

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**CIV 2010-485-1274
[2017] NZHC 1864**

BETWEEN DANIEL FRANCIS AYERS
First Plaintiff

AND ELEMENTARY SOLUTIONS LIMITED
Second Plaintiff

AND LEXISNEXIS NZ LIMITED
Defendant

Teleconference: 7 August 2017

Counsel: First Plaintiff Self Represented No appearance for Second
Plaintiff D McLellan QC and T Goatley for Defendant

Judgment: 8 August 2017

JUDGMENT OF CHURCHMAN J

[1] This matter relates to defamation proceedings. The alleged defamation occurred in 2009. The proceedings were issued in 2010. The fourth amended statement of claim is dated 25 February 2015. The matter for hearing today is an application by the defendant for orders striking out the proceedings and entering judgment. That application is dated 19 June 2017.

[2] Prior to the commencement of this hearing the issue of a potential recusal on my part was raised on the basis that in the period 2002 to 2005 and on a subsequent occasion or occasions I had referred matters of a professional nature to Mr Ayers or had engaged him or his company to provide services to my clients. After some discussion both parties agreed that there was no basis for my recusal and agreed that I should hear and determine the matter.

[3] The application for orders striking out the proceeding sets out a number of grounds. These include that on 15 June 2015 Associate Judge Smith had ordered the second plaintiff to give security for costs in the sum of \$20,000 and directed that such security be paid within 21 days of the judgment and that the second plaintiff's claim be stayed pending the payment of that security.

[4] A further ground is that on 8 September 2015 Associate Judge Matthews further ordered the second plaintiff to pay security for costs in the sum of \$20,000 by 18 September 2015.

[5] A further ground is that the second plaintiff has failed to comply with either of these orders.

[6] A further ground is that on 5 August 2015 this Court ordered the second plaintiff to pay to the defendant costs and disbursements of \$4,694. The application notes that on 16 November 2015 the first and second plaintiffs filed an interlocutory application seeking leave to review this Court's decision dated 8 September 2015. The notice notes that on 27 October 2015 Justice Mallon dismissed the plaintiffs' application for review and ordered costs in favour of the defendant which by further judgment of the Court dated 21 December 2015 were fixed in the sum of \$9,701.50. The plaintiffs have failed to pay the costs award.

[7] On 16 March 2016 Associate Judge Smith ordered that the first plaintiffs' claims be stayed pending further order of the Court. No steps have been taken by the plaintiff now for some 15 months.

[8] The application for strike out first came before Justice Thomas on 17 July 2017. She issued a minute requiring certain steps to be taken. She indicated that unless and until the orders for security for costs and costs had been paid no further action could be taken and also noted that even when that had been done the leave of the Court was still required to bring the proceedings back on foot.

[9] At that hearing before Justice Thomas the plaintiffs were represented by Mr Sumner. He sought leave to withdraw and that leave was granted. Justice

Thomas noted that Mr Ayers had not attended Court that day but had filed two memoranda dated 14 July 2017 and 17 July 2017. At paragraph [4] of her Minute Justice Thomas recorded that Mr Ayers intended to file an application for leave to represent the second plaintiff. Her Honour noted that Mr Ayers took some issue with the proposed timetabling directions.

[10] In her Minute in paragraph [5] Her Honour agreed to extend the timetable dates by one week and her specific directions were that the first plaintiff file and serve his notice of intention to act in person and that he follow the procedure set out in High Court Rule 5.41 by 31 July 2017. She also directed that the first plaintiff file and serve any notice of opposition to the defendant's strike out application and affidavit in support by 31 July 2017. The third direction was that the first plaintiff pay the outstanding costs order against him no later than 31 July 2017.

[11] As to the second plaintiff, Justice Thomas' direction was that it file and serve by way of its solicitor any notice of opposition to the defendant's strikeout application and affidavit in support by 31 July 2017 or alternatively pay the outstanding costs award against it and security for costs in the proceedings on or before 31 July 2017 and file and serve any *Mannix* application on or before 31 July 2017.

[12] Mr Ayers has filed a memorandum of first plaintiff in relation to this telephone conference. In that he makes a number of claims. He points to the costs that he has incurred in relation to legal fees, raises issues as to the ineffectiveness or incompetence of his prior counsel. He also refers to the health issues that he has suffered and, during the course of his oral submissions this morning, elaborated on those suggesting that they were contributed to if not caused by the alleged defamation.

[13] In relation to the Minute of Justice Thomas, Mr Ayers suggested that so far as the second plaintiff was concerned that instead of it appropriately having been the subject of the direction in paragraph [6](d)(ii) of the Minute it should have been directed to himself as first plaintiff. He is correct in that. However it is also clear that Mr Ayers had indicated to the Court that he intended to file an application for

leave to represent the second plaintiff. He has not done so and neither has the second plaintiff complied with the direction in paragraph [6](d)(i).

[14] Overall, the issues raised by Mr Ayers by way of explanation relate to his financial inability: he used the words “his coffers had been depleted”; and to his health issues. It appears that Mr Ayers has significant financial challenges. It also appears that the second plaintiff faces winding up or liquidation proceedings. The sums involved are substantial although Mr Ayers expressed optimism that his circumstances (in terms of income earning) had changed for the better. I have no firm evidence relating to that and his financial situation presently is undoubtedly that he is unable to meet the various costs and security orders that he was directed to meet by Justice Thomas.

[15] That now brings us to this application. Section 50 of the Defamation Act applies to proceedings of this nature. Mr Ayers suggested that this was not a “gagging writ” as they are sometimes called and Mr McLellan QC in response agreed with that. However Mr McLellan correctly pointed out that s 50 applies other than in relation to gagging writs. The law is clear that, as a matter of public policy, defamation actions should be brought promptly to conclusion so that they do not become stale. There is an onus on the plaintiff who seeks to pursue stale proceedings.

[16] As I have previously mentioned, s 50 of the Defamation Act says that the Court shall order proceedings to be struck out if no step has been taken in the 12 month period unless I find good reason not to do that.

[17] I am satisfied that Mr Ayers and the second plaintiff have not complied with the directions made by Justice Thomas. I note that Mr Ayers applied orally for leave to appeal Justice Thomas’ decision and that, in paragraph 26 of his memorandum, he had referred to this. An application for leave to appeal is a separate set of proceedings and cannot be achieved by mention in a paragraph in a memorandum addressing other matters. If Mr Ayers wishes to obtain leave to appeal Justice Thomas’ decision he must file a separate application to achieve that.

[18] Having listened to Mr Ayers and to counsel and having reviewed the documentation filed, I find that there is no reason why, in terms of s 50, these proceedings should not be struck out. It is clear that Mr Ayers and the second plaintiff are in no position to comply with the directions of Justice Thomas in relation to the payment of security and costs.

[19] Accordingly I strike these proceedings out and make an order for costs and any disbursements on a 2B basis.

Churchman J

Solicitors:
Plaintiffs
D McLellan QC, Auckland
Bell Gully, Auckland