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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

A.176/82

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BETWEEN ROBERT ANTHONY CONSEDINE and ROBIN MURRAY WOODSFORD

Plaintiffs

A N D JOHN FRASER ROBERTSON

First Defendant

A N D ROBERT DAVID MULDOON

Second Defendant

Hearing: 29 March 1984

Counsel: P.F. Whiteside for Plaintiffs
T.A. Goddard for First Defendant
T.F. Fookes for Second Defendant

Judgment: F 9 APR 1984

JUDGMENT OF ROPER J.

I have before me motions by the Defendants to set aside the Writ of Summons in this action; and one by the Plaintiffs seeking an order that in the event of the Court holding that no material part of their cause of action arose in Christchurch, the Defendants be required to file their statements of defence in Wellington. The Plaintiffs also sought an order that in the event of the Defendants being required to file in Wellington there be a change of venue to Christchurch. For reasons given on the day I was not prepared to consider the Plaintiffs' application for a change of venue at that time so the sole issue is whether the Defendants should be required to file their defences in Wellington or Christchurch.

Between the 9th and 20th July 1981 the Plaintiffs were inmates of Addington Prison, being on remand for charges arising out of their protest against the visit to New Zealand of the South African rugby team. While in prison they went on a hunger strike as a further form of protest. Their allegation against the First Defendant, who was then the Secretary for Justice, is that he prepared a report on the Plaintiffs' actions for Cabinet and in the course of it said "There has been no loss of weight and I suspect nibbling". Their allegation against the Second Defendant is that at his post-Cabinet press conference, which was attended by journalists from newspapers, radio and television, he said "The Secretary for Justice said there has been no loss of weight and he suspects nibbling".

The Plaintiffs claim that the "nibbling" comments were defamatory of them in their ordinary and natural meaning, or by innuendo, in that they indicate that the Plaintiffs were "hypocrites and/or dishonest". Paragraph 8 of the Statement of Claim reads:-

> "8. THAT the statement referred to in paragraph 6 hereof was republished by the said news media throughout New Zealand."

(Paragraph 6 contains the allegation against the Second Defendant.)

The Plaintiffs' Writ requires the statements of defence to be filed at Christchurch, and annexed to it is an affidavit justifying that requirement in that it alleges that a material part of the Plaintiffs' cause of action arose in Christchurch because of these circumstances:-

"(a) Both the Plaintiffs reside in Christchurch and have done so for some years.

(b) The events about which the alleged defamatory statements were made by the Defendants all occurred in Christchurch."

The relevant Rules of the Code of Civil Procedure are 4, 9 and 10. They read:-

" 4. Place where statement of defence to be filed - The place at which the defendant shall file his statement of defence shall be the office of the Court nearest by the most practicable route to the defendant's residence:"

" 9. Alternative place for filing statement of defence - If the place where the cause of action sued on, or some material part thereof, arose is nearer by the most practicable route to the place where the plaintiff or the plaintiff first named in the writ resides than to the place where the defendant resides the place at which the defendant shall be required to file his statement of defence may be the office of the Court nearest by the most practicable route to the residence of the plaintiff or the plaintiff first named as the case may be."

" 10. Affidavit as to place where cause of action arose - Before a writ of summons is issued under rule 9, there shall be filed in the office of the Court out of which it is proposed to issue the writ an affidavit by the plaintiff or one of the plaintiffs or by his solicitor, in the form No. 4 in the First Schedule hereto, showing where the cause of action or some (and if so what) material part thereof arose and that the place where the cause of action or the material part thereof arose is nearer by the most practicable route to the place where the plaintiff or the plaintiff first named in the writ resides than to the defendant's residence."

Both Defendants reside in Wellington so that unless the Plaintiffs can bring themselves within R.9 that is where the statements of defence must be filed.

In the result Mr Whiteside did not rely, and indeed could not have relied, on the fact that both Plaintiffs live in Christchurch (as stated in the affidavit as to material part of the cause) as justifying Christchurch as the place of filing, but did seek to rely on a variation of the second ground in the affidavit, and a further ground which was raised at the hearing for the first time.

In order to establish a prima facie case in an action for defamation a plaintiff must prove that the words were published of him, that they were defamatory, and were published by the Defendant. Mr Whiteside submitted that as the Plaintiffs were not identified by name in the Defendants' publications they must prove as part of their cause of action their identification as the persons referred to, and for that purpose evidence of events in Christchurch is essential. For example, that they were the persons in prison who went on a hunger strike at the relevant time, with presumably evidence by residents of Christchurch that they believed the Plaintiffs were the people referred to in the publication.

In the footnotes to R.9 of the code "cause of action" is defined thus:-

> "The cause of action is every fact which it would be necessary for the plaintiff to prove if traversed, in order to support his right to the judgment of the Court; and a material part of the cause of action is any such fact - any fact which, if not proved, would give the defendant an immediate right to the judgment of the Court."

Read v. Brown (1889) 22 Q.B.D. 128 which was referred to by Mr Whiteside is one of the authorities cited for that statement. This is what was said by Lord Esher M.R. at page 131 in that case:-

> "What is the real meaning of the phrase 'a cause of action arising in the City?' It has been defined in Cooke v. Gill Law Rep. 8 C.P. 107 to be this: every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

I think the last sentence in that passage meets Mr Whiteside's submission.

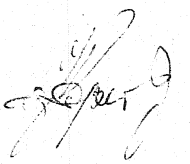
The evidence available to establish identity may be in Christchurch but it does not follow that a material part of the cause of action arose there. It is really a question of the existence of a plaintiff, not of proof of a cause of action.

It is also relevant that the Plaintiffs have not sought to show that the comments would be understood to refer to them because of some facts or circumstances extrinsic to the words themselves by pleading those extrinsic facts as they would be bound to do.

Mr Whiteside's next submission was that the Second Defendant's statement had been published in Christchurch newspapers in circumstances which made at least the Second Defendant liable for republication. The only reference to republication is in paragraph 8 of the Statement of Claim as set out above. It is a pleading which on its face goes to the

question of aggravation of damages, and by no stretch of the imagination could it be regarded as raising a claim for damages based on republication in Christchurch.

I therefore conclude that it has not been shown that any material part of the cause of action arose in Christchurch. It would not be appropriate to set aside the writ and I therefore direct that the Defendants' Statement of Defence be filed in the Wellington Registry. Costs reserved.



Solicitors:
Wynn Williams & Co., Christchurch, for Plaintiffs
Goddard Moran Finlayson & Co., Wellington, for First Defendant
Bell Gully & Co., Wellington, for Second Defendant