IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2022-404-1187
[2022] NZHC 2960

BETWEEN	VIJENDRA PRASAD Plaintiff
AND	PRATIGHA RAJ Defendant

Hearing: 3 November 2022

Appearances: M R Taylor for Plaintiff
C T Patterson for Defendant

Judgment: 11 November 2022

JUDGMENT OF POWELL J
[Application to strike out – redacted version]

This judgment was delivered by me on 11 November 2022 at 2pm.
Pursuant to R 11.5 of the High Court Rules.

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Registrar/Deputy Registrar

Solicitors:
Maria Taylor, Auckland for Plaintiff
Lateral Lawyers Ltd, Auckland for Defendant

Counsel:
M R Taylor, Auckland
C T Patterson, Auckland

[1] The defendant, Pratibha Raj, has applied to strike out all or part of the defamation proceedings brought by the plaintiff, Vijendra Prasad.

[2] The applicable legal principles are well settled and not in dispute. Rule 15.1 of the High Court Rules 2016 provides jurisdiction, with the principles summarised as follows:[1]

(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. In *Couch v Attorney-General,* Elias CJ and Anderson J said: "It is inappropriate to strike out a claim summarily unless the court can be certain that it cannot succeed."[2]

(c) The jurisdiction is to be exercised sparingly, and only in clear cases. This reflects the Court's reluctance to terminate a claim or defence short of trial.

[3] In addition, both parties accept that there is an additional element to be considered when a strike-out application is made in a defamation context. Specifically, the principles first identified in the decision of the English Court of Appeal in *Jameel v Dow Jones & Co Inc*[3] are applicable. In that case, applied subsequently in New Zealand,[4] the Court accepted that notwithstanding the pleadings disclosing an arguable case in defamation, a Court can nevertheless strike proceedings out as an abuse of process where the costs of allowing the proceedings to continue would be disproportionate to any material benefit that could be obtained by the plaintiff to the extent that the proceedings were successful ("*Jameel*

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1 Summarised by the Court of Appeal in *Attorney-General v Prince* [1998] 1 NZLR 262, (1997) 16 FRNZ 258 (CA) at 267 and endorsed by the Supreme Court in *Couch v Attorney-General* [2008] NZSC 45 at [33].

2 At [33].

3 *Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75, [2005] QB 946.

4 See for example *Opai v Culpan* [2017] NZHC 1036, [2017] NZAR 1142; *X v Attorney-General (No. 2)* [2017] NZHC 1136, [2017] NZAR 1365.

disproportionate").[5] Later cases have similarly indicated that Courts can in appropriate cases strike out proceedings where the plaintiff has failed to demonstrate a minimum level of harm or seriousness.[6] For example, Palmer J considered that "less than minor" harm to reputation is the threshold for showing a cause of action is clearly not tenable in a strike-out application.[7]

[4] In this case Ms Raj argues that:

(a) There is no material benefit that could result from Mr Prasad's defamation claims that would justify the use of the Court's resources, and the parties' resources, and that necessitate litigation of the claims; and/or

(b) Mr Prasad's claims have been brought for an improper purpose, and in particular:

(i) to cause distress to and/or to embarrass Ms Raj; and/or

(ii) to gain an advantage in the disputes between the parties arising out of their relationship separation; and/or

(iii) to inhibit Ms Raj from pursuing her genuine concerns that Mr Prasad may have [REDACTED].

[5] In response Mr Prasad submitted that this was not a case where the *Jameel* disproportionate test was met, nor a case that fails to demonstrate a minimum level of harm or seriousness. On the contrary, Mr Prasad submitted that the seriousness of the allegations coupled with a lack of information about the extent of any publication and level of harm, as well as the fact that Mr Prasad seeks more than vindication, means that any strike-out is premature.

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5 See *Opai v Culpan* at [16]–[19].
6 *Thornton v Telegraph Media Group Ltd* [2010] EWHC 1414 (QB); *Sellman v Slater* [2017] NZHC 2392, [2018] 2 NZLR 218.
7 *Sellman v Slater* at [68]–[69].

[6] In relation to Ms Raj's alleged grounds of improper purpose, Mr Prasad submitted that no distress or embarrassment would be caused to Ms Raj given his view that the pleaded allegations are all relevant factual background to his claim of defamation. He submitted that Ms Raj has not identified what advantage he is seeking to gain in their other disputes, nor how he was prohibiting her from pursuing her genuine concerns.

The allegations

[7] There is no dispute that Mr Prasad's defamation proceedings are extremely limited. The first four paragraphs of the statement of claim introduce the parties, note that they are married, have two children together and have now separated.

[8] Paragraphs 5–22 of the statement of claim then set out details of what are described as "civil disputes between the parties". These consist of a range of allegations by Mr Prasad against Ms Raj which are entirely unconnected to the defamation allegations and in respect of which no relief is sought.

[9] The alleged defamatory statements are then detailed as follows:

> 23. On around 3 July 2022, Pratibha made defamatory statements about Vijendra to various members of the public.
>
> Particulars
>
> (a) [statement alleged to have been made to Prakash Mani REDACTED];
>
> (b) [statement alleged to have been made to Dharmendra Kumar REDACTED]
>
> (the slanderous and defamatory statements).
>
> 24. Shortly thereafter, Vijendra became aware of the slanderous and defamatory statements.

[10] After noting that Mr Prasad requested undertakings from Ms Raj which were not provided, Mr Prasad goes on to plead:

30. The slanderous and defamatory statements:

(a) Are untrue;

(b) Are false and malicious;

(c) Are slanderous and defamatory in their normal and ordinary meaning;

(d) Lower Vijendra in the estimation of right-thinking members of society generally;

(e) Expose Vijendra to public hatred or contempt;

(f) Cause Vijendra to be shunned and avoided by society;

(g) Impute criminal behaviour and immoral conduct.

[11] The plea for relief then provides:

A. A declaration that Pratibha is liable to Vijendra in defamation and/or the tort of slander;

B. An order that Pratibha cease and desist from making the slanderous and defamatory statements;

C. An order that Pratibha issue an apology and retraction to Mr Mani and Mr Kumar (and any other persons to whom the slanderous and defamatory statements were made);

D. General damages in a sum to be quantified prior to trial;

E. Punitive damages in a sum to be quantified prior to trial;

F. Costs on a solicitor-client basis.

Discussion

[12] It is immediately apparent that the material included under the heading of "civil disputes between the parties" is entirely irrelevant to the defamation allegations. In addition, as Mr Taylor accepted on behalf of Mr Prasad, while those allegations relating to the civil disputes could form the basis of civil claims against Ms Raj, they do not fit easily within the current proceedings to the point that they would have to be severed from the defamation allegations prior to any substantive hearing. On the contrary, the civil disputes allegations would be more likely to be the subject of separate District Court or even Disputes Tribunal proceedings. As a result there can be no dispute that paragraphs 5–22 must be struck out from the present proceedings.

[13] More broadly I also accept Mr Patterson's submissions that the proceedings as a whole should be struck out as an abuse of process because to allow the proceedings to continue would be *Jameel* disproportionate, the proceedings do not reach a minimum level of seriousness and/or because they are otherwise an abuse of process.[8] In particular, while, if proven to be true, the allegations would be serious, it is noted they are not only denied by Ms Raj, but on the basis of Mr Prasad's pleadings there are at most only two instances of publication, both to members of Mr Prasad's wider family (Mr Mani being the husband of his niece and Mr Kumar a nephew). Even then, Mr Mani has confirmed that the statements complained of have not apparently changed the way he thinks about Mr Prasad. Instead, Mr Mani notes in his affidavit:

> I know [Mr Prasad] to be a person of integrity. [Mr Prasad] has good standing in the local Fijian Indian community including as a reputable businessman.

[14] In contrast it is noted that what Mr Kumar may have heard from Ms Raj has not been particularised because he has declined to provide any evidence. As a result, any information about what Mr Kumar may have heard from Ms Raj is at the moment hearsay and therefore inadmissible.

[15] Other than those expressly limited allegations of publication, there is otherwise no suggestion of any wider publication other than Ms Raj's expressed intention of raising the allegations of inappropriate behaviour by Mr Prasad [REDACTED], which, as Mr Taylor concedes, is neither inappropriate nor defamatory.

[16] In such circumstances, while it is clear that the proceedings, like almost all defamation proceedings, would take significant resources to bring through to a hearing, it is difficult to see that even if successful Mr Prasad would accrue any material benefit. In particular there is little dispute that he would be unlikely to receive more than nominal damages, while pursuing the proceedings simply for the purpose of vindication appears equally unnecessary given what Mr Patterson described as the

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[8] In *Adamson v Hutt Valley District Health Board* [2022] NZHC 1403 at [28(c)], Associate Judge Johnston noted that both the *Jameel* principle and the minimum seriousness threshold in *Thornton v Telegraph Media Group Ltd*, above n 6, fit within a broader framework where the overarching question is whether the Court, in exercising its jurisdiction to control its own processes, should permit the case to go to trial.

"smallest potential pool" of recipients coupled with the recorded attitude of Mr Mani and the absence of evidence from Mr Kumar.

[17] Moreover, the inclusion of the irrelevant material with regard to the "civil disputes" addressed above lends weight to the suggestion that Mr Prasad has brought these proceedings primarily for the purposes of placing inappropriate pressure on Ms Raj in the context of an acrimonious marriage separation. This is further reinforced by noting Mr Prasad's concurrent threats to report her, a practising lawyer, to the Law Society with regard to aspects of the civil disputes allegations as well as ostensibly claiming relief in these proceedings which is not available, such as directing Ms Raj to provide an apology[9] and seeking solicitor-client costs on the filing of the proceedings.[10]

[18] Taking these various matters together I conclude that the proceedings are an abuse of process and must be struck out.

Decision

[19] The proceedings are struck out.

[20] Ms Raj is entitled to costs. If these cannot be agreed by 5 December 2022 Ms Raj will have until 9 December 2022 to file and serve memoranda. Mr Prasad will then have until 16 December 2022 to respond, following which I will determine the issue on the papers.

[21] It will be apparent that it would be inappropriate to publish this judgment in an unredacted form. Counsel are to discuss appropriate redactions and advise any agreed redactions by joint memorandum by **18 November 2022**. I will then make a final determination on whether the judgment is to be published and if so on what basis.

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9 While an apology may be taken into account in assessing damages under s 29 of the Defamation Act 1992, the Court does not have the power to order a defendant to make an apology: *Mana Motuhake O Aotearoa (Inc) v News Media Ownership Ltd* HC Wellington CP867/88, 7 October 1992 at 8.

10 See the criteria for indemnity costs in the High Court Rules 2016, r 14.6(4).

Powell J