IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CP 114/96

BETWEEN ANTHONY HAMUERA HODGE

Intended Plaintiff

AND TELEVISION NEW ZEALAND

Intended Defendant

Hearing: 4 October 1996

Judgment: 10 OCT 1996

Counsel: P R Kellar for Intended Plaintiff
W Akel for Intended Defendant

RESERVED JUDGMENT OF MASTER VENNING

This is an application for leave to bring a defamation action against Television New Zealand (the Defendant).

On 14 February 1993 the Defendant rang a "60 Minutes" television programme regarding activities at the House of Hope and the death of seven young people in a fire in a shed at the rear of the property on 20 November 1992 at Christchurch. The House was run by four trustees. Mr Hodge (the Plaintiff) was one of them.

The first notice the Defendant received of the Plaintiff's intention to bring a claim against it in respect of the programme was this application filed on 7 August 1996, some three and a half years after the programme.

Leave is required because of the provisions of the Defamation Act 1992. That Act came into force on 1 February 1993. Section 55 amends s4 of the Limitation Act 1950 by introducing a new subsection, (6A) and (6B), in the following terms:

> "(6A) Subject to subsection (6B) of this section, a defamation action shall not be brought after the expiration of 2 years from the date on which the cause of action accrued.
>
> (6B) Notwithstanding anything in subsection (6A) of this section, any person may apply to the Court, after notice to the intended defendant, for leave to bring a defamation action at any time within 6 years from the date on which the cause of action accrued; and the Court may, if it thinks it is just to do so, grant leave accordingly, subject to such conditions (if any) as it thinks just to impose, where it considers that the delay in bringing the action was occasioned by the mistake of fact or mistake of any matter of law (other than the provisions of subsection (6A) of this section), or by any other reasonable cause."

NOTICE

The Plaintiff did not give the Defendant notice before filing this application. Mr Akel submitted that notwithstanding that in *Russell v Attorney General* [1995] 1 NZLR 749 Smellie J held that the provision was not mandatory but directory only, I should distinguish that case and the two cases referred to in the decision (*Auckland Harbour Board v Kaihe* [1962] NZLR 68 and *E J Tyler Ltd v Ainger* [1976] 2 NZLR 310), on the basis that in each of those cases some form of notice had been given to the Intended Defendant. He submitted that the correct interpretation of the Court of Appeal's finding in *Kaihe* was that notice requirements are directory in relation to the adequacy of the notice, but that the notice requirement itself was still mandatory.

However, despite those submissions I do not consider the present case can be distinguished on the ground that no notice was given. If the requirement is directory rather than mandatory then whether a notice given is defective or whether there is no notice given at all really amounts to the same thing. Further, I note that in the *Russell* decision Smellie J said:

> "... the fact that there may have been late notices, possibly defective notices and even no notices at all ... is not fatal to the applications ..." p755 (underlining added)

While I accept that such comment was obiter nevertheless the general point of notice was considered in some detail by the learned Judge in that case.

Alternatively Mr Akel submitted that the failure to give prior notice may still be fatal depending on the circumstances of the particular case. He submitted that the intent of the legislature may have been to enable a broadcaster or publisher to consider whether an apology or other appropriate response should be made after receipt of the notice and before any proceedings were filed in Court. The force of that submission is lessened by the fact that the notice is, of course, only required when the two year period has expired and the value and effect of an apology would be more relevant at a time more directly related to the publication complained of.

In my view in light of the authority referred to, the failure to give notice before making this application is not fatal to the Plaintiff's case. However, I accept that the failure to give any notice before making the application is one of the factors to be considered in the exercise of the Court's general discretion in determining whether it is just to grant leave.

REASONABLE CAUSE

Before leave can be granted the Plaintiff must establish that the delay in bringing the action was occasioned by either:

(a) Mistake of fact; or

(b) Mistake of any matter of law (other than the provisions of subsection 6(A)); or

(c) Any other reasonable cause.

In this case Mr Kellar accepted that the Plaintiff could not rely upon any mistake of fact or mistake of any matter of law. He accepted that it was the Plaintiff's case that the delay had been occasioned by "other reasonable cause".

The relevant period for which the Applicant must show reasonable cause for his delay is the time from the expiration of the limitation period to the time of making the application for leave. In *W M Cable Ltd v Trainor* [1957] NZLR 337 Shorland J (delivering the decision of the Court of Appeal and considering a section which for present purposes is identical to the present Limitation Act provisions) stated:

> "If the words 'the delay in bringing the action' are, however, construed as connoting the time which has elapsed since the limitation period expired or the period during which the claimant can be said to be in default, as we think they should, then the concluding words of the subsection earlier referred to manifest an intention on the part of the Legislature that prejudice to the Defendant from matters arising only during the period the claimant has been in default becomes an answer to the claimant's right to obtain leave to bring action. Such an intention is consistent with the intention earlier manifested by the subsection, and, in our opinion, is to be deduced as the intention of the Legislature as manifested by the subsection taken as a whole."

See also *Outfox Total Security (New Zealand) Ltd v New Zealand Security Industry Association Inc* [1995] 3 NZLR 122, 128 per Barker J.

The Plaintiff has sworn two affidavits in support of his application. His current solicitor, Mr Dyhrberg, has also sworn an affidavit in support.

The Plaintiff says that shortly after the report was broadcast (in February 1993) he consulted a lawyer for one of the other trustees but was advised by that lawyer that he could not act for the Plaintiff. The Plaintiff then went to see another lawyer, a woman whose name he cannot recall,

who said she would do some research into the matter and come back to him. He says she went overseas and he heard nothing further. In his second affidavit he confirms that he thought he had a good case in relation to the broadcast but was not sure what to do. He again refers to spending a short time in the solicitor's office and says that he left a tape with her. She said she would have a look at the tape and let him know where to go from there. He says she said she would let him know within a couple of weeks. He never heard from her again.

The solicitor is not identified in either of the Plaintiff's affidavits. Although he knows where her office was there is no evidence of an attempt by the Plaintiff to identify her or locate her to enable an affidavit to be obtained from her. There is no evidence that she is still overseas. I note that according to the Plaintiff the matter was left on the basis that she would get back to him within a few weeks and that he initially consulted lawyers shortly after the broadcast. He must have seen her during the early part of 1993 and would have expected to hear from her by mid 1993 at the latest.

On the evidence I am satisfied that the effect of the Plaintiff's involvement with this unidentified solicitor must have been spent well before the expiry of the limitation period and cannot be called in aid by him as being a reasonable cause occasioning his delay in commencing proceedings after the expiry of the two year period.

The Plaintiff also refers to the fact that after the fire he was devastated personally and was trying to rebuild his life. He carried on as trustee in the Ferry Rd property for a time and was also doing voluntary work with the Aranui Community Social Services. He says he was told by that organisation to concentrate on rebuilding his life. However, in other parts of his affidavit he confirms that he thought he had a good case in relation to the broadcast and wanted to take advice about the matter.

Again in those circumstances I am satisfied that any effect or explanation of his delay in commencing proceedings because he was

attempting to rebuild and refocus his life must have been spent before the expiry of the two year limitation period and cannot be relied upon by him as a reasonable cause of his delay after the expiry of that period.

To that extent this case is distinguishable from the earlier decision of *Parris v TVNZ* (unreported, Christchurch, CP 138/95, 11 March 1996). In that case there were a number of steps being taken by the Applicant immediately prior to the expiry of the two year period which ran over into the time after the expiry of the two year period and explained the delay during the initial months after the expiry of that period.

In his affidavit the solicitor, Mr Dyhrberg, confirms that he was consulted by the Plaintiff in July 1995 and that he immediately applied for legal aid and instructed a senior barrister regarding the matter. Mr Dyhrberg's affidavit then deals with his communications with counsel which culminated in him terminating the instructions to that counsel in April 1996. The Plaintiff's present counsel was instructed on 17 April 1996.

After considering the Plaintiff's own affidavits and the affidavit of his solicitor three periods of delay after the expiry of the two year limitation period can be identified:

(a) 15 February 1995 to 7 July 1995 - There is no reasonable cause or explanation advanced by the Plaintiff to explain this five month period before his current solicitor was instructed.

(b) July 1995 to 17 April 1996 - The Plaintiff's current solicitor explains the difficulties experienced with senior counsel. Reliance on solicitors and legal advice is an example of a delay not attributable to the Plaintiff: *Lee v Wilson & Horton Ltd* (5 July 1996, High Court Auckland, Mr 1401/95, Robertson J, p 18).

Notwithstanding that, two points can be made about that period of delay. Whilst the instructing solicitor may have experienced difficulty with the original counsel instructed, at the end of the day the ultimate responsibility for the proceedings rests with the solicitor. A period of

some nine months delay during which no notice was given to the Defendant and no steps were taken to make an application to file proceedings out of time is a very long period in the context of a two year limitation period.

Secondly, the fact that delay has been occasioned by a legal adviser will not automatically excuse delay and lead to leave being granted in appeal proceedings: *Avery v No. 2 Public Service Appeal Board* [1973] 2 NZLR 86 (CA). The same reasoning must apply to an application under s55 of the Defamation Act.

(c) 17 April 1996 until 7 August 1996 - There is no explanation on the papers before me of the reason for the delay of almost three months from the time fresh counsel was instructed to the filing of this particular application. It appears from the papers that a statement of claim was drafted in May (the draft statement of claim is dated May) and the first affidavits in support of this application were sworn on 28 June and 10 July 1996 respectively. Notwithstanding that, the application was not filed until 7 August 1996 and as noted previously no prior notice was given to the Defendant during this period. The reason for the delay remains unexplained on the papers. Where there has been initial delay it behoves a party in the Plaintiff's position to act promptly on discovery of the oversight: *NZ Meat Producers IUOW v Registrar of Industrial Unions* (28/4/87, Holland J, A 839/92).

In summary there is a five month period from February until July 1995 that is unexplained. There is no evidence before me of any reasonable cause occasioning that delay. Nor is there any direct evidence before me of a reasonable cause occasioning the delay between April 1996 and August 1996, although it can be inferred from documents on file that steps were being taken during that period to ready this application. Whilst an explanation has been given for the delay from July 1995 to April 1996, that does not automatically amount to a reasonable cause of the delay. However,

for the reasons which follow it is unnecessary for me to consider the delay from July 1995 to April 1996 in the particular circumstances of this case.

Mr Akel submitted that as there was no reasonable cause for the delay for part of the period then that was fatal to the Plaintiff's application. I accept that submission. The whole period of delay must be occasioned by reasonable cause. In certain cases it will not be possible to precisely say when the explanation or reason for the delay is spent. For example, in the *Lee* decision, Robertson J considered a submission that the Applicant was under a misapprehension that he could not issue defamation proceedings until the amount of loss was able to be worked out and accounts had to be finalised to enable him to do that. The accounts were available in August 1995 but Robertson J accepted that a reasonable time period after that had to be allowed to study the accounts and to prepare the proceedings. In those circumstances he accepted that the mistake could explain the delay that extended from August 1995 when the accounts were available until November when the application was filed.

In the present case similar reasoning may perhaps explain the delay from April 1996 until August 1996, but it cannot assist to explain the delay from February 1995 until July 1995.

For the reasons set out earlier, I am of the view that the Plaintiff cannot rely on his dealings with the unidentified solicitor or his desire to rebuild his life in explanation of the delay otherwise unexplained from February 1995 to July 1995.

For the foregoing reasons the Plaintiff cannot satisfy the Court that a significant period of delay in bringing the action was occasioned by reasonable cause, and the application must be declined.

EXERCISE OF THE DISCRETION

If I am wrong in concluding that the Plaintiff has not established the delay was occasioned by reasonable cause I propose to consider the

exercise of the residual discretion left to the Court on applications such as these.

If the Plaintiff had met the jurisdictional requirement for leave it is still necessary for the Court to consider whether in the context of the overall justice of the case it is just to allow the application and to grant leave.

The circumstances of each case will, of course, vary. In the present case the following factors are, in my view, relevant to the exercise of the overall discretion:

(a) *Notice* - the Programme aired on 14 February 1993. The Plaintiff took no steps either personally or through his legal advisers to alert the Defendant to this potential claim before making application to the Court for leave to commence proceedings on 7 August 1996, some three and one half years after the programme.

Even accepting that notice is directory rather than mandatory, the plain wording of the statute must be given some effect and the delay is exacerbated if notice is not given. If, for instance, notice had been given of intention to apply for leave when the Plaintiff sought legal advice in July 1995 then the Defendant could have considered its position at that time and, indeed, would not be in a position to now say, as it does, that three and a half years have passed without any notice or warning of this claim being made.

(b) *Prejudice* - If the Defendant were able to lead evidence of prejudice then that would be a relevant factor in declining the exercise of the discretion in favour of the Plaintiff. In the present case Mr Akel did not put the issue of prejudice as high as saying that evidence had been lost, or that witnesses were unavailable, but he did identify difficulties the Defendant will face in preparing a defence. The presenter of the programme is now employed by an opposition channel, and to defend any proceedings the Defendant would have to call a number of

witnesses who have previously given evidence at the Coroner's inquest. Some are lay witnesses who may be difficult to find now, given the passage of time.

As there is no specific evidence of prejudice, these potential difficulties identified are simply further factors to be taken into account generally on the issue of discretion..

(c) *Merits of the claim* - Whilst it is impossible to attempt any detailed consideration of the merits of the Plaintiff's claim at this interlocutory state, it is nevertheless relevant to consider the merits generally. The proceedings arise out of, and the comments made during the course of, a programme in which the Plaintiff was interviewed and took part. The background to the programme was the investigation of the deaths of seven young street children who were under the care or supervision of the Plaintiff. It is sufficient to say that for present purposes the positive defences proposed by the Defendant are not without merit. As noted by the Coroner in his report:

> "It is probably only stating the obvious however to reiterate that even with the best and most extensive legislative change, ultimately the prime responsibility must fall on those who have the day to day control of what is going on in a property. Smoke detectors clearly had their place but as was indicated by the expert evidence they still have their limitation. They still require regular maintenance and supervision, and as Mr Sinclair explained, the only real effective protection, particularly when persons as asleep or impaired by alcohol and/or drugs, is to ensure that there is someone who maintains a responsible unimpaired supervisory role, particularly where drugs or alcohol have been involved."

(d) *Overall consideration* - In the exercise of the overall discretion I consider that the Plaintiff has failed to make out a case justifying the grant of an indulgence in his favour. As noted by Turner J in *Wall v Caldow* [1964] NZLR 539:

> " ... yet the Court must, in exercising the overall discretion given to it by s4(8), still consider whether on the whole of the facts 'it is

just' to grant the leave sought; and that it will not generally be 'just' where the delay is substantial, and no reasonable excuse is put forward for it, to grant an indulgence which withdraws from a defendant a statutory shield expressly given to him by the Legislature." p544

Mr Kellar submitted that as stated in *Thwaites v Niechclawkowski* [1969] NZLR 526 it needs to be a very strong case before a Plaintiff is deprived of his remedy. However, as also noted in that case by McCarthy J, each application must be determined on its own facts. In that case the Plaintiff had been given incorrect medical advice by two doctors. In the present case the Plaintiff has failed to take any steps to advance his claim for a considerable period of time. The Plaintiff simply sat on his hands for a considerable period of time and took no action before July 1995. He should not receive the benefit of the exercise of the Court's discretion at this stage: *Moot v Crown Crystal Ltd* [1976] 2 NZLR 268.

When all of the above factors are balanced against the Plaintiff's desire to pursue a claim against the Defendant then even if the Plaintiff had established the delay had been occasioned by reasonable cause I would have been minded to decline to exercise the discretion in the Plaintiff's favour.

The application for leave is therefore declined.

I note the Plaintiff is legally aided. There will be an order under s87(4) of the Legal Services Act that were it not for the the provisions of s87 costs of $1,500 together with disbursements, including counsel's reasonable travel expenses, would have been awarded against the Plaintiff.

MASTER VENNING

Solicitors:
Gloucester Bridge Law, Christchurch for Intended Plaintiff
Simpson Grierson, Auckland for Intended Defendant