleaded as follows:

> A. <u>The words used</u>
>
> The words complained of in this proceeding in defamation are
>
> 1. "Intimidated"; and
>
> 2. "Harassed"
>
> as quoted by Ms Christine Manning in her email to me of 5th March 2019 which is annexure "MW 1" to my affidavit in support of this statement of claim.
>
> Given the natural meaning of the two words and their use by the defendant Mr Makinson in the context of his informing Ms Manning against me, they constitute the principal cause of action in these proceedings.
>
> How the two words were understood by Ms Manning is made clear by the tenor and also her blame-attributing, as against me and Mr Wilson, specifics of her email to me, and also her invitation to us to solve our lease and permanently quit the house; leaving Mr Makinson and [another flatmate] to find two replacement flat-mates more embracing of their sexual ethos and manner of living.

Limitation

[12] Any defamatory statement made by Mr Makinson would have been at the meeting on 4 March 2019. The proceeding was filed on 4 March 2021.

[13] Section 11(1) of the Limitation Act, as directed by s 15, reads as follows:

> **11 Defence to money claim filed after applicable period**
>
> (1) It is a defence to a money claim if the defendant proves that the date on which the claim is filed is at least [2] years after the date of the act or omission on which the claim is based (the claim's primary period).

[14] Section 35(2) of the Interpretation Act 1999 provides:

> (2) A period of time described as beginning from or after a specified day, act, or event does not include that day or the day of the act or event.

[15] Accordingly, the first day of the two year limitation period began 5 March 2019 and the claim was therefore filed on the last available day. It is not necessary to consider whether the late notice provisions would have applied.

[16] However, Mr More, counsel for Mr Makinson, submitted that limitation remained relevant. While limitation as a ground of strike out in itself cannot be maintained, Mr More submitted limitation nonetheless continues to be relevant on the basis that the statement of claim cannot be repleaded to now add a cause of action which would be statute barred. Mr More's criticism of the pleading is that it does not plead the statements Mr Makinson is alleged to have made at the meeting on 4 March 2019, rather it relies on the contents of Ms Manning's email to Dr Wislang on 25 March 2019. In short, it was submitted that the content of Ms Manning's email to Dr Wislang cannot be a defamatory statement by the defendant.

[17] Rule 7.77(2) of the Rules provides that an amended pleading may introduce, as an alternative or otherwise:

> (a) relief in respect of a fresh cause of action, which is not statute barred; or
>
> (b) a fresh ground of defence.

[18] Accordingly, Mr More's submission was that the statement of claim should be struck out as it cannot be saved through an amendment. An amendment to plead that Mr Makinson made a defamatory statement so as to include an essential element of the claim would be to introduce a fresh cause of action which would be statute barred.

[19] The principles that apply when determining whether an amended pleading raises a fresh cause of action are discussed in *McGechan on Procedure*:[2]

> The principles … were summarised in *Transpower New Zealand Ltd v Todd Energy Ltd* [2007] NZCA 302 at [61], as follows:
>
> - A cause of action is a factual situation the existence of which entitles one person to obtain a legal remedy against another (*Letang v Cooper* [1965] 1 QB 232 (CA) at 242-243 per Diplock LJ).
>
> - Only material facts are taken into account and the selection of those facts "is made at the highest level of abstraction" (*Paragon Finance plc v D B Thakerar & Co (a firm)* [1999] 1 All ER 400 (CA) at 405 per Millett LJ).
>
> - The test of whether an amended pleading is "fresh" is whether it is something "essentially different" (*Chilcott v Goss* [1995] 1 NZLR 263 (CA) at 273 citing *Smith v Wilkins & Davies Construction Co Ltd* [1958] NZLR 958 (SC) at 961 per McCarthy J). Whether there is such a change is a question of degree. The change in character could be brought about by alterations in matters of law, or of fact, or both.
>
> - A plaintiff will not be permitted, after the period of limitations has run, to set up a new case "varying so substantially" from the previous pleadings that it would involve investigation of factual or legal matters, or both, "different from what have already been raised and of which no fair warning has been given" (*Chilcott* at 273 noting that this test from *Harris v Raggatt* [1965] VR 779 (SC) at 785 per Sholl J was adopted in *Gabites v Australasian T & G Mutual Life Assurance Society Ltd* [1968] NZLR 1145 (CA) at 1151).

[20] The Court of Appeal has noted with reference to these principles that in order for an amendment to amount to a new cause of action there must be a change to the legal basis for the claim.[3] That can, in theory, occur through the addition of new facts but only if the facts are so fundamental that they change the essence of the case against the defendant.[4] If the basic legal claims made are the same, and they are simply backed up by the addition or substitution of a new fact, that is unlikely to amount to a new cause of action:[5]

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2 Andrew Beck and others (eds) *McGechan on Procedure* (online ed, Thomson Reuters) at [HR7.77.04].
3 *Commerce Commission v Visy Board Pty Ltd* [2012] NZCA 383 at [146].
4 At [146].
5 At [146]-[147].

> … the importance of the pleaded fact to the success of the claim is not the test; the question is whether the amendment has changed the essential nature of the claim.

[21] The assessment of whether an amended pleading is "essentially different" is objective and it relates to the substance of what is pleaded rather than the form.[6]

[22] Mr More's submission is that the cause of action, as it stands, seeks to make Mr Makinson liable for the words in the email of Ms Manning. Mr More notes the pleading of the cause of action set out at [11] above, focuses on the words Dr Wislang objects to *in the email*.

[23] There is no pleading of what Mr Makinson said to Ms Manning on 4 March 2019. The assumption underpinning the claim is that Ms Manning's email is an accurate summary of what Mr Makinson said: indeed, the cause of action claims Ms Manning is quoting Mr Makinson.

[24] If an amended statement of claim were to be filed pleading the statements allegedly made by Mr Makinson at the 4 March 2019 meeting were defamatory, would this be essentially different from the claim as it stands? I am satisfied that it would be.

[25] It has been said that pleadings in defamation retain a more formal character than generally applies in other civil proceedings.[7]

[26] The publication complained of in the statement of claim as it stands is Ms Manning's email. While that is said to quote Mr Makinson, nonetheless the statement of claim does not plead against Mr Makinson that the defamatory publication by him was at the meeting of 4 March 2019. The statement of claim does not refer expressly to the 4 March 2019 meeting between Mr Makinson and Ms Manning at all.

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6 *ISP Consulting Engineers Ltd v Body Corporate 89408* [2017] NZCA 160, (2017) 24 PRNZ 81 at [22].

7 *Lee v New Korea Herald Ltd* HC Auckland CIV-2008-404-5072, 9 November 2010 at [36], referred to at *Wishart v Murray* [2015] NZHC 3363, [2016] 2 NZLR 562 at [17].

[27] For the pleading to be amended to rely on the previously unpleaded meeting as the occasion of defamation would be, in my view, to create an "essentially different" claim.

[28] This is not a case of adding a further particular of damage or even a further particular of breach, but of a new factual allegation which would be a new foundation of the cause of action in defamation. The occasion of the allegedly defamatory statement is a key material fact "at the highest level of abstraction". Put another way, the claim as presently framed cannot succeed because it does not include the occasion of publication. The substance of the claim will change from one that relies on Ms Manning's email of 5 March 2019 to one that relies on Mr Makinson's alleged statement the previous day.

[29] I am satisfied such an amendment is not permitted by r 7.77(2) of the Rules, as it would be to introduce a new cause of action that would be time-barred. Dr Wislang could not rely on the late knowledge exception under s 14 of the Limitation Act 2010. Ms Manning's email of 5 March 2019 begins: "It has come to my attention through the police that there have been issues with the current tenancy.", meaning he gained knowledge of the allegedly defamatory statement a subject of the claim on 5 March 2019.

[30] Dr Wislang made a request under the Official Information Act 1982 to the Police. On 8 April 2019, Dr Wislang received a response from the Official Information Supervisor of the Dunedin Police. Dr Wislang, in an affidavit filed in support of the statement of claim, confirmed that he ascertained from a meeting with the Supervisor that Ms Manning had not received a complaint about Dr Wislang "through" the Police as claimed by Ms Manning in her email. Dr Wislang did not give the date of the meeting with the Supervisor, but in context, it would have been not long after receiving the initial substantive response from the Police on 8 April 2019.

[31] It follows from the above review that I am satisfied the statement of claim does not disclose a cause of action against Mr Makinson as it does not plead a defamatory publication by him and it is too late for that to now be pleaded. It follows the statement of claim is ***struck out*** on the basis that it does not disclose a reasonably arguable cause

of action and it is now too late for it to be amended. It is no answer to say that what Dr Wislang intended to plead could arguably be discerned with reference to the reference to quotation, the issue is what is set out in the pleading objectively assessed.

Costs

[32] I did not hear from the parties in respect of costs. I would see no reason why costs should not follow the event on a 2B basis.

[33] If either party wishes to be heard on costs, they may file a memorandum within ***five working days*** of the date of this judgment, not more than three pages, on the question of costs. If no memorandum is filed then the costs order shall be that there is an award of costs and disbursements in favour of Mr Makinson on a 2B basis.

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Associate Judge Lester

Solicitors:
Downie Stewart, Dunedin

Copy to:
D J More, Barrister, Dunedin
Dr M R Wisland, Dunedin