IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

A.127/84

BETWEEN MAURICE WICKS of Christchurch, Invalid Beneficiary

Plaintiff

AND JOHN VINCENT BARRY McLINDEN of Wellington, Barrister

First Defendant

AND RT HON KENNETH JAMES McLAY of Wellington, Attorney-General of New Zealand, on behalf of the New Zealand Police

Second Defendant

Hearing: In Chambers
3 August 1984

Counsel: Plaintiff in person
M.R. Abrams for First Defendant
G.K. Panckhurst for Second Defendant

Judgment: 16 AUG 1984

JUDGMENT OF HARDIE BOYS J.

On 30 September 1981 and 10 February 1982 Mr McLinden appeared in the Court of Appeal as counsel for Mr Wicks to bring to a successful conclusion proceedings which Mr Wicks had instituted in this Court against his former legal advisers in Christchurch. The outcome was that Mr Wicks was awarded

damages of $750.00 together with interest of $433.00, costs of $750.00 and disbursements to be fixed by the Registrar. However Mr Wicks is dissatisfied with the way in which Mr McLinden handled the appeal, particularly because he was not permitted to give evidence before the Court of Appeal. But that complaint is not a matter which I am able to examine in these proceedings.

Mr Wicks had apparently made an advance payment of costs to Mr McLinden, but it appears that Mr McLinden's final fee was considerably in excess of the total of that sum and of the costs awarded in Mr Wicks' favour and that when he received the damages and interest he deducted the excess before sending the balance remaining to Mr Wicks. This course displeased Mr Wicks, who believes that Mr McLinden ought to have looked to the unsuccessful respondents for full payment of his fees. That of course is not the case, for their liability was limited to the amount the Court ordered them to pay, whereas Mr McLinden's entitlement was not so limited. He was entitled to charge a proper fee for the work he did. Costs ordered by the Court against an unsuccessful litigant are normally to be regarded only as a contribution towards the costs properly payable by the successful litigant to his own counsel and solicitor. If Mr Wicks was dissatisfied with the amount of Mr McLinden's bill he was entitled to have that bill examined by way of a taxation before the Registrar. But it seems that he did not adopt that course but rather chose to act in a different way. That choice has brought about the problems now besetting him.

When in due course Mr McLinden returned Mr Wicks' papers

to him he inadvertently sent with them a file relating to a quite different matter, one in which he had been appointed to act as counsel for the child in a domestic dispute. The contents of that file were of a highly personal and confidential nature and obviously someone was extremely careless in sending them to Mr Wicks. Mr Wicks' plain duty was to have returned them at once to Mr McLinden. But he did not do that. Instead he kept them, indicating in a letter which he wrote on 1 August 1983 that he would not return them unless he were fully reimbursed, not only in respect of the costs allegedly wrongfully retained, but also in respect of the loss he claims to have suffered as a result of the way in which Mr McLinden handled his appeal. This quite preposterous demand was very properly rejected and in due course Mr McLinden referred the matter to the police. Mr Wicks was prosecuted for theft and after a defended hearing in the District Court at Christchurch on 11 June 1984 he was convicted. He has appealed against that conviction and the appeal is still to be heard. It would therefore be improper for me to make any comment about the matters in issue in that appeal.

On 29 May 1984 Mr Wicks issued the proceedings now before me in which he claims damages of $75,000 against each of the defendants; and he also claims from Mr McLinden as a sum "already owing" the amount which Mr McLinden retained out of damages. The cause of action appears to be in defamation. First there is an allegation that by the actions of the defendants the plaintiff has been "wilfully branded a common thief". Then there is an allegation that these actions were taken in order to frighten the plaintiff and in order to cover

up the negligence and breach of confidence in sending the domestic file to Mr Wicks. Then there is a reference to the wording of the summons issued in the District Court, which is said to be a serious defamation by both defendants "who wilfully made this charge knowing that the plaintiff did not steal anything".

One would have thought that these proceedings called for punctilious compliance with the Rules by both defendants. But not so. The writ was served on Mr McLinden on 11 June 1984 and on Mr McLay on 15 June 1984. Neither took any step until after the time for filing a statement of defence had expired. As soon as it had expired, on 18 July Mr Wicks filed a praecipe to have the action set down for trial before a Judge and jury and paid the necessary fees. Then on 19 July Mr McLinden filed a motion to strike out the statement of claim or alternatively for leave to file a statement of defence out of time, and this was followed by a similar motion by Mr McLay filed on 2 August. Mr McLinden's motion was subsequently amended. That the defendants having failed to meet the time limit set by the writ, should now be allowed to be heard in support of their motions causes some perplexity and indignation to Mr Wicks.

The time limit set out in the writ reflects the requirements of Rule 121 of the Code of Civil Procedure. That Rule must be read subject to Rule 124 which authorises the Court to allow further time. The Court's practice is to grant leave to file a statement of defence out of time unless special circumstances exist which show that leave ought not to be granted. Normally any prejudice caused to a plaintiff by the

defendant's delay can be compensated by an award of costs. Despite Mr Wicks' apparent belief to the contrary, indulgence under this practice is not accorded only to solicitors who are defendants but to any defendant who fails strictly to comply with the time limits. This is because the Court's main concern is to ensure that a defendant is not deprived of the opportunity of presenting a proper defence by reason merely of a procedural irregularity or default. Thus in this case there can be no reason not to grant the defendants leave on appropriate conditions as to costs, for it is only in the incurring of the costs of setting the action down that Mr Wicks can be said to have suffered any prejudice at all. However, the defendants have also applied to strike out the statement of claim. The Rules do not require a motion such as this to be filed within the time limited for filing a statement of defence. To the contrary, there is authority that such a motion may be filed after the pleadings have closed: Soler v Public Trustee [1923] NZLR, 869; Meadows v Commissioner of Crown Land [1949] NZLR, 663. The only requirement is that the motion should be filed promptly and in my view both motions before me complied with this requirement: see Penberthy v Dymock & Ors [1954] NZLR, 130. I am therefore entitled, indeed required, to hear them.

Both motions are brought upon the grounds that the statement of claim discloses no cause of action against the defendant concerned, and it is frivolous and vexatious - and in the case of Mr McLinden, that it is also an abuse of the jurisdiction of the Court. In the event, only Mrs Abrams relied on the second ground whilst both defendants relied on

another ground altogether. As the emphasis of each defendant's case was thus somewhat different, I deal with them separately and with that of the second defendant first.

Mr Panckhurst relied primarily on the first ground set out in his motion, namely that the statement of claim discloses no cause of action. It is well recognised that the Court has jurisdiction to strike out a claim on this ground, but that it is a jurisdiction that ought to be exercised sparingly and only where it appears plainly that the claim is so bad in law that it is impossible in any circumstances for the plaintiff to succeed. It is apparent both from the statement of claim and from Mr Wicks' submissions that the sole basis for the claim against the second defendant is the fact that the District Court in Christchurch processed the information and summons containing the charge of theft upon which Mr Wicks was subsequently convicted. But the law is very clear that no action will lie for defamatory statements contained in a document properly used in the course of Court proceedings. This rule extends to documents properly initiating the proceedings, such as an information or summons: see Gatley on Libel and Slander, 8th Ed, paras 383 and 385. Even the fact that the charge may be subsequently dismissed does not destroy the immunity or privilege which attaches to it. There is therefore no basis in law upon which the second defendant can be liable to the plaintiff in respect of the matter complained of and accordingly there must be an order striking him out as a party to the action.

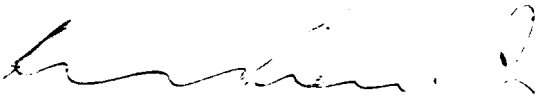
The exact nature of the wrong alleged against the first defendant is obscure on the face of the pleadings but in

response to a question from me Mr Wicks explained that his complaint is that Mr McLinden told the police that he had stolen the file. In the light of that explanation, and because the pleadings indicate none of the ingredients of an action for malicious prosecution, the claim must be treated, as on its face it purports to be, as one in defamation. On that basis Mrs Abrams' principal submission was that the pleadings are defective in that the actual words relied upon as constituting the defamation are not set out. That this is an essential requirement of pleading in an action for defamation was conclusively established by the Court of Appeal in Kerr v Haydon [1981] 1 NZLR, 449. The reason for such a rule is demonstrated by this very case. Mr McLinden's complaint to the police may have been couched in words defamatory of the plaintiff but equally it may not have been. It may have been merely a request to inquire into the circumstances of the retention of the file. It may merely have been a statement that the file was inadvertently sent to Mr Wicks and that Mr Wicks had refused to return it. No defendant may be put to the expense and inconvenience of defending an action for defamation brought on no firmer ground than a suspicion or an assumption that defamatory words have in fact been used. For then litigation would become tyrannical.

It is clear from Kerr v Haydon that the proper course for me to adopt in the present case is to strike out the statement of claim. If it seemed possible for the plaintiff to remedy the deficiency by amendment, or if it were one of those cases where it was abundantly clear that slanderous words had been used so that interrogatories might be permitted to

establish the precise words (as in Atkinson v Fosbroke [1866] LR 1 QB, 628) the position may have been different. But this case is far from either of those situations. On this ground therefore the first defendant is entitled to have the statement of claim struck out.

The result is that for different reasons relating to each defendant the statement of claim is struck out as against them both. Normally the defendants would be entitled to costs, but in view of the delay on their part and the expense to which that has put Mr Wicks I do not propose to make any order.



Solicitors:

Duncan Cotterill & Co, CHRISTCHURCH, for First Defendant
Crown Solicitor, CHRISTCHURCH, for Second Defendant.