

Moodie v Strachan and Another [2013] NZHC 1394

(Interlocutory decision – HC Wellington)

Issues: Limitation period – *Jameel* abuse of process

Judgment: 12 June 2013

Disclosure: Ali Romanos assisted S subsequent to this decision.

Facts: S was a solicitor employed by M. After the two had a falling out over remuneration, S and M were entangled in various disputes across the Employment Court and High Court. M brought a claim against S for comments about her employment by M, which she allegedly made to a journalist with the *Listener* who used the comments in an article. M also sued another barrister for comments in the article, as well as the magazine publisher. M subsequently settled with those two parties, but maintained his action against S.

M made application for leave to add two new causes of actions. Meanwhile, S sought to have M's claim – based on S's publication to the journalist – struck out for abuse of process in a manner consistent with the English *Jameel* abuse-of-process doctrine. S raised five arguments as to why the Court should strike out or stay M's claim:

- M was unlikely to succeed;
- Possible defences included truth, honest opinion and qualified privilege;
- Even if M was successful, damages would be minimal;
- A costly trial was likely in which M might be unable to meet S's costs; and
- Substantial delay had already occurred and M's pleadings were not yet settled.

Held: (Ronald Young J) The Judge struck out M's additional causes of action because they were time-barred (the limitation period being 2 years from the date of publication – i.e. when the cause of action accrued) had expired. Further, the Judge was not satisfied that M's delay was caused by mistake or any other reasonable cause, and so refused to grant leave to add the causes of action out of time. See [43].

In respect of S's application, the Judge held that, while *Jameel* abuse of process *might* be available in New Zealand, it was not applicable to the present case. The Judge stated several reasons for rejecting S's application.

- First, S had pleaded truth to serious allegations: “*And so the plaintiff should have the opportunity to establish that what was said about him was not true.*” See [62].

- Secondly, the Judge considered it was impossible to assess the likelihood of M's success. See [64].
- Thirdly, while publication was only to one person, the allegations were serious, and were made to a journalist, "someone whose opinion of Dr Moodie could be seen as important". See [64].
- Fourthly, the delay that had occurred (7 years since the filing of proceedings) did not amount to an abuse of process. See [54] and [65].
- Fifthly, the Judge considered M's potential inability to pay costs to be an irrelevant factor. See [66] and [67].

Ultimately, the Judge held: "*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.*" See [68].

Discussion:

Limitation issue: The decision is a timely reminder that courts will tend to apply limitation periods strictly in defamation cases. This is good sense because, as the old adage goes, "*a libel dies*".

Jameel issue: I disagree with the decision on this point. The crux of my objection is that this case was, on the facts, a perfect candidate for New Zealand's adoption of the *Jameel* principle – a principle so desirable it has been legislated into the Defamation Act 2013 (UK). Moreover, it is felt the Judge did not properly apply the *Jameel* principle, which essentially is an enquiry of "*whether the game is worth the candle*" – that is, whether the plaintiff's claim is proportionate to public expense incurred in he or she pursuing it.

For interested parties, I have [written elsewhere](#) advocating the *Jameel* principle's adoption in New Zealand.