IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2007-485-2212
[2013] NZHC 1394

BETWEEN	ROBERT ALEXANDER MOODIE Plaintiff
AND	ELIZABETH GRACE STRACHAN Defendant
AND	APN SPECIALIST PUBLICATIONS NZ LIMITED Cross Claim Defendant

Hearing: 6 June 2013

Counsel: Plaintiff in Person
J O Upton QC for Defendant

Judgment: 12 June 2013

JUDGMENT OF RONALD YOUNG J

Introduction

[1] There are two interlocutory applications for resolution in this judgment:

(a) the defendant's application to strike out the current sole remaining cause of action against her; and

(b) Dr Moodie's application to add two new causes of action. Such an application is necessary because these causes of action are said to be time barred by virtue of s 55 of the Defamation Act 1992 (amending s 4 of the Limitation Act 1950).

Background facts

[2] In 2005 it was alleged the plaintiff was in contempt of Court in his profession as a lawyer. He instructed Mr A J Ellis, a barrister, to act for him. Mr Ellis and Dr Moodie fell out over arrangements as to legal fees. Ms Strachan was an employee of Dr Moodie. She is also a lawyer. Joanne Black, a journalist who worked for the *Listener*, interviewed Mr Ellis and Dr Moodie regarding the contempt case and the fact that they had fallen out. She also interviewed Ms Strachan. As a result, in March 2007 an article was published in the *Listener* magazine entitled "Moodie Blues" written by Ms Black.

[3] Ms Strachan eventually stopped working for Dr Moodie and issued proceedings through the Employment Court. Arising from the *Listener* article, Dr Moodie sued Mr Ellis, Ms Strachan and APN in defamation commencing in October 2007. APN and Mr Ellis settled the proceedings with Dr Moodie in September 2009. Part of the settlement consisted of an apology read in open court and payment of damages to Dr Moodie by Mr Ellis and APN.

[4] By this stage Dr Moodie had filed a fifth amended statement of claim. Ms Strachan applied to the High Court to strike out parts of this claim. Ms Strachan's application was partly successful and partly unsuccessful. As to the unsuccessful parts she appealed to the Court of Appeal. In the meantime she applied for a stay of proceedings until her appeal was resolved. This application was not heard but the parties agreed the case could not continue until this appeal (and another appeal, see at [7]) was heard.

[5] Ms Strachan also applied to strike out Dr Moodie's second cause of action as it related to her arising from the allegedly defamatory article published in the *Listener* in March 2007. Wild J, in August 2010, struck out this cause of action because of the operation of the joint tortfeasor rule.[1]

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[1] *Moodie v Strachan* HC Wellington CIV 2007-485-2212, 26 August 2010.

[6] The final result was that Dr Moodie was left with the first cause of action in his fifth amended statement of claim but not as Wild J observed "in relation to the damage arising out of the subsequent publication in the *Listener*".[2] That damage had been dealt with by the settlement with Mr Ellis and APN and the joint tortfeasor rule as it affected Ms Strachan.

[7] Dr Moodie appealed the judgment of Wild J. The Court of Appeal ordered that both Ms Strachan and Dr Moodie's appeals be heard together. However, Dr Moodie's appeal against Wild J's judgment has now been deemed abandoned. Ms Strachan's appeal against part of Mallon J's judgment has not yet been heard.

[8] In the fifth amended claim, Dr Moodie sues Ms Strachan for alleged defamatory remarks made by her in her discussion with Ms Black in February 2007 and seeks damages as follows:

(a) $650,000 for injury to reputation;

(b) $388,164 for loss of earnings for five years (a claim for special damages);

(c) exemplary damages of $50,000.

[9] As to the proposed additional causes of action, these arise from two emails and a draft affidavit sent by Ms Strachan to Mr Ellis. The first was an email of 7 December 2006, the second an email of 5 January 2007 and the third, a 60 page draft affidavit from Ms Strachan accompanying the email of 5 January. Dr Moodie gave notice of his intention to seek leave in December 2009 and applied for leave in July 2010.

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2 At [11].

Application to add further causes of action

Leave not required

[10] The plaintiff's first submission is that an application for leave is unnecessary because the plaintiff can file these claims as of right. This submission is based on Dr Moodie's claim that because Wild J found that Ms Strachan was a joint tortfeasor, she was already a party to the publications by Mr Ellis and APN which were the subject of the proceedings that were commenced in October 2007. Thus, Dr Moodie says, he was entitled to simply amend the statement of claim by adding additional causes of action any time before the hearing.

[11] I reject this submission. The proposed additional causes of action are clearly new causes of action. They involve allegations of publication of defamatory material by Ms Strachan to Mr Ellis in two emails and a draft affidavit. Ms Strachan is sued severally. None of the plaintiff's previous pleadings have involved an allegation of publication of defamatory material by Ms Strachan to Mr Ellis arising from these emails and the draft affidavit. Dr Moodie cannot, therefore, somehow claim that because Ms Strachan was a joint tortfeasor in one cause of action, his statement of claim could be amended by adding additional causes of action without being subject to Limitation Act restrictions. I, therefore, reject the claim that leave to bring these two additional causes of action is not required. The proposed causes of action are both beyond the two year time limit in s 4(6A) of the Limitation Act 1950 (Defamation Act 1992, s 55).

Limitation Act leave application

[12] Dr Moodie's application for leave to bring these proceedings is made because of s 55 of the Defamation Act 1992. Section 55 amends s 4 of the Limitation Act 2010 by adding after s 4(6) the following subsections:

> (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.
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> (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 just to do so, grant leave accordingly, subject to such conditions (if any) as it thinks it just to impose, where it considers that the delay in bringing the action was occasioned by 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.

[13] It is common ground between the parties that a cause of action in defamation accrues when the alleged defamatory comment is published. Accordingly, time began running as to the first email on 7 December 2006, and with respect to the second email and the draft affidavit from 5 January 2007, and expired two years later. Dr Moodie's application to bring these additional causes of actions was filed in the High Court on 2 July 2010. No claims based on these emails or affidavit were filed within this two year time limit.

[14] Section 4(6B) entitles a Court, if it thinks just to do so, to grant leave to bring a cause of action any time within six years from the date in which the cause of action accrued. Leave can be granted subject to conditions. It can be granted where the Court "considers that the delay in bringing the action was occasioned by 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. Thus, an applicant for leave cannot claim a mistake of fact relating to the limitation period as a basis for granting leave to bring a cause of action out of time.

[15] The plaintiff bases his application for leave on a claim of a mistake of fact or law. He claims that he believed until 2010 that the two emails and the draft affidavit were either privileged or confidential thus preventing him from issuing proceedings based on their content within the two year limit.

[16] The evidence establishes that Dr Moodie was provided with access to the two emails in February 2008 and the draft affidavit in late March 2008 in circumstances where neither privilege nor confidentiality was claimed.

[17] The email dated 7 December 2006 was discovered in Mr Ellis' affidavit of documents dated 19 February 2008. No claim to privilege has ever been made with respect to that document.

[18] As to the email of 5 January 2007, that document was also discovered in Mr Ellis' affidavit of documents of 19 February 2008, and was not and never has been, the subject of a claim of privilege in these proceedings.

[19] As to the draft affidavit, this document was also discovered in the same affidavit of documents. It was then the subject of a claim to confidentiality by Ms Strachan. However, in a letter from Ms Strachan's solicitors of 20 March 2008 to Dr Moodie, that claim was waived. No claim for privilege, however, with respect to that document has ever been made. A copy of the affidavit was provided to Dr Moodie on 1 April 2008.

[20] The plaintiff says that he originally believed the basis for the publication of the defamatory article in the *Listener* arose from comments from Mr Ellis and Ms Strachan in an interview between them and Ms Black.

[21] However, Dr Moodie claims that when he received copies of these emails and the draft affidavit in late 2007 and early 2008, he then understood for the first time the part Ms Strachan had played in making allegedly defamatory comments to Mr Ellis who, in turn, provided them to Ms Black. He described Ms Strachan as the original source of the defamatory comments.

[22] Dr Moodie says he did not issue proceedings in 2007/2008 when he first became aware of this material because he believed that a claim for privilege and/or confidentiality could be made with respect to the emails and affidavit.

[23] Dr Moodie's case was he had made what was in effect a mistake regarding the legal status of these documents. He believed he could not bring proceedings until the status of these documents was clear. Their status was not clear until after the Employment Court case between him and Ms Strachan. Within a reasonable time after the status of the documents was clear he had sought leave.

[24] To support that contention, Dr Moodie pointed first to the decision of Williams J in this case, relating to, as Dr Moodie said, a claim to privilege by Ms Strachan with respect to other similar email communications between her and

Mr Ellis. Secondly, the question of privilege and confidentiality of these documents was raised in Employment Court proceedings between Ms Strachan and Dr Moodie. Dr Moodie claimed that there had been privilege claims relating to these documents in the Employment Court. Thus, until the issue of privilege was resolved, Dr Moodie did not consider he should issue proceedings based on documents with a disputed privilege claim.

[25] I did not find Dr Moodie's claims that he did not appreciate the status of these documents until the completion of the Employment Court hearing as credible. As I have noted, neither Ms Strachan nor Mr Ellis has ever claimed privilege for any of the three documents in these proceedings. Dr Moodie is an experienced lawyer. He has high academic qualifications. He may not be an expert in defamation law but there is no reason to doubt that he has a good understanding of the law of evidence and of the concept of privilege and confidentiality.

[26] These three documents were discovered in these proceedings. Where privilege is claimed for a document, this fact and the reasons for the claim must be identified.[3] Without the possessor of the document asserting privilege and the reasons for it, there is no claim to privilege. And so, in this case, there was nothing in the discovery process by Ms Strachan or Mr Ellis which could have led Dr Moodie to believe the documents were privileged. On the contrary, there was every reason to believe no such claim was made.

[27] Nor was there anything in the professional relationship between Mr Ellis and Ms Strachan that could have suggested legal professional privilege may have arisen with respect to these documents. There was nothing to suggest in 2007 or 2008 that Mr Ellis was acting as Ms Strachan's lawyer.

[28] Further, when Ms Strachan's solicitors wrote to Dr Moodie in March 2008 withdrawing their claim to confidentiality with respect to the draft affidavit, it was express and clear notice to Dr Moodie that there was no privilege or confidentiality impediments to him using the draft affidavit.

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[3] High Court Rules, rr 8.15 and 8.16.

[29] This analysis illustrates that it is simply not credible for Dr Moodie to claim he somehow made a mistake about the status of these documents arising from the circumstances of the discovery process in this case.

[30] The second basis on which Dr Moodie claimed he believed he could not bring proceedings because the documents might be privileged, arose he said, because of a decision of Williams J with respect to a claim of privilege relating to similar documents.[4]

[31] The decision of Williams J arose from a hearing on 5 November 2008 with respect to a challenge by Dr Moodie to asserted privilege by Mr Ellis with respect to particular documents relating to Ms Strachan. The documents related to proceedings intended to be issued by Mr Ellis suing Dr Moodie for alleged unpaid remuneration. Ms Strachan was to be a witness in these proceedings called by Mr Ellis. The claimed privileged communications arose from the fact that Mr Ellis was acting as his own lawyer, and Ms Strachan's role as a witness for Mr Ellis.

[32] Williams J was satisfied the documents were clearly privileged with respect to the proposed Ellis proceedings. The question was, however, whether they were also privileged with respect to this litigation. The Judge concluded that they were also privileged for this litigation.

[33] As can be seen from the above description, the privilege issue relating to the emails and affidavit are quite different. There is no question the emails and affidavit were given in the context of briefing a witness or in a solicitor/client relationship between Mr Ellis and Ms Strachan. It is difficult to understand, therefore, how Dr Moodie as an experienced lawyer could have thought Williams J's decision was some form of precedent for the emails and affidavit.

[34] Further, the assertion of a privilege claim by Mr Ellis with respect to his communications with Ms Strachan in relation to the Williams J case, would have illustrated for Dr Moodie that the defendants were well aware of their entitlement to

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4 *Moodie v Ellis* HC Wellington CIV 2007-485-2212, 13 November 2008.

assert privilege and would have highlighted the fact that they had not done so with respect to the emails and draft affidavit.

[35] Finally, the hearing of William J's case was in November 2008, at least six months after Dr Moodie had access to the emails and affidavit. Dr Moodie's concern about Williams J's decision could not, therefore, have explained why during that six month period Dr Moodie did not issue proceedings.

[36] Dr Moodie said that Ms Strachan's attitude at the Employment Court hearing and the Employment Court Judge's rulings also contributed to his belief that he could not or should not bring proceedings based on the emails and affidavit until it was clear they were not privileged and not confidential.

[37] Dr Moodie says that in the Employment Court proceedings, Ms Strachan claimed the draft affidavit was confidential and it was only in February 2010 that she agreed the documents could be treated as discovered. Dr Moodie says it was finally at the May 2010 hearing in the Employment Court, that the status of the documents as non confidential/non privileged material was finally clarified.

[38] The Employment Court proceedings were not issued by Ms Strachan until 2009. Until this time (save for the confidentiality claim abandoned in March 2008), there was no assertion of privilege or confidentiality by Ms Strachan or Mr Ellis with respect to these documents nor any Employment Court proceedings to raise the concern of privilege.

[39] As I have observed, there was no basis on which Dr Moodie, therefore, could have thought that these documents were privileged in these proceedings at least from the time when they were discovered (the latest in 2008) until the issue of the Employment Court proceedings in 2009 (over a year after the documents were discovered) Dr Moodie could not have known there would be any claim to privilege or confidentiality with respect to these documents in the Employment Court until well after he knew about the existence of the emails and affidavit.

[40] And so for that year, at least, he could not have been under any mistaken view as to the status of these documents arising from the Employment Court proceedings.

[41] Further, as counsel for Ms Strachan pointed out in his submissions, Dr Moodie had advised Ms Strachan in December 2009 that he was intending to sue on the emails and draft affidavit. This was months before the May 2010 Employment Court case. It could hardly be said that the Employment Court hearing somehow provided the release for Dr Moodie from the uncertainty about privilege as he claimed.

[42] In summary, therefore, Dr Moodie knew there was no claim to privilege and only a brief claim to confidentiality with respect to these documents from late 2007 and early 2008. I reject his claim that until 2010 he was mistaken about the status of these documents. Even if he thought there may be a challenge to these documents, he knew the two year limitation period expired at the latest in early 2009. It would have been a simple matter to have filed proceedings within the time and dealt with any challenge if and when it arose.

[43] Dr Moodie has not satisfied me that his delay from January 2008 until July 2010 (or even December 2009 when he gave notice he intended to bring proceedings) was caused by any mistake or by any reasonable cause. On that basis, therefore, I refuse to give leave for him to file these causes of action out of time.

Other factors

[44] Even if I had taken a different view of mistake and reasonable cause, there are strong reasons not to give leave here. These proceedings were issued in 2007 relating to events in 2006, now seven years ago. The application for leave was made in 2010 and, while delays occurred from interlocutory appeals, the plaintiff's pleadings are still to be settled.

[45] There has been a settlement of the litigation relating to the wider publication (in the *Listener*). The current available cause of action relates to a publication by Ms Strachan to Ms Black (a limited publication). The proposed causes of action also

all relate to a limited publication from Ms Strachan to Mr Ellis only. The alleged defamatory material in all publications is similar although not identical. The defences are likely to be the same. The delay here was substantial and there was further delay, after notice was given by Dr Moodie in December 2009, until July 2010 when the application was made. In my overall discretion I would not have been prepared to exercise it in favour of Dr Moodie and grant leave.

Strike out

[46] The defendant says to allow Dr Moodie's sole cause of action now remaining to continue to trial would be an abuse of process. She says the Court should strike out or stay this cause of action because:

(a) Dr Moodie's action is unlikely to succeed;

(b) the available defences are broad including truth, qualified privilege and honest opinion;

(c) even if successful, damages would be minimal;

(d) this would be a costly trial where the plaintiff may not be able to meet the defendant's costs if unsuccessful;

(e) there has already been substantial delay and the plaintiff's pleadings are not yet settled.

[47] Overall, the defendant says that Dr Moodie has had a public apology and damages for the *Listener* article. This was the main publication of the alleged defamatory material. Dr Moodie's position, therefore, has been vindicated and he has been paid damages. Another trial involving much the same allegedly defamatory comments, but with the publication alleged to be only to one person, Ms Black, cannot be justified.

[48] Dr Moodie submits that the defendant's application to strike out his remaining cause of action has already been decided by Wild J in his judgment in this

case of 26 August 2010. The plaintiff, therefore, says that the defendant is estopped from relitigating the matter relying upon the doctrine of *res judicata*.

[49] At the end of his judgment, Wild J said:[5]

> This result means that Mr Moodie can pursue the first cause of action in his fifth amended statement of claim against Ms Strachan, though not in relation to the damage arising out of the subsequent publication in the *Listener*. It also retains Ms Strachan's ability to pursue the first cause of action in her amended statement of cross claim against APN, which Mr Gray accepted must stand.

[50] Dr Moodie submits that these observations of Wild J illustrate that his Honour had concluded that Dr Moodie had a proper claim with respect to the first cause of action, which he was entitled to have heard. I reject this claim which is effectively an allegation of issue estoppel.

[51] The application before Wild J was to strike out the plaintiff's second cause of action where Dr Moodie sued Ms Strachan, Mr Ellis and APN jointly. Dr Moodie settled this cause of action against Mr Ellis and APN. He, however, wished to continue this cause of action against the third joint tortfeasor, Ms Strachan. Ms Strachan, in turn, had cross claimed against APN. And so APN (and Ms Strachan) wanted to strike out this second cause of action by Dr Moodie against Ms Strachan arising from the publication in the *Listener* under the joint tortfeasor rule. If successful this would end APN's potential liability through Ms Strachan's claim against them as cross claim defendants.

[52] Wild J held that the effect of the settlement agreement between Dr Moodie, APN and Mr Ellis was also to release Ms Strachan from any liability she may have had for the publication of the *Listener* article because she was a joint tortfeasor.

[53] This identification of what was before Wild J in the strike out application illustrates that the strike out application did not challenge the first cause of action. And so no issue estoppel can arise. I reject Dr Moodie's argument.

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5 *Moodie v Strachan*, above n1, at [40].

[54] I am not prepared to strike out the plaintiff's sole remaining cause of action on the basis that it is an abuse of process. The defendant relied upon the approach of the English Court of Appeal in *Jameel (Youset) v Dow Jones & Co Inc*.[6] This judgment has been the subject of considerable academic and judicial comment both in the United Kingdom and throughout the Commonwealth.

[55] In *Jameel* there was publication of alleged defamatory material to five people only, three of whom were associates of the plaintiff and the other two did not know the plaintiff.

[56] The Court of Appeal in *Jameel* said:

> 52 Mr Millar submitted that these principles applied equally to his application to strike out the claim on the ground that the action was an abuse of process. He submitted that no substantial tort had been committed in this jurisdiction. The publication had been minimal and it had done no significant damage to the claimant's reputation. In these circumstances pursuing this expensive action was disproportionate and an abuse of process.
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> 55 There have been two recent developments which have rendered the court more ready to entertain a submission that pursuit of a libel action is an abuse of process. The first is the introduction of the new Civil Procedure Rules. Pursuit of the overriding objective requires an approach by the court to litigation that is both more flexible and more proactive. The second is the coming into effect of the Human Rights Act 1998. Section 6 requires the court, as a public authority, to administer the law in a manner which is compatible with Convention rights, in so far as it is possible to do so. Keeping a proper balance between the article 10 right of freedom of expression and the protection of individual reputation must, so it seems to us, require the court to bring to a stop as an abuse of process defamation proceedings that are not serving the legitimate purpose of protecting the claimant's reputation, which includes compensating the claimant only if that reputation has been unlawfully damaged.
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> 68 What will be in issue at the trial, if it proceeds, has not been explored before us. The judge [2004] EWHC 1618 (QB) at [6] summarised the position by saying that the defence included "defences by way of qualified privilege on various bases". We anticipate that these defences are likely to prove cumbersome to try with a jury, involving a lengthy and expensive trial. At the end of the day the trial will determine whether the publications made to the five subscribers were protected by qualified privilege. If they were not, it does not seem to us that the jury can properly

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6 *Jameel (Youset) v Dow Jones & Co Inc* [2005] EWCA Civ 75, [2005] QB 946.

> be directed to award other than very modest damages indeed. These should reflect the fact that the publications can have done minimal damage to the claimant's reputation. Certainly this will be the case if the three subscribers who were in the claimant's camp prove to have accessed the Golden Chain list in the knowledge of what they would find on it and the other two had never heard of the claimant.

[57] There were, therefore, two particular factors which made the Court ready to entertain an abuse of process submission in libel cases; the objects behind the English Civil Rules and the provisions of the Human Rights Act 1998 (UK). There are no statutory provisions in New Zealand equivalent to the relevant sections of the Human Rights Act.

[58] But there are similarities in New Zealand to the English Civil Rules. The New Zealand High Court Rules applicable to civil proceedings have, as their express object, the just, speedy and inexpensive determination of proceedings.[7] Flexibility and active judicial management of civil litigation are also the hallmarks of the current Rules. As has been often noted, justice, speed and inexpensive determination of proceedings can often be in conflict. Speedy and inexpensive determination of litigation may not always equate with a just outcome.

[59] But modern case management does not see that one size fits all. The management of a case must fit the particular litigation. And judges have taken the view that as courts are public institutions, judges have an obligation to ensure each case is managed to a resolution efficiently.

[60] I see no reason why New Zealand courts would not be prepared to stay (or strike out) civil proceedings that cannot serve the legitimate purpose of the cause of action pleaded. In defamation this is typically the protection of the plaintiff's reputation. But real caution would need to be exercised where it was proposed to end a litigant's access to the courts.

[61] In *Jameel* the publication was such that no real vindication would occur even if the plaintiff was successful. Further, damages would in those circumstances be minimal. Thus, even if the plaintiff established that he was defamed, the defamation

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[7] High Court Rules, r 1.2.

did little or no damage to Mr Jameel's reputation given it was published, as I have noted, to three acquaintances of Mr Jameel and two persons who did not know him.

[62] Here, the position is quite different. The publication was only to one person (no doubt ultimately relevant to the quantum of damages). However, the defence, in part, is truth. And so the plaintiff should have the opportunity to establish that what was said about him was not true.

[63] The alleged defamatory comments by Ms Strachan to Ms Black are serious. They include allegations, the plaintiff says, that he is a compulsive liar, a dishonest fraudster, a false pretender, deceitful and a conman. There was also an allegation he had, as a lawyer, ripped off his clients. These allegations go the heart of the plaintiff's professional reputation. They are from an employee whom it could be said had the closest chance to observe the plaintiff's conduct.

[64] Nor is it possible to assess the likelihood of the plaintiff succeeding in his action. The litigation is likely to be essentially fact based. As to damages, while the publication was very limited, the allegations, as I have noted, are very serious. The publication was to a journalist, someone whose opinion of Dr Moodie could be seen as important.

[65] The delay in this case has been unacceptable, now almost seven years. Part of the responsibility falls to both the litigants in agreeing a "stay" while both appealed interlocutory orders (some three years). However, the delay is not such that currently it is an abuse of process to allow the case to continue. Dr Moodie will, however, understand that this ligation cannot go on forever. As plaintiff, it is his responsibility to get the case now to a speedy hearing. Further, unreasonable delay could justify further consideration as to whether this litigation is an abuse of process.

[66] As to trial costs, the defendant is understandably concerned about the plaintiff's capacity to meet any costs award if he loses. That concern is, in part, based on a letter from Dr Moodie himself to the solicitors for Ms Strachan relating to her successful Employment Court claim against Dr Moodie. In that letter Dr Moodie said he is "unable to satisfy the amount of a judgment or any material lesser amount

...". He says he has no assets, owes $70,000 in taxes and is a guarantor of a large loan. He says that he does not ever anticipate being in a position to pay Ms Strachan's judgment.

[67] While this information about Dr Moodie's financial position may be relevant to any further security for costs application, I do not consider it relevant to this application.

[68] In summary, therefore, while I do not discount the possibility that a *Jameel*-type approach to litigation and abuse of process is open in New Zealand, the facts of this case do not come within that principle. Dr Moodie is entitled to the opportunity to bring his proceedings to vindicate himself. That is so, in my view, despite the settlement of the action against Mr Ellis and APN as publisher of the *Listener*.

[69] For the reasons given, therefore, the application to strike out the sole remaining cause of action is dismissed.

Costs

[70] My tentative view given the result in this case is that costs should lie where they fall. If either party have a different view then they should file a memorandum with 14 days and the opposing party a response within a further 14 days.

Ronald Young J

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Addendum

As I have noted, this case has gone on for far too long. A Judge will be assigned to manage it to trial.