IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2009-485-1233

UNDER	the Defamation Act 1992
IN THE MATTER OF	interlocutory application for summary judgment
BETWEEN	VONRICK CHRISFORD KERR Plaintiff
AND	THE DOMINION POST Defendant

Hearing: 19 November 2009

Counsel: Plaintiff in person
R K P Stewart and B J Marten for defendant

Judgment: 20 November 2009

RESERVED JUDGMENT OF DOBSON J

---

[1] A hearing in this matter was convened to hear applications on behalf of the defendant (the Dominion Post) seeking a strike-out of Mr Kerr's current proceedings, or alternatively for an order for security for costs against him.

[2] The proceedings are the third filed by Mr Kerr alleging defamation against the Dominion Post, and the second in respect of publications in that newspaper in October 2007 relating to Mr Kerr.

[3] Before hearing counsel on the strike out, Mr Kerr sought to challenge the circumstances in which that was being heard.

[4] On 10 August 2009, Associate Judge Gendall had ordered that the Dominion Post's strike out application, together with its alternative application for security for

costs, plus an application by Mr Kerr for summary judgment, all be set down for hearing on 19 November 2009. Thereafter, the Dominion Post applied to the trial Judge for a variation on the Associate Judge's scheduling. In my absence, the matter was referred to Simon France J. On 3 September 2009, acting in my stead as the Judge allocated to hear the respective applications, he amended the order made by the Associate Judge, and directed that the hearing was to be limited to the Dominion Post's application for strike out and security for costs.

[5] Mr Kerr protested that the informality with which that change had occurred prejudiced his interests. He opposed any decisions being made before the merits of his claim, such as would be canvassed in the course of his summary judgment application, were heard and appreciated by the Court. Mr Kerr insisted that the Dominion Post ought to have proceeded by way of formal application for review of the Associate Judge's order, any determination on which would have afforded him rights of appeal.

[6] Having heard briefly from Mr Kerr on the gravamen of this complaint, I declined to vary the order that Simon France J had made. If the Dominion Post can make out grounds for either a strike out or a stay pending provision of security for costs, then, as a matter of sequence, those arguments should occur before any other steps which would be rendered irrelevant or need to be postponed by the making of any such orders. Mr Kerr's concern that his perceived strengths in the merits of his claim should be appreciated before the Court determined their future is a matter for him to attribute relevance to, within the context of the argument on strike out.

[7] Mr Kerr first sued the publisher of the then Dominion newspaper in 2000, in relation to an item published about him in November 1998. It appears that those proceedings were eventually struck out on the Court's own motion after non-compliance by Mr Kerr with orders for security for costs.

[8] Then in October 2007, Mr Kerr commenced a second proceeding against the Dominion Post, this time in relation to articles published on 6 and 9 October 2007. In January 2008, Associate Judge Gendall ordered Mr Kerr to pay security for costs in the sum of $30,000 and stayed the 2007 proceedings pending payment in full. I

determined an application to review that decision. In a judgment delivered on 13 March 2008, I dismissed Mr Kerr's application for review. I subsequently dismissed an application for leave to further appeal and in August 2008 Mr Kerr's application for special leave to appeal to the Court of Appeal was also dismissed. Mr Kerr has not met the order for security for costs and accepts that he is unable to do so.

[9] In June 2009, Mr Kerr commenced a third defamation action against the Dominion Post. This action relates to the same articles as are complained of in the 2007 proceedings. However, whereas the 2007 proceedings alleged publication in the hard copy form of the Dominion Post newspapers, the 2009 Statement of Claim alleges separate re-publication by electronic means. There are minor differences in the allegations as to the content alleged to be defamatory, and the innuendoes pleaded as arising from the words used. All of those differences, however, are within the parameters of what might reasonably be expected by way of an amendment to the 2007 pleading. So far as the 2009 pleading relates to separate publications, that would ordinarily be pleaded by way of a separate cause of action within the same Statement of Claim.

[10] Mr Stewart accepted that the Dominion Post could not oppose the extent of new material in the 2009 Statement of Claim, namely refinement of allegations arising from the words of the publication, and the new allegation of re-publication in electronic form, in a further Amended Statement of Claim in the 2007 proceedings.

[11] Ultimately, I took Mr Kerr as accepting that that would ordinarily be the course to be followed. However, he asserts the right to plead separately in relation to the electronic re-publication, when his 2007 proceedings are stayed because of his inability to meet the order for security for costs.

[12] In these circumstances, I accept Mr Stewart's submission that it is a classic situation involving abuse of the Court's process, and vexatious conduct, for a plaintiff to attempt to avoid the effect of a stay on extant proceedings by commencing a new set of proceedings in relation to essentially the same subject matter, albeit in respect of discrete re-publication. I am satisfied that the new

proceedings have been chosen as the form of pursuing the complaint, in order to avoid the effect of a stay ordered in relation to the 2007 proceedings.

[13] In the absence of a compelling justification for doing so, that constitutes vexatious conduct and is an abuse of the Court's processes entitling the Dominion Post to have the 2009 proceedings struck out.

[14] The matters Mr Kerr urged in support of allowing the proceedings to continue are that:

a) a decision on the future of the 2009 proceedings should not be taken without reflecting on what he treats as their obvious merit;

b) the record of convictions relied upon by the Dominion Post had not been disclosed when he argued against security for costs in the 2007 proceedings, but that is now available and allegedly supports his arguments of errors made by the newspaper, rendering its report false and defamatory; and

c) the Court should not condone use of obvious tactics by the Dominion Post, seeking to prevent Mr Kerr having his day in Court on account of his impecuniosity.

[15] In part, Mr Kerr sought to advance these arguments by urging that I hear him on an application to review the stay of the 2007 proceedings. He had purported to file that application in the 2009 proceedings but it had not been scheduled for hearing. Mr Kerr sought to re-argue the order that stayed his 2007 proceedings pending satisfaction of the order for security for costs. However, Mr Kerr was unsuccessful at the original hearing and on appeal on this issue. Both the Court of Appeal and I declined to allow a second appeal on it.

[16] As to Mr Kerr's ability to cast the merits differently, Mr Stewart reminded me that Mr Kerr had been invited to produce the record of his convictions upon which he relied at the time of the argument of the security for costs appeal before

me. Mr Kerr had apparently provided some document addressing this record to the Associate Judge, but had then required its return to him, and declined my invitation to provide it to me. In those circumstances, any suggestion that the merits of his claim ought to be reconsidered because of a belated change of heart that he supply such records to the Court is not deserving of great weight.

[17] Motive for a defendant's reliance on security for costs initiatives cannot of themselves be determinative. The rule exists to protect defendants from incurring costs in circumstances where, if they successfully defend the matter, they are not left completely out of pocket on account of the plaintiff's impecuniosity. The criteria for such orders that have been thoroughly considered in the circumstances of the present defamation allegations and there has been a fully adequate opportunity for Mr Kerr to advance such matters. There has been nothing advanced (such as a change in his financial position) which would go near to requiring the Dominion Post to re-argue, yet again, its entitlement to the order upheld by me.

[18] Accordingly, this is one of those unusual situations in which a defendant can clearly establish that commencement of new proceedings is vexatious and an abuse of the Court's process whilst existing proceedings remain extant. That arises here in circumstances where the extant proceedings are stayed only by virtue of Mr Kerr's inability to meet the order for security for costs.

[19] I have considered whether the appropriate consequence of that finding is to stay or strike out these present, 2009, proceedings. I note, for instance, that in *Registered Securities Ltd (in liquidation) v Yates* (1991) 5 PRNZ 68 (HC), the course adopted in somewhat similar circumstances was to order a stay of the second set of proceedings. In contrast, in *Otis Elevator Co Ltd v Linnell Builders Ltd* (1991) 5 PRNZ 72, a third party notice issued by a defendant in somewhat similar circumstances was instead struck out.

[20] I am satisfied that there is no justification to allow the 2009 proceedings to remain dormant by staying them. Mr Kerr is conscious of the limitation periods applying under the Defamation Act 1992, but if he is able to fund his defamation claims, they can all be brought within the 2007 proceedings. I am satisfied that that

is the appropriate course and I accordingly order the strike out of the 2009 proceedings.

Costs

[21] Mr Stewart sought costs on an increased or indemnity basis. The first reaction of the Dominion Post to the commencement of these proceedings was to have its solicitors write to Mr Kerr. That letter pointed out the grounds on which the commencement of the proceedings constituted an abuse of process whilst the 2007 proceedings remained extant, and referred to authorities, including those I have cited above. The position in law is tolerably clear. Had Mr Kerr been advised by competent solicitors, I would have seriously considered an award of indemnity costs against him for not conceding the point when it was drawn to his attention, and instead requiring the Dominion Post to incur the further expenses that have since been involved.

[22] However, Mr Kerr claims not to be able to afford solicitors, and claims also to be passionately concerned at the unfairness of inequality of resources keeping him from his day in Court. Some acknowledgement can be given to that clouding his judgement in not recognising the inevitability of the reasoning conveyed to him in the solicitors' letter.

[23] I am satisfied an increased award of costs is warranted and order the sum of $2,750, together with usual disbursements.

Dobson J

Solicitors:
V C Kerr, 22 Warwick Street, Wilton, Wellington
Izard Weston, Wellington for defendant