

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV-2024-404-706
[2024] NZHC 2410**

UNDER the Defamation Act 1992

BETWEEN PHILLIP RAYMOND NOTTINGHAM,
ROBERT EARLE MCKINNEY and
GEORGE BULLOCK
Plaintiffs

AND THE ATTORNEY-GENERAL
First Defendant

PATTERSON HOPKINS LAW, WILLIAM
PATTERSON and ROBYN HOPKINS
Second Defendants

WARREN ERNEST BEERE
Third Defendant

Hearing: On the papers

Counsel: Plaintiffs in person, D Nottingham as McKenzie Friend
R Fistonich / D Watson for the First Defendant
L G Cox for the Second Defendants
Third defendant in person

Judgment: 27 August 2024

JUDGMENT OF ASSOCIATE JUDGE BRITTAIN

*This judgment was delivered by me on 27 August 2024 at 12 Midday.
Pursuant to r 11.5 of the High Court Rules.*

.....
Registrar/Deputy Registrar

Solicitors/Counsel:
Crown Law, Wellington
Morgan Coakle, Auckland

Introduction

[1] The plaintiffs sue the defendants for defamation, pleading that registration of two caveats on several records of title amounted to publication of defamatory statements.

[2] The Attorney-General is named as the first defendant on behalf of the Registrar-General of Land and/or his delegates. The Attorney-General has applied for an order striking out the claim against her, or alternatively, for summary judgment. That application is opposed by the plaintiffs and set down for hearing on 14 October 2024.

[3] The Registrar-General of Land, Robert Muir (Mr Muir), has filed an affidavit in support of the application for strike out/summary judgment, giving brief background evidence regarding the functions and processes of the Office of the Registrar-General under the Land Transfer Act 2017 (LTA), particularly in respect of the registration of caveats.

[4] The plaintiffs are self-represented. In this judgment, I determine interlocutory applications made informally by the plaintiffs for orders:

- (a) rescinding or varying the directions made in my minutes dated 12 and 30 July 2024;
- (b) for discovery from the Attorney-General before the Attorney-General's application for strike out/summary judgment is determined;
- (c) that I recuse myself;
- (d) that this proceeding be dealt with by a full bench of the High Court and counsel be appointed to assist the Court;
- (e) for an order requiring Mr Muir to attend the hearing on 14 October 2024 to be cross-examined; and

- (f) for permission for Dermot Nottingham, the plaintiffs' McKenzie Friend, to present the plaintiffs' oral and written submissions at the hearing on 14 October 2024.

Background

[5] The plaintiffs take issue with the Registrar-General's registration of caveats lodged by the third defendant, which assert a beneficial interest in the subject properties under a cestui que trust. There is a related proceeding involving the plaintiffs and the third defendant and the affairs of the Beere Family Trust.

[6] The Attorney-General relies on the following defences:

- (a) qualified privilege, which is not available if the plaintiffs establish that the Registrar-General was predominantly motivated by ill-will towards the plaintiffs or otherwise took improper advantage of the occasion of publication;¹
- (b) absolute privilege; and
- (c) a statutory defence of Crown immunity under s 6 of the Crown Proceedings Act 1950 and s 235 of the Land Transfer Act 2017 (LTA).

[7] On 12 July 2024, I made the following directions, inter alia:

...

- (c) the first defendant shall file and serve a memorandum by **16 July 2024**, advising the first defendant's position in respect of:
 - (i) the plaintiffs' application to cross-examine Mr Muir at the hearing on 14 October 2024;
 - (ii) whether the application for cross-examination can be dealt with on the papers; and
 - (iii) the plaintiffs' application that Mr Dermott Nottingham be entitled to present written and oral submissions at the hearing on 14 October 2024 at 10 am on behalf of the plaintiffs, as McKenzie Friend;

¹ *Durie v Gardiner* [2018] NZCA 278, [2018] 3 NZLR 131 at [36]; Defamation Act 1992, s 19.

- (d) the plaintiffs shall file and serve a written memorandum in reply by **26 July 2024**;

...

[8] The first defendant complied with the directions, the plaintiffs did not. On 30 June 2024, I directed the plaintiffs to file and serve their memorandum by 9 August 2024, containing the plaintiffs' submissions in respect of:

- (a) the plaintiffs' application to cross examine Mr Muir;
- (b) whether the application for cross-examination can be dealt with on the papers; and
- (c) the plaintiffs' application that Dermot Nottingham be entitled to present written and oral submissions at the hearing on 14 October 2024.

[9] I directed the plaintiffs to file and serve any amended statement of claim by 9 August 2024, and the Attorney-General to file and serve any amended statement of defence and/or amended application for strike out/summary judgment by 23 August 2024.

[10] The plaintiffs did not file an amended statement of claim by 9 August 2024. Instead, the plaintiffs filed written submissions dated 9 August 2024 in support of the various applications dealt with in this judgment, which run to 59 pages. The plaintiffs did not request an oral hearing. The plaintiffs also filed a document titled "Memoranda of plaintiff confirming lies of second and third defendant and the failure to comply with discovery".

[11] The Attorney-General filed an amended statement of defence dated 16 August 2024, and an amended interlocutory application for strike out/summary judgment.

[12] In their submissions, the plaintiffs say that their substantive case is that the Registrar-General somehow acted dishonestly by failing to take steps to check the veracity of the grounds stated in the caveats, and that this failure together with the Registrar-General's failure to remove the caveats evidence the involvement of the Registrar-General in a criminal conspiracy.

[13] However, this proceeding is solely for defamation. The plaintiffs' submissions suggest that they intend to amend their pleadings to include a breach of the International Covenant on Civil and Political Rights (ICCPR), making some link between the ICCPR and an asserted right of the plaintiffs to protection of their reputation.

[14] Underlying the plaintiffs' applications and the other issues that are dealt with in this judgment is the plaintiffs' complaint that they should be entitled to discovery before the Attorney-General's application for strike out/summary judgment is determined, so that they can prove criminal conduct by the defendants. In my minute dated 12 July 2024, I declined to order discovery before the Attorney-General's application for strike out/summary judgment is determined.

The plaintiffs' request that I rescind or vary the directions made in my minutes dated 12 and 30 July 2024

[15] Although a formal application has not been filed, the plaintiffs' memorandum signals that the plaintiffs wish to apply for a "recall" of the directions that I made on 12 July and 30 July 2024. I am not prepared to do so for the reasons that follow.

The plaintiffs' request for discovery from the Attorney-General

[16] The Attorney-General's application for strike out/summary judgment will largely turn on legal issues, in particular:

- (a) whether registering a caveat is a step in the course of a judicial proceeding subject to a defence of absolute privilege;
- (b) whether qualified privilege applies because the registration was pursuant to the Registrar-General's legal duty under the LTA, and if so, whether it is arguable that the Registrar-General was predominantly motivated by ill-will towards the plaintiffs or otherwise took improper advantage of the occasion of publication; and
- (c) whether the Registrar-General enjoys Crown immunity from liability for defamation.

[17] The plaintiffs have each filed at least one affidavit in support of their notice of opposition and in reply to Mr Muir's affidavit.

[18] I remain of the view that this is not a suitable case for discovery before determination of the Attorney-General's application for strike out/summary judgment. The onus will be on the Attorney-General to satisfy the Court that the plaintiffs' claim cannot succeed. It will be incumbent on the Attorney-General to demonstrate that there are no disputed facts or undisclosed documents that prevent strike out and/or summary judgment.

The plaintiffs' request for recusal

[19] During the call of this proceeding in the Chambers List on 12 July 2024, I indicated that I was not prepared to order that the Attorney-General provide discovery before the Attorney-General's applications for strike out/summary judgment are determined. The plaintiffs' McKenzie Friend, Dermott Nottingham, immediately made an oral application that I recuse myself for bias. The only ground put forward in support of the application was that I had indicated that I was going to decline the discovery order sought. I declined the application for recusal, confirmed in my minute dated 12 July 2024.²

[20] In their latest memorandum, the plaintiffs intimate that they intend to renew the application for my recusal. No formal application has been filed.

[21] Before the call of this matter on 12 July 2024, I had no prior dealings with any of the parties to this proceeding, either as an Associate Judge, or before that, as counsel. I have no connection to the subject matter of the proceeding.

[22] The only ground for my recusal advanced by the plaintiffs is that they are dissatisfied with my direction regarding discovery. A fair minded, fully informed observer would not have a reasonable apprehension that I might not bring an impartial mind to the resolution of the questions that I am required to decide in this proceeding. I am not prepared to recuse myself.

² Minute of Associate Judge Brittain dated 12 July 2024 at [8] and [9(a)].

The plaintiffs' request that this proceeding be dealt with by a full bench of the High Court and counsel be appointed to assist the Court

[23] These applications are made on the ground that the allegations by the plaintiffs of a criminal conspiracy warrant the proceeding to be heard before a full bench of the High Court.

[24] This is a proceeding in defamation. There is nothing about the proceeding that justifies consideration by a full Court. However, that is a decision that would be made when the matter is ready to be set down for trial. During the interlocutory stage of the proceeding it is appropriate that the proceeding is managed by an Associate Judge in the usual way.

[25] For the same reason, appointment of counsel to assist the Court is unnecessary.

Cross-examination of Mr Muir

[26] In his affidavit dated 21 May 2024, Mr Muir confirms that he is the Registrar-General of Land, and he gives evidence regarding:

- (a) the duties, functions and powers of the Registrar-General prescribed under the LTA in relation to caveats against dealings;
- (b) the process followed to register the caveats in issue on the subject records of title and to provide notice to the registered owners of those records of title;
- (c) communications between the Registrar-General's delegates in his office and Dermot Nottingham regarding the subject caveats.

[27] Rule 7.28 of the High Court Rules 2016 relevantly provides:

7.28 Cross-examination of maker of affidavit

A Judge may in special circumstances, on the application of a party, order the attendance for cross-examination of a person who has made an affidavit in support of, or in opposition to, an interlocutory application.

[28] The requirement for special circumstances indicates that something abnormal, uncommon or out of the ordinary, but less than extraordinary or unique, is needed.³

[29] Relevant factors to consider include whether:

- (a) cross-examination will elicit relevant and admissible evidence that will assist the Court to determine the substantive interlocutory application before it;⁴
- (b) the Court will be able to properly assess the factors relevant to the substantive interlocutory application without cross-examination;⁵ and
- (c) the detriment that may result in terms of conducting the proceeding speedily and effectively if cross-examination is permitted is outweighed by other factors that make it necessary in the interests of justice for the cross-examination to occur.⁶

[30] The plaintiffs wish to cross-examine Mr Muir to elicit evidence to support a submission that the Registrar-General or his delegates were involved in a criminal conspiracy. I see no basis for that line of inquiry.

[31] The line of inquiry might be limited to evidence relevant to the allegation that the Registrar-General was motivated by ill-will towards the plaintiffs, or otherwise took improper advantage of the occasion of publication or acted in bad faith.

[32] However, I am cognizant of the onus that the Attorney-General will have when the strike out/summary judgment applications are heard on 14 October 2024, to establish that the plaintiffs' claim cannot succeed. The Attorney-General will need to establish that there are no disputed facts which militate against strike out or defendants' summary judgment. The Court will be able to properly assess the factors relevant to the substantive interlocutory application without cross-examination.

³ *Kidd v Van Heeren* (1997) 11 PRNZ 422 (CA).

⁴ *Smith v Shaw* [2020] NZHC 238, [2020] 3 NZLR 661 at [63].

⁵ *Roebuck v Liddle* [2023] NZHC 1479 at [33].

⁶ *Sleeman v ANZ Banking Group (NZ LTD)* (1994) 7 PRNZ 508 (HC) at 510.

[33] Having reviewed Mr Muir's affidavit evidence, I am satisfied that its purpose is to provide background and context for the legal issues. In his affidavit, Mr Muir does not profess to have any first-hand knowledge of the events surrounding the registration of the caveats that are in issue. I see no prospect of cross-examination eliciting any admissible evidence that will assist in determining the Attorney-General's application for strike out/summary judgment.

[34] The plaintiffs have not indicated who they intend to conduct cross-examination. It would not be appropriate for Dermott Nottingham to do so as a McKenzie Friend. Cross-examination is likely to unnecessarily prolong the hearing without any advantage.

[35] The application for leave to cross-examine Mr Muir is declined.

Presentation of the plaintiffs' oral and written submissions at the hearing on 14 October 2024

[36] The Attorney-General consents to Dermot Nottingham being permitted to attend the hearing on 14 October 2024, and abides the Court's decision on whether Dermott Nottingham is permitted to present written and oral submissions on behalf of the plaintiffs.

[37] A McKenzie Friend is not generally permitted to participate in a hearing as an advocate.⁷ The Court has the discretion to allow a McKenzie Friend to play a more active role. I accept the Attorney-General's submission that the discretion should be exercised sparingly.

[38] Counsel for the Attorney-General referred to Hinton J's decision in *Currie v Doe*,⁸ where the Judge described Dermott Nottingham's conduct of his own case as vexatious and scandalous.⁹

[39] The plaintiffs' latest memorandum contains material that is vexatious and scandalous regarding an alleged criminal conspiracy between the Registrar-General,

⁷ *Craig v Slater* [2017] NZHC 874, [2017] NZAR 649 at [2].

⁸ *Currie v Doe* [2022] NZHC 1547.

⁹ At [91].

Patterson Hopkins Law and the third defendant. The plaintiffs' memorandum is also discursive and prolix. The memorandum does not state that it was prepared by Dermott Nottingham.

[40] If Dermot Nottingham is not permitted to present the plaintiffs' written and oral submissions at the hearing on 14 October 2024, then he has indicated that the plaintiffs will seek to join him as a party. Irrespective of whether there are any grounds for Dermot Nottingham to be joined as a plaintiff, such an application will inevitably cause delay and require the hearing on 14 October 2024 to be vacated. This will cause prejudice to all parties.

[41] I am satisfied that the preferable course is to allow Dermot Nottingham to present the plaintiffs' written and oral submissions on 14 October 2024. This is not to be taken as a precedent for any other steps in this proceeding.

[42] Dermott Nottingham's role as McKenzie Friend at the hearing on 14 October 2024 will be confined to the presentation of written and oral submissions on the issues raised by the Attorney-General's application for strike out/summary judgment. Mr Nottingham will not be permitted to make submissions on irrelevant matters or matters that are vexatious and scandalous. If he does so, then he will be at risk of the Court revoking his right to present written and oral submissions.

Orders

[43] The plaintiffs' application for an order requiring Robert Muir to attend at the hearing on 14 October 2024 to be cross-examined is declined.

[44] Dermot Nottingham is permitted to attend the hearing on 14 October 2024 as the plaintiffs' McKenzie Friend, and to present the plaintiffs' written and oral submissions.

[45] I confirm the following extant directions in respect of the hearing:

- (a) the plaintiffs shall file and serve any amended notice of opposition to the first defendant's application for strike out/summary judgment, and any supporting affidavits, by **6 September 2024**;

- (b) the first defendant shall file and serve written submissions and authorities, and a bundle of the relevant pleadings and affidavits, **10 working days before the hearing** of the application for strike out/summary judgment;
- (c) the plaintiffs shall file and serve written submissions **5 working days before the hearing**.

[46] Costs are reserved.

Associate Judge Brittain