In The Supreme Court of Bermuda

CIVIL JURISDICTION

2006: No. 368

BETWEEN:

DEAN O. MING

Plaintiff

-and-

CURTIS A. SIMMONS

Defendant

Date of Hearing: Monday 17 March 2008
Date of Judgment: Monday 7 April 2008

The plaintiff in person;
Richard Horseman of Wakefield Quin for the Defendant.

RULING

INTRODUCTION

1. This matter comes before the court on –

(i) the plaintiff's application to amend the statement of claim to add a raft of further paragraphs; and

(ii) the defendant's application to strike out certain specific paragraphs of the statement of claim as vexatious, an abuse of process and as disclosing no cause of action, and to strike out the whole of the Writ, the Statement of Claim and the Reply as likely to prejudice, embarrass or delay the fair trial of the action.

2. The writ was issued on 5 December 2006. The statement of claim appears to have been filed with it. It is a lengthy document running to 34 paragraphs[1]. However, the writ was not served until 12 September 2007. The defendant entered his appearance on 19th September, and filed a Defence on 4 October. On 16 October the plaintiff then applied to amend the statement of claim to add further paragraphs 35 to 56, and on 6 November filed a Reply[2] (headed 'Answer to Defence'). The defendant's summons to strike out was then issued on 3 January 2008.

3. The plaintiff acts in person, and has drafted the pleadings himself. While the initial statement of claim is fairly restrained, the other documents become progressively more detailed and prolix, so that the 'Answer to Defence' is a massive and impenetrable 30 pages long.

4. The parties are former friends who have fallen out. The plaintiff believes and vigorously asserts that the defendant was responsible for the breakdown of his marriage, and indeed he cited the defendant as co-respondent in his divorce proceedings (Div. 2000 No. 2). The divorce Petition was presented on 5th January 2000, and from about that time the relationship between the parties became bitter and hostile, and both sides took to making complaints to the police about the alleged aggression of the other. The plaintiff says that he came off the worse in this, the police tending to believe the defendant, with the result that the plaintiff was prosecuted on a number of occasions, although never convicted as either the defendant failed to appear at the hearings or the plaintiff was able to prove his side of the case.

5. The matter might have rested there, for most of these incidents are old, but in November 2006 the plaintiff obtained from the Police a copy of their "computer generated reports with respect to an ongoing dispute between yourself and Mr. Curtis Simmons[3]". The plaintiff says that when he saw that document he found out for the first time about many further reports by the defendant of which he had previously been

[1] There are 28 primary paragraphs plus a further six in an addendum headed "Plaintiff's additional claim".
[2] This document is date stamped as received on 6 November, but mysteriously bears the date 14 November.
[3] See letter of 24th November 2006 from Acting Chief Inspector Bothello to the plaintiff.

unaware, and it is plain that the material in the police file has given new life to the old feud.

6. One particular piece of evidence about which the plaintiff is especially aggrieved is a tape recording from the defendant's answering machine ('the tape'), on which the defendant had recorded a series of abusive messages from the plaintiff. This was apparently used by the defendant in various court proceedings and other situations to demonstrate the plaintiff's bad attitude. However, it is the plaintiff's case that he was set-up by the defendant who would telephone him and irritate him, and then hang up, and when the plaintiff called back he would refuse to answer, so that the plaintiff left an angry message. In addition the plaintiff says that the tape contains one-sided recordings of actual calls, and even a false message by someone impersonating him.

7. Much of what the plaintiff complains about is, on the face of the pleading, time-barred, having occurred prior to 5th December 2000. In some instances the plaintiff says that he was unaware of some of the complaints made to the police and others by the defendant until he saw the police report. Mere ignorance of a cause of action is not, on its own, enough to suspend the running of time under the Limitation Act 1984. In actions other than those for personal injury time can only be suspended in cases of fraud, deliberate concealment or mistake[4]. In those circumstances the period of limitation only starts to run when the plaintiff has discovered the fraud, concealment or mistake, or when he could with reasonable diligence have discovered it. This action is not based upon the fraud of the defendant, and no question of mistake arises. That leaves the question of deliberate concealment. For these purposes the deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in the breach of duty[5].

8. For the reasons set out when I come to deal with the specific pleaded instances, I do not think that, in respect of the events occurring before 5th December 2000, any fact

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[4] Limitation Act 1984, section 33(1).
[5] Ibid. section 33(2).

relevant to the plaintiff's right of action can be said to have been deliberately concealed from the plaintiff by the defendant. In those circumstances it seems to be clear from the statement of claim itself and the other material put before the court by the plaintiff that matters occurring before 5th December 2000 are time barred, and thus susceptible to being struck out, applying the principles set out in note 18/19/11 of the Supreme Court Practice, 1999 ed., at p. 349:

> "However, if the defendant does plead a defence under the Limitation Act, he can seek the trial of a preliminary issue, or in a very clear case, he can seek to strike out the claim upon the ground that it is frivolous, vexatious and an abuse of the process of the Court (see, per Donaldson L.J. in Ronex Properties Ltd v. John Laing Construction Ltd [1983] Q.B. 398). Thus, where the statement of claim discloses that the cause of action arose outside the current period of limitation and it is clear that the defendant intends to rely on the Limitation Act and there is nothing before the Court to suggest that the plaintiff could escape from that defence, the claim will be struck out as being frivolous, vexatious and an abuse of the process of the Court (Riches v. Director of Public Prosecutions [1973] 1 W.L.R. 1019; [1973] 2 All E.R. 935, CA, as explained in Ronex Properties Ltd v. John Laing Construction Ltd, above)."

APPLICATION TO STRIKE OUT

9. I turn now to the application to strike out the original statement of claim. Paragraph 1 concerns the making of the tape, and paragraphs 2 and 3 allege its publication on or about 28th January 2000 to the police and to the defendants' attorney. This is plainly statute barred. The plaintiff asserts that he did not know about the publication on 28th January at the time, and only found out when he received the police report. He also complains that he was not given a copy of the tape at the time, although he asked for it. However, it is plain he was aware of the existence of the tape and that the defendant's attorneys had disclosed it to the police. Indeed in a letter to the plaintiff of 1st February 2000, the defendant's then attorney said:

> "In particular, you have been calling our client at the place of his residence over the past couple of months and leaving threatening messages on his answering machine, all of which have been recorded. We have advised our client to make an

> official police complaint immediately, and the police are now aware of your threats as recorded."

In my view, therefore, the plaintiff was sufficiently aware of any cause of action that he may have had in respect of the tape and its publication at the time, and that matter is now statute barred. It is vexatious and an abuse of process to seek to resurrect it now, and I therefore strike out paragraphs 1 – 3.

10. Paragraph 4 alleges numerous false claims and fabricated accusations between 28th January and February 1st 2000, and the forwarding of this false information to a third party. This is insufficiently particularized, but appears to relate to the letter of 1st February and its publication to the police. Again, it is time-barred. The plaintiff was well aware that the defendant and his then attorney were making complaints to the police during this period. He may not have known of each one, but he was sufficiently aware of the facts giving rise to any cause of action in defamation. Nor could it be said that the defendant did anything to conceal these reports (and hence any cause of action the plaintiff may have had in defamation). Indeed, on the plaintiff's case, the reports were made to harass him, and so would come to his knowledge when the police acted on them. In particular he knew, from the letter quoted above, that the defendant's attorney was going to complain to the police. I therefore strike out paragraph 4.

11. Paragraph 5 alleges breaches in July 2001 and February 2002 by the defendant of a restraining letter served on him by the plaintiff. Such a letter may be written under section 19(d) of the Summary Offences Act 1926, and it is thereafter an offence under that Act to trespass on the land concerned. However, breach of the letter itself does not give rise to a civil cause of action. I therefore strike out paragraph 5 as disclosing no cause of action.

12. Paragraph 6 concerns an alleged phone call by the defendant's lawyer to the plaintiff's employer accusing him of assault. The date is given as December 2000. If true this would be a slander actionable *per se* as it imputes a criminal offence. It sufficiently

attributes causation to the defendant ("the Defendant had his attorney call"). The date straddles the 5th December cut off, and until properly particularized it is susceptible to strike out. However, buried away on page 19 of the 'Answer to Defence' (for which see further below), is an averment that this occurred on 10th December 2000[6]. I think, therefore, that this paragraph is capable of being saved by particulars, which the defendant now in fact has, and I therefore decline to strike it out.

13. Paragraph 7 appears to be introductory to the allegations of defamatory reports to the police which were unknown to the plaintiff at the time. I therefore decline to strike it out.

14. The defendant does not apply to strike out paragraphs 8 – 23 other than on the general ground that they may prejudice, embarrass or delay the fair trial of the action. They appear to be a list of incidents extracted from the police file. For example, paragraphs 8 – 12 appear to detail one such report on 7th December 2000. The pleading appears to advance a cause of action in defamation, and I do not think that it is so bad as to merit striking out. It may well be that some of the allegations need further particularization, but if the defendant wants particulars he should apply for them in the normal way.

15. It is plain that paragraphs 8 – 23 contain surplus material, and aver matters which could not give rise to a cause of action. Thus paragraph 18 concerns a surveillance operation that the police instituted in response to the complaints, but which came to nothing. That in itself could not confer a cause of action on the plaintiff. However, it is all part of a narrative derived from the police file, and I do not think it so embarrassing as to require me to strike it out. Paragraphs 19 and 20 plead damage. Some of that damage, being "unnecessary embarrassment and humiliation" to his mother and children, is likely to be irrecoverable in an action by the plaintiff, but I really do not think that it merits a detailed editing exercise at the pleading stage.

[6] "The meeting at T.C.D. was on Dec. 10th, 2000."

16. Paragraph 23 seems to aver an action in malicious prosecution, by way of a false report to the police that led to proceedings. I think it pleads a sufficient case of malicious prosecution. The allegation of perjury in the last sentence of paragraph 23 cannot itself amount to a cause of action, it being long settled law that there is no civil action for perjury, that being an aspect of the absolute privilege from civil action given to a witness in court proceedings. However, the assertion is material to the question of knowledge of falsity of the complaint which is a component of the cause of action for malicious prosecution[7] which the plaintiff appears to be asserting here. I do not, therefore, think it appropriate to strike out the allegation.

17. The defendant does seek to strike out paragraph 24 and 25. Paragraph 24 alleges a breach of a court order (made in other civil proceedings between the parties) for disclosure of the tape. Breach of that order should have been pursued in those proceedings. It gives rise to no civil remedy in separate proceedings. To the extent that the plaintiff relies on this as showing that he was not fully aware of the contents of the tape until its disclosure on 1 August 2006, I think that that is neither here nor there as he was aware of its tenor and the use being made of it from the outset. I therefore strike out paragraph 24.

18. Paragraph 25 concerns the way in which the defendant's attorneys dealt with a $500 payment made by the plaintiff on account of a costs order made against the plaintiff by the Court of Appeal. It is no concern of the plaintiff's whatsoever, and gives rise to no cause of action. I therefore strike out paragraph 25.

[7] In order to make out a case in malicious prosecution the plaintiff must plead and establish that:

(a) he was prosecuted by the defendant, i.e. that proceedings on a criminal charge were instituted or continued by the defendant against him;
(b) the proceedings were terminated in the claimant's favour;
(c) the proceedings were instituted without reasonable and probable cause;
(d) the defendant instituted the proceedings maliciously; and
(e) the claimant suffered loss and damage as a result.

19. Paragraph 26 is merely a repetition of the pleading by way of summary. As it contains various matters which I have struck out, and is otherwise otiose, I strike it out also. Paragraphs 27 and 28 are merely prayers, and are unobjectionable.

20. I turn now to the "Additional Claim" which is tacked on to the Statement of Claim. The defendant applies to strike out paragraphs 29 – 33 of this. Paragraph 34 is merely a prayer and is unobjectionable, although otiose.

21. Paragraph 29 pleads trespass into the plaintiff's home on 27th July 2000. The plaintiff was plainly aware of that at the time, and indeed files evidence from his son which demonstrates that. It is time-barred, and I strike it out.

22. Paragraph 30 pleads that the defendant had his attorney secure a temporary protection order under false pretences. That is a civil and not a criminal process, and there appears to be doubt over whether there is a tort of maliciously instituting civil proceedings.[8] But in any event it would, by analogy with the cause of action for malicious prosecution, require that the proceedings have been terminated in the plaintiff's favour. In the case of a protection order that would require its discharge by a judicial order, and that never appears to have happened. It may be that it eventually expired by the effluxion of time, but that is, in my judgment, insufficient. In any event, a finding in the plaintiff's favour is certainly not pleaded, and I therefore strike this out.

23. Paragraph 31 is a further reference to false reports to the police. It is wholly unparticularised and appears to add nothing to the earlier part of the pleading. I strike it out.

24. Paragraphs 32 and 33 allege the criminal offences of having an offensive weapon in a pubic place, and threatening behaviour. They appear from the date (13 May 2005) to relate to the same incident as paragraph 23. As these paragraphs stand they appear to be an attempt to charge the defendant with criminal offences. That is inappropriate in a civil

[8] See Metall und Rostoff v Donaldson Luffkin & Jenrette Inc [1990] 1QB 371 at 391.

pleading. In any event, as framed these paragraphs disclose no actionable civil wrong. I therefore strike them out.

LEAVE TO AMEND

25. The plaintiff explains that the further paragraphs, which he seeks permission to add by way of amendment, were not included in the original claim as he was rushing to get that in because of the limitation issue, and I also understand him to have said that he had computer problems. As the writ was filed on 5 December 2006, but not served until 9 months later, on 12 September 2007, and the application to add the additional material was then delayed until 16 October 2007, that is not a very satisfactory explanation. In reality the document appears to be a lengthy re-iteration of old grievances, none of which are now capable of giving rise to a cause of action.

26. The amendment seeks in particular to open up two old matters. One concerns a cruise that the plaintiff's ex wife and their children took before the divorce. The defendant was on the same cruise with his family, and the plaintiff alleges that the defendant took the cabin that the plaintiff had bought and paid for for his children and used it for his mother. This occurred in late 1998, and although it may have given rise at the time to a magistrate's court action for the cost of the cabin, it is long-time barred and cannot be litigated now.

27. The plaintiff is also aggrieved because the defendant successfully appealed to the Court of Appeal against the costs order made against him in the divorce proceedings, and obtained his costs of the appeal against the plaintiff. The plaintiff asserts that he has a tape of the defendant admitting adultery to him on 31st December 1999, and that he should have been liable for the costs of the divorce which he caused. However, the plaintiff did not attend the appeal hearing, due, he says to work problems that day caused by the defendant's false allegations against him. All of this is a collateral attack on the Court of Appeal's decision and an attempt to relitigate issues which have been finally decided against the plaintiff, and is impermissible.

28. The plaintiff also plainly cherishes a wider grievance that the defendant was responsible for the breakdown of his marriage. This is not actionable, the law having long ago recognized that interference with personal relationships should not give rise to an action for damages.

29. Turning to the specifics of the proposed new material, paragraphs 35 and 36 assert time-barred defamation actions. Paragraphs 37 to 39 concern the appeal which the defendant filed against the costs order made against him in the divorce proceedings. That appeal was resolved in the defendant's favour by the Court of Appeal, and that is the end of that. Paragraph 40 recites the Articles of the UN Declaration of Human Rights which the plaintiff says have been breached, but that discloses no civil cause of action against this private defendant. Paragraph 41 complains of the use of the tape recording to turn the plaintiff's own lawyer against him in February 2000, and apparently its use in court. That is either statute barred or subject to the absolute privilege of court proceedings. Paragraph 42 complains that the defendant had withheld from the authorities the fact that the plaintiff had been calling him to collect an $800 debt. Paragraph 43 concerns the making of the tape and is not a cause of action. Paragraph 44 pleads the intentional withholding from the court of information about the cruise. This is just an attempt to litigate this old matter, which is long time-barred. Paragraph 45 pleads that the defendant had withheld tape-recorded information that proves his adultery. Not only is this strange, as it is the plaintiff who claims to have the tape of the defendant admitting adultery, but it discloses no cause of action. Paragraphs 46 returns to the tape. Paragraph 47 involves another alleged withholding, but discloses no cause of action. Paragraph 48 complains that the defendant deleted from the tape allegations made by the plaintiff concerning the defendant's involvement in drugs. Paragraphs 49 – 51 are repetitive but unparticularised assertions of the withholding of evidence, perverting the course of justice and making false accusations. Paragraph 52 is an allegation that one of the items on the tape is the voice of an impostor. Paragraph 53 is a demand for reimbursement for time lost from work, and paragraph 54 is a summary of the new heads of claim. None of this discloses causes of action, although some of the material might possibly be pleaded by way of Reply as particulars of malice in order to defeat a plea of qualified privilege.

30. I therefore refuse leave to amend to add these additional paragraphs. They disclose no viable causes of action, and by seeking at length to introduce and litigate old complaints, or issues that have already been dealt with in other litigation, they would inevitably prejudice, embarrass and delay the fair trial of what is left of the original action.

THE ANSWER TO DEFENCE

31. This long document is not really a pleading, but a lengthy recital of the evidence that the plaintiff relies on, and his arguments. It is cross-referenced in part to a binder of documents, which includes the police report, and correspondence. Parts of the Answer could, perhaps, stand as the plaintiffs' witness statement, but other parts amount to intemperate comment and argument, the most egregious of which is the following on page 28 –

> "You two forked tongued reptilians need to remember this lesson for the future. OK? Come on Richard let's laugh. You finding any of this funny now, I think not."

32. As it stands, the Answer can only prejudice and embarrass the fair trial of the action, and I strike it out. The plaintiff needs to understand that the pleadings in an action are intended to be a brief and concise statement of what is relevant. They are intended to facilitate the trial process by identifying the issues. They should, therefore, plead material facts only and not evidence, and should be framed succinctly and temperately. They are not an opportunity to unload old grievances or have a go on paper at a hated opponent.

33. If the plaintiff wishes to plead a formal Reply to any of the allegations in the Defence he may do so, provided he does so within 14 days of the date of this ruling. As to when a Reply is necessary, he should refer himself to the Supreme Court Practice, 1999 ed., at

note 18/3/2[9]. He should note that it is not permissible to use the Reply to plead new causes of action. However, it is necessary to file a Reply to allege express malice, in the technical sense that that word bears in defamation proceedings, to defeat a claim of qualified privilege:

> "(3) Where in an action for libel or slander the plaintiff alleges that the defendant maliciously published the words or matters complained of, he need not in his statement of claim give particulars of the facts on which he relies in support of the allegation of malice, but if the defendant pleads that any of those words or matters are fair comment on a matter of public interest or were published upon a privileged occasion and the plaintiff intends to allege that the defendant was actuated by express malice, he must serve a reply giving particulars of the fact and matters from which the malice is to be inferred."
>
> (Rules of the Supreme Court, Ord. 82, r. 3(3))

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[9] **18/3/2 - Where reply necessary**
It is unnecessary to serve a reply if the plaintiff only wishes to deny the allegations contained in the defence, since if no reply is served, all material facts alleged in the defence are put in issue (r.14 (1)). A reply merely "joining issue" is therefore unnecessary, and the Court may order the costs to be disallowed on taxation (O.62, rr.3 (3) and 10 (1)). On the other hand, it is frequently necessary for the plaintiff to set up some affirmative case of his own in answer to the facts alleged by the defendant. Thus, a reply is necessary if it is required to comply with r.8, i.e. the plaintiff must serve a reply and plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality which he alleges makes the defence not available or which might otherwise take the defendant by surprise or raises issues of fact not arising out of the defence (r.8 (1)). The plaintiff may in his reply admit part of the defence; he may traverse or confess and avoid or both traverse and confess and avoid the allegations in the defence. "The reply is the proper place for meeting the defence by confession and avoidance" (per James L.J., in Hell v. Eve (1876) 4 Ch.D. 341 at 345). So is any equitable ground of reply (see SCA 1981, s.49 (2); Gibbs v. Guild (1882) 9 Q.B.D. 59 (followed in Legh v. Legh (1930) 169 L.T.J. 284); Betjemann v. Betjemann [1895] 2 Ch. 474). The plaintiff must therefore be careful not merely to join issue where he ought to allege new facts. The danger of not doing so is well illustrated in Kronstein v. Korda [1937] W.N. 67, CA Where, for example, the defendant has pleaded the Limitation Act, it may be necessary for the plaintiff to plead facts which take the case out of the statute. The better practice is for the plaintiff to plead the facts relating to an acknowledgment to take the case out of the statute in the statement of claim, and not in a reply (Busch v. Stevens [1963] 1 Q.B. 1; [1962] 1 All E.R. 412). He must not, however, put forward in his reply a new cause of action which is not raised either on the writ or in the statement of claim (Williamson v. L. & N. W. Ry. (1879) 12 Ch.D. 787); that would be a "departure" (see r.10). But he may add a fact in his reply. This is not a departure (Breslauer v. Barwick (1877) 36 L.T. 52, 53; see also Collett v. Dickinson [1878] W.N. 52). As to serving a reply in defamation actions to allege that the defendant was actuated by express malice, see O.82, r.3 (3).

SUMMARY

34. In summary, I strike out paragraphs 1 – 5, 24 – 26, and 29 – 33 of the Statement of Claim, but refuse the application to strike out the remainder. I refuse leave to amend the original pleadings to add the further paragraphs 35 – 56. I also strike out all of the "Answer to Defence". I give leave to re-plead the Answer as a proper Reply within 14 days.

35. That leaves causes of action in defamation on 7 December 2000 [paragraphs 8 - 12]; 10 December 2000 [paragraph 6]; 12 December 2000 [paragraph 13]; 22 December 2000 [paragraph 14]; 9 March 2001 [paragraph 15]; 27 April 2001 [paragraph 16]; 3 February 2004 [paragraph 17]; 17 January 2003 [paragraph 21]; 14 January 2003 [paragraph 22]; and 13 May 2005 [paragraph 23]. I take it that paragraph 23 also pleads a cause of action in malicious prosecution on 13 May 2005. I think that, thus confined, the case is manageable and triable, and that these paragraphs do not merit striking out as likely to embarrass or delay the fair trial of the action.

36. I will hear the parties on costs.

Dated 7 April 2008

Richard W. Ground
Chief Justice