IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2019-404-2501
[2024] NZHC 1791

UNDER	the Defamation Act 1992
BETWEEN	ROBERT GRAHAM NOE Plaintiff/Respondent
AND	GUY CHRISTIAN HOLLISTER First Defendant/Applicant
	GARY ARTHUR HINDS Second Defendant/Applicant

Hearing:	24 June 2024
Appearances:	D J G Cox for Plaintiff (by AVL) J E G San Diego for First Defendant (by AVL) W A McCartney for Second Defendant (by AVL)
Judgment:	3 July 2024

JUDGMENT OF ASSOCIATE JUDGE LESTER

This judgment was delivered by me on 3 July 2024 at 12.30 pm
pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

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[1] On 8 November 2019, the plaintiff, Mr Noe, issued defamation proceedings against the first defendant, Mr Hollister, and the second defendant, Mr Hinds. The proceedings related to nine allegedly defamatory statements Mr Noe says Mr Hollister and Mr Hinds were responsible for and made during the period 12 June 2018 to 5 July 2019.

[2] Mr Hinds filed a statement of defence on 14 February 2020. Mr Noe was not able to serve Mr Hollister personally and so he obtained an order for substituted service pursuant to which Mr Hollister was served on 11 March 2020.

[3] After Mr Noe undertook substituted service (through his legal team), he took no other step in this proceeding until 1 November 2023 — nearly 44 months after substituted service.

[4] Mr Cox, counsel for Mr Noe, filed a memorandum on 1 November 2023 which noted the proceeding had been set down for mention in the Chambers List on Friday 3 November 2023. The Court took that step, because no formal step had been taken in the Court since 28 February 2020, when the application for substituted service was filed. In Mr Cox's words, the matter had "stalled".

[5] Mr Cox, in his 1 November 2023 memorandum says: "Counsel *now* has instructions from the plaintiff to progress THE proceeding …." (emphasis ADDED), having said in the same memorandum he had been without instructions "… for a lengthy period". Mr Cox, in his memorandum of 1 November 2023, also foreshadowed an application to seek judgment by default as to liability.

[6] A statement of defence was not filed by Mr Hollister until 2 November 2023.

[7] It is apparent that but for the Court's enquiry, nothing further would have happened in this proceeding. The fact that Mr Noe has indicated he wishes to continue with the proceeding has prompted Messrs Hollister and Hinds to apply for the proceeding to be struck out for want of prosecution under r 15.2 of the High Court

Rules 2016 (**the Rules**) and pursuant to s 50 of the Defamation Act 1992 (**the Act**) which provides:

> **50 Striking out for want of prosecution**
>
> (1) In any proceedings for defamation, unless the court in its discretion orders otherwise, the court shall, on the application of the defendant, order the proceedings to be struck out for want of prosecution if—
>
> (a) no date has been fixed for the trial of the proceedings; and
>
> (b) no other step has been taken in the proceedings within the period of 12 months immediately preceding the date of the defendant's application.

[8] However, Messrs Hollister and Hinds recognise that with Mr Hollister filing a defence on 2 November 2023 and with the strike out applications being made in March 2024, a step had been taken in the proceeding in the 12 months prior to that application meaning s 50 of the Act does not apply.

Legal principles that guide an application to strike out for want of prosecution

[9] The Court of Appeal recently summarised the relevant principles in this context as follows:[1]

> *Relevant legal principles*
>
> [37] Rule 15.2 of the High Court Rules provides:
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> > Any opposite party may apply to have all or part of a proceeding or counterclaim dismissed or stayed, and the court may make such order as it thinks just, if —
> >
> > (a) the plaintiff fails to prosecute all or part of the plaintiff's proceeding to trial and judgment; or
> >
> > (b) the defendant fails to prosecute all or part of the defendant's counterclaim to trial and judgment.
>
> [38] It has been well-settled since the decision of this Court in *New Zealand Industrial Gases Ltd v Andersons Ltd* that an applicant seeking the strike-out of a claim or counterclaim for want of prosecution, as provided in r 15.2 of the High Court Rules, must show that there has been inordinate delay, the delay is inexcusable and the delay has caused prejudice to the other party.[2] However, the decision to strike out is discretionary and those

[1] *Southwest Contracting (2002) Ltd v Power Farming New Zealand* [2024] NZCA 15.

[2] *New Zealand Industrial Gases Ltd v Andersons Ltd* [1970] NZLR 58 (CA) at 61, citing *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229 (CA) at 268-269.

> considerations are not necessarily exclusive. The overriding consideration is whether justice can be done, despite the delay.[3]
>
> [39] These principles have been referred to and applied in many subsequent decisions, including *Lovie v Medical Assurance Society* …[4]

Has the delay been inordinate?

[10] I have already referred to Mr Noe having taken no steps in this proceeding for nearly 44 months. The 12-month timeframe in s 50 of the Act is some guidance as to what, in a defamation proceeding, would be considered inordinate.

[11] Mr Cox, in his written submissions, offered only limited explanation as to why the delay here is not inordinate. In my view, the delay speaks for itself. It is inordinate. Mr Cox's focus was on whether the delay could be adequately explained or excused and focused on the issue of prejudice.

Does Mr Noe have an adequate reason for the delay?

[12] I am satisfied that Mr Noe has not demonstrated an adequate reason for his failure to pursue the claim.

[13] Mr Noe's evidence on this issue is scanty. He firstly refers to the difficulty in serving Mr Hollister. Mr Noe then says:

> Mr Hollister took no steps in the defamation proceedings until about two years and eight months later, when on 2 November 2023 he filed a document headed "first defendant's statement of defence." This was done only after the issue of the Court's Minute on 1 November 2023…

[14] That Mr Hollister took no steps after being served, is not adequate reason for Mr Noe's failure to pursue his case. Indeed, the contrary is true. In the absence of

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[3] At 61, citing *Austin Securities Ltd v Northgate & English Stores Ltd* [1969] 1 WLR 529 (CA) at 534.

[4] *Lovie v Medical Assurance Society New Zealand Ltd* [1992] 2 NZLR 244 (HC) at 248; Jessica Gorman and others *McGechan on Procedure* (online ed, Thomson Reuters) at [HR15.2.01]; and decision on appeal *Power Farming New Zealand Ltd v South West Contracting (2002) Ltd* [2022] NZHC 2275 [decision on appeal], at [9]-[10]. Although the Associate Judge referred to and set out the terms of r 15.1, it is apparent that his analysis was principally by reference to r 15.2 and the commentary on that rule. See also *Bank of New Zealand v Savril Contractors Ltd* [2005] 2 NZLR 475 (CA) at [89]; and *Scottwood Charitable Trust v Bank of New Zealand* (2001) 15 PRNZ 534 (CA) at [33].

a statement of defence being filed, Mr Noe could have moved to formal proof against Mr Hollister in May 2020.

[15] Mr Noe then says:

> From March 2020 and the following months all of New Zealand, including many judicial processes, came to a complete standstill due to the Covid 19 Pandemic. This undoubtedly had an effect on these proceedings.

[16] This is an unsatisfactory explanation. What is missing from Mr Noe's evidence is why he did not give instructions to Mr Cox to pursue this proceeding.[5] As to the impact of COVID-19, while the Court was closed for a relatively short period during the initial COVID 19 lockdown, that does not explain Mr Noe's inaction after the lockdown ended. Changes to the Rules to permit affidavits to be filed electronically during COVID-19 and other changes were introduced to permit the continued operation of the Court.

[17] A separate set of proceedings was commenced on 9 April 2019 when Mr Hinds sued Mr Noe in the District Court for his share of liability as co-guarantor of a company's bank debt met by Mr Hinds. That matter went to trial in 2021 and Mr Hinds was successful. That judgment was eventually paid in June 2023. Even this litigation did not prompt Mr Noe to advance his own claim in this Court against Mr Hinds.

[18] Mr Noe notes that sealed judgments in respect of the judgment from May 2021 obtained by Mr Hinds in the District Court and a subsequent costs award were not served upon Mr Noe's solicitors until June 2023. What that has to do with Mr Noe's inaction in this proceeding is not explained — any delay in Mr Hinds calling for payment did not mean there was a "stand off", between Mr Noe and Mr Hinds, as Mr Cox put it. That a judgment which, with costs, was approximately $90,000.00 was entered against Mr Noe was, if anything, a factor which would prompt the pursuit of this proceeding particularly if it was as strong as Mr Noe suggests.

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[5] Jessica Gorman and others, above n 4, at [HR15.2.08(3)] notes "Affidavits in opposition should give full explanation of delays".

[19] Mr Noe also says:

> … both these defamation proceedings, and the enforcement of Mr Hinds' District court proceedings, were effectively in abeyance at the same time for a period of about two years from 2021 until 2023.

[20] What Mr Hinds' delay in enforcing his judgment has got to do with Mr Noe's failure to pursue his own claim is unexplained. In any event, this proceeding was "in abeyance", to use Mr Noe's expression, not from 2021 but from March 2020.

[21] Mr Noe attempts to say Mr Hollister contributed significantly to the delay in this proceeding. That is an untenable position given, as I have already noted, Mr Noe could have moved to formal proof against Mr Hollister well over four years ago. Nothing Mr Hollister did or did not do prevented Mr Noe pursuing this proceeding. Mr Noe then attempts to place some responsibility on Mr Hinds, saying he took no steps after filing his defence on 14 February 2020. While that may be true, the onus is on a plaintiff to pursue his proceeding.

[22] In *Allen v Sir Alfred McAlpine & Sons Ltd*, the Court said:[6]

> …the defendant, instead of spurring the plaintiff to proceed to trial, can with propriety wait until he can successfully apply to the Court to dismiss the plaintiff's action for want of prosecution…

[23] While a defendant cannot rely on their own delay,[7] here there is no delay by Messrs Hollister and Hinds that contributed to the matter not progressing — it was always open to Mr Noe to progress his claim. This is not a case where periods of delay can be attributed to a defendant dragging the chain on discovery or other interlocutory steps.

[24] The reality is a defendant is not able to frustrate a plaintiff's progress of their claim. A plaintiff, within the limits of the case management system, can make their case move as quickly as they desire. What is entirely missing from Mr Noe's submission is why he did not give instructions to pursue this proceeding. We know from Mr Cox's memorandum, noted at 1 November 2023, that he had no instructions

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6 *Allen v Sir Alfred McAlpine & Sons Ltd*, above n 2, at 258.
7 Jessica Gorman and others, above n 4, at [HR15.2.07(1)].

"for a lengthy period" but why that was the case is unexplained. The simple fact here is that Mr Noe did nothing after Mr Hinds filed his defence and Mr Noe is entirely responsible for that delay. I find his delay was inexcusable.

Is it in the interests of justice to permit this proceeding to continue?

[25] The presence of prejudice is a factor that can mean the interests of justice do not warrant the proceeding continuing. General prejudice can be inferred from the sheer lapse of time whereas specific prejudice has to be proved on the facts of the case. Generally, the longer the delay, the more likely that fair trial rights will have been prejudiced. Statutory limitation periods can legitimately be used as a marker of the likely prejudice to a claim.[8]

[26] Here the limitation period for defamation is two years and s 50 of the Act, in a practical sense, shifts onto Mr Noe the onus of demonstrating a case should proceed where there has been a delay of more than one year. Mr Noe here, avoided that onus by virtue of Mr Hollister's late filing of his defence.

The interests of justice – the merits and the prejudice

[27] Mr Noe says his case is straightforward. The statements he alleges defamed him are in writing — one being an email, the other eight being published on a website.

[28] Mr Hollister admits he sent the email in question and that he was responsible for the website on which the remaining eight statements complained of appeared.

[29] Mr Hinds denies responsibility for the website although Mr Hollister pleads that Mr Hinds supplied him with "copy and content" for the website. I address this point below, of course such a pleading is not of itself evidence against Mr Hinds.

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[8] *Krakauer v Katz* [1954] 1 WLR 278 cited at *Greening v Ormond* [1961] NZLR 965 referred to in *Power Farming v South West Contracting (2002) Ltd*, above n 4, with no adverse comments on these principles in the Court of Appeal decision *South West Contracting (2002) Ltd v Power Farming*, above n 1.

[30] Mr Hollister pleaded guilty to charges laid by the Police in late 2019 under the Harmful Digital Communications Act 2015 in respect of some of the publications on the website. Mr Hinds was not charged.

[31] Mr Hinds' evidence is that he was not, save for the provision of some information that I note below, the co-author of the website, nor did he publish or cause to be published, any material on the website.

[32] At a very general level, the nature of the defamatory statements is that Mr Noe did not pay his debts, was dishonest, fraudulent, could not be trusted and is an unpleasant person. Further defamatory meanings are that he was a con-man, a narcissist, psychopath and a thief and had made a false complaint to the Police. This is not an exhaustive list.

[33] Mr Hinds admits telling Mr Hollister about the above proceeding (and the one detailed below) against Mr Noe, and the steps Mr Noe took in relation to those claims including Mr Noe's subsequent appeals and the need for Mr Hinds to obtain an order to sell Mr Noe's property to obtain payment of one judgment. Mr Hinds said it took him six years of litigation to obtain the payment from Mr Noe in respect of one debt. Mr Hinds explains that his initial claim commenced in 2014 (detailed below), related to an unpaid business debt pursued through arbitration.

[34] Both Messrs Hollister and Hinds to a greater or lesser extent, rely on the defence of truth and each intends to adduce evidence that Mr Noe is a person whose reputation is generally bad.

[35] Messrs Hollister and Hinds say prejudice has arisen because witnesses they would have called to give evidence as to Mr Noe's poor character (s 42 Defamation Act) have died and two other witnesses (Mr Hollister's parents) are now so elderly he is reluctant to get them involved. Mr Noe says he does not know two of the witnesses who have died. Mr Hollister says he is unable to provide full details of what these two witnesses would have said given they are no longer available and with the passage of time, he cannot remember the detail of what he was told by them other than they may have sold a car to Mr Noe. Mr Noe says he did not buy a car from the named

witnesses. The third witness who has died, was known to Mr Noe but he says he had limited involvement with him. The generality of Mr Hollister's description of the possible evidence from the first two deceased witnesses makes assessing the extent of prejudice difficult — in a sense that is the issue. Mr Noe's assertion that he did not have much to do with all three witnesses who have died is, if anything, an example of prejudice. Mr Hollister will find it difficult to counter Mr Noe's evidence that he did not know them and, of course in any event, they are not available.

[36] Here, Mr Noe says his claim is strong as it is based not on oral evidence but on the history of the website and the email. Accordingly, any prejudice through delay is far more significant for Messrs Hollister and Hinds than for Mr Noe whose case is based on a non-oral record. The simple fact is, the witnesses Mr Hollister says on oath he would have called, are not available. Such prejudice is not determinative but goes into the balancing of factors.

Was Mr Noe's proceeding for a collateral purpose?

[37] One of the grounds relied on both by Mr Hinds and Mr Hollister is:

> 2.e. The plaintiff commenced the proceeding for an ulterior purpose — being an attempt obtain a stay of enforcement of a separate judgment — and didn't prosecute the proceeding once the application for stay failed. Therefore:
>
> i. The plaintiff was never bona fide.
>
> i. The proceeding is an abuse of process.

[38] At least as regards Mr Hinds, the timing of its commencement is consistent with this proceeding being for a collateral purpose. As noted, Mr Hinds obtained a judgment in arbitration against Mr Noe. Mr Hinds commenced a sale process through the High Court to sell Mr Noe's property. On 5 November 2019, Mr Noe filed an application to stay the sale process. That application relied in part on a defamation claim to be filed against Mr Hinds with Mr Noe saying the quantum to be claimed would far exceed the amount he owed Mr Hinds.

[39] Mr Noe said in the stay application that he would that week file in the Auckland High Court a defamation claim and: "…it is only fair that I be allowed to pursue this

claim… before my farm is sold". The present proceeding was commenced a few days later and proceedings were just underway at the time of the stay hearing.

[40] On 12 November 2019, the application to stay the sale was heard by Wylie J and Mr Noe argued the stay should be granted so Mr Noe could complete a subdivision of the land and also pursue the defamation claim. Wylie J dismissed the application by an oral judgment at the conclusion of the hearing noting the following:[9]

> … there has been significant delay in filing the application. Mr Noe has known of his liability to Ratzapper since the award against him issued in June 2017. He has known of the defamatory comments since they occurred, first in June 2018 and then in March 2019. He only filed the defamation proceedings against Mr Hinds in early November 2019. He delayed in filing the stay application until 29 August 2019.[10] There is no explanation for these delays.

[41] Mr Noe's land was sold by the High Court on 27 November 2019. The defamation proceedings were not pursued following Mr Noe obtaining an order for substituted service against Mr Hollister.

[42] Mr McCartney, counsel for Mr Hinds, submits the overwhelming inference is that the real purpose of this proceeding was to provide a reason to prevent the sale of the property and with that purpose having failed, Mr Noe had no interest in pursuing it. Mr McCartney submits Mr Noe was therefore never a bona fide litigant and that to permit him to pursue the proceeding would be an abuse of process and not in the interests of justice.

[43] Mr McCartney relies on an observation from the Court of Appeal decision in *London v Smallbone* that:[11] "A plaintiff who is really concerned at an injury to his reputation will not be dilatory."

[44] Mr Hinds accepts telling Mr Hollister about his litigation with Mr Noe. Mr Hinds says that communication was the extent of his involvement with Mr Hollister and there is no evidence that Mr Hinds was involved in the initial email

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9 *Noe v Ratzapper Australasia Ltd* [2019] NZHC 2962 at [21].
10 This appears to be an error. The application is dated 5 November 2019.
11 *London v Smallbone* [2018] NZCA 131 at [13].

or in the website beyond Mr Hinds' acceptance he passed the above information on to Mr Hollister.

[45] Mr Noe's failure to pursue formal proof against Mr Hollister and indeed, his failure to pursue the claim at all, is consistent with Mr McCartney's submission that this proceeding was only commenced to bolster the stay application. Mr Cox in oral submissions did not directly confront this submission.

[46] It is clear it was only with the Court asking the parties on 1 November 2023 what had become of this proceeding that Mr Noe gave instructions to his solicitor to progress this claim.

[47] I have already said, I am satisfied Mr Noe has not provided an adequate explanation for his failure to advance this proceeding for nearly 44 months. Again, the irresistible conclusion is that but for the Court seeking advice as to the status of this proceeding, it would still be dormant.

[48] The Court is entitled to draw an adverse inference from Mr Noe's failure to explain why he did not give instructions to pursue this proceeding until prompted by the Court and, from his counsel not expressly addressing Mr McCartney's submission as to this proceeding being for a collateral purpose and, therefore this is an abuse of process. While there is a bare denial from Mr Noe that this proceeding was commenced for a collateral purpose, there was not even an attempt by Mr Noe to say the timing of the commencement of this proceeding and the stay application was coincidental or that it was coincidental that this proceeding was not pursued shortly after the stay application was declined (albeit I accept Mr Noe pursued substituted service against Mr Hollister in the New Year of 2020). The circumstances called for a full explanation from Mr Noe as to why he did not pursue the claim given the application expressly relied on the proceeding being for a collateral purpose.

[49] That this proceeding was never intended to be pursued if the stay was not granted fits with Mr Noe not seeking judgment against Mr Hollister when he did not file a defence, Mr Noe's failure to pursue this proceedings when he was again sued by Mr Hinds in April 2019, with Mr Noe taking no further steps when judgment was

entered against him in June 2021 and when payment was called for by Mr Hinds in June 2023. The subsequent proceeding and judgment being entered against Mr Noe, following the forced sale of his property at the end of 2019, must have rubbed salt into his wounds but he did nothing to advance this proceeding.

[50] Mr Cox submitted this proceeding was commenced because of the seriousness of the defamatory statements. That submission, however, is almost entirely undermined by Mr Noe's inaction and, in my view, cannot survive Mr Noe not explaining his own failure to pursue his claim even against a party who had not filed a defence.

Balancing the factors

[51] Mr Cox submitted the interests of justice is the pivotal consideration which can over-ride the significance of delay or potential prejudice.[12]

[52] I am left with the essentially unanswered submission that this proceeding was commenced to bolster the stay argument and then abandoned shortly after the stay was declined. Mr Noe's claims about the seriousness of the allegedly defamatory statements ring hollow in the circumstances I have outlined. It is not in the interests of justice to allow Mr Noe to continue a proceeding commenced for tactical reasons, then abandoned and which it appears he only gave instructions to pursue when reminded of its existence by the Court.

[53] While delay of itself is generally not conclusive, here the delay is simply the other side of the coin of Mr Noe having decided not to pursue the claim. That is the only real explanation that is available for him not giving instructions to his solicitor. Mr Noe does not suggest the other litigation he was involved in with Mr Hinds prevented him from pursuing this proceeding perhaps from a resourcing point of view.

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[12] *Lovie v Medical Assurance Society New Zealand Ltd*, above n 4, at [248] and *London v Smallbone*, above n 11, at [8].

[54] I remind myself it is not a light thing to deprive a party of access to the Court but countering that, as I have said, is the irresistible inference that this proceeding was commenced as part of bolstering the application for a stay. *McGechan* notes that:[13]

> the Court of Appeal addressed the need to 'stand back' in *CC v Giltrap City Ltd* (1997) 11 PRNZ 573 (CA) by considering whether the overall interests of justice would allow the case to proceed.

[55] The factors in favour of strike-out are:

(i) the extent of delay — well beyond the two year limitation period and the one year provided by s 50 of the Act;

(ii) the absence of explanation for the delay and for not giving instructions to pursue the claim;

(iii) the related point that it was only the Court's prompting that re-activated Mr Noe;

(iv) there being only a bare denial this proceeding was commenced for a collateral purpose when more was called for given the above factors;

(v) the general prejudice and the specific prejudice which, in the case of Mr Hollister, is significant given Mr Noe submits his claim is strong against Mr Hollister; and

(vi) the relative weakness of the case against Mr Hinds.

[56] In favour of dismissing the application is the apparent strength of Mr Noe's claim against Mr Hollister, the general principle that delay should not be determinative, and the access to justice point noted at [54] above.

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13 Jessica Gorman and others, above n 4, at [HR15.2.01(2)].

[57] In my judgment, standing back, the factors in favour of the application and the overall interest of justice favour it being granted. This is not a case of delay simplicita given the other factors outlined. To resurrect the claim which, for all intents and purposes was gone and forgotten for years, is not in the interests of justice.

[58] The application to strike out is granted.

Costs

[59] There is no reason why costs should not follow the event. Mr Noe is to pay Messrs Hinds and Hollister costs on a 2B basis on this application and this proceeding together with disbursements as fixed by the Registrar.

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Associate Judge Lester

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