IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CIV-2011-419-000463
[2012] NZHC 856

BETWEEN	JOHN KENNETH SLAVICH Plaintiff
AND	DAVID BRIAN COLLINS, CAMERON LESLIE MANDER, CHERYL RAEWYN GWYN, MATTHEW SIMON RUSSELL PALMER First Defendants
AND	CHRISTOPHER FRANCIS FINLAYSON Second Defendant
AND	REGISTRAR OF WELLINGTON DISTRICT COURT Third Defendant

Hearing: 29 March 2012

Appearances: D N Soper for Defendants (Applicant)
Plaintiff in person (Respondent)

Judgment: 1 May 2012

RESERVED JUDGMENT OF PRIESTLEY J

This judgment was delivered by me on 1 May 2012 at 4.00 pm pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date:……

Counsel:
D N Soper, Crown Law, Wellington 6140. Email: david.soper@crownlaw.govt.nz

Copy to:
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[1] The respondents have applied to strike out the plaintiff's proceeding. In essence the respondents submit that the plaintiff's causes of action are meritless, constitute an abuse of process, and are a naked attack on other proceedings (both civil and criminal) which have been finally determined. Thus, in accordance with well-known principles which attach to strike out applications, the proceeding should be struck out.

The plaintiff's claim

[2] The statement of claim was filed in April 2011. It has subsequently been modified by an August 2011 amended statement of claim. Although the causes of action appear to be framed in terms of injunctive relief (various orders of a mandatory nature requiring the respondents to do certain things) the parties seem to have agreed that rather than require the plaintiff to re-plead, his causes of action should be treated as seeking three declarations.

[3] As is apparent from the intituling, the first defendants include the then Solicitor-General, the Deputy Solicitor-General, and two Crown Law solicitors. The second defendant is New Zealand's Attorney-General. The third defendant is the Wellington District Court Registrar in whose court a number of informations (in the nature of private prosecutions) have been filed and stayed.

[4] The three broad areas in which the plaintiff seeks relief are:

(a) Restraining the first defendants from filing any further notices of stay under s 159 of the Summary Proceedings Act 1957 relating to various prosecutions which the plaintiff may bring;

(b) Requiring the Attorney-General to seek advice from counsel, other than the first defendants and Crown Law, on the issue of whether or not there should be intervention under s 159;

(c) Preventing the Wellington District Court Registrar from accepting any documents filed by the defendants which breach the orders sought in (a) and (b).

Brief background

[5] The focus and origin of the plaintiff's concerns are to be found in his conviction on six counts (generically involving forgery and dishonest use of documents) in October 2006. The plaintiff faced trial, along with others, before Heath J whose verdicts and reasons were delivered on 12 October 2006.[1] The plaintiff appealed unsuccessfully.[2] Leave to appeal to the Supreme Court was refused.[3]

[6] One of the plaintiff's responses to his unsuccessful attempts to overthrow his convictions (he was imprisoned) was to launch private prosecutions against various counsel (including the Hamilton Crown Solicitor and counsel inside Crown Law). It is the plaintiff's perception, for reasons I shall briefly outline later, that the prosecutor at his 2006 trial deliberately withheld or destroyed a witness statement. These attempts to prosecute privately various counsel were met by stays which, by this proceeding, the plaintiff hopes to prevent.

[7] Related to those private prosecutions/stay matters were eight separate proceedings filed in the Hamilton Registry of this Court citing as parties various counsel, law officers, the Legal Complaints Review Officer, and the Judicial Conduct Commissioner, as well as Heath J. A successful strike out application in respect of all those proceedings (which were consolidated) was heard by Andrews J last year.[4]

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[1] *R v Slavich* HC Hamilton CIV-2006-419-89, 12 October 2006. The trial was part of "Operation All Sorts" which resulted in a series of sequential judge alone trials. The plaintiff was tried alone.
[2] *R v Slavich* [2009] NZCA 188.
[3] *R v Slavich* [2009] NZSC 87.
[4] HC Hamilton CIV-2010-419-975, 1149, 1502, 1682, 256, 369, 533 & 112, 14 July 2011.

[8] Predictably the plaintiff appealed that decision. The appeal was dismissed.[5] Dismissed too was the plaintiff's subsequent application to the Court of Appeal to recall its judgment.[6]

The core of the plaintiff's discontent

[9] The plaintiff's grievance, which lies at the core of this multitude of proceedings, is his perception that a document, which should have been produced to Heath J during his trial, was not produced; that the Hamilton Crown Solicitor and all his staff deliberately took steps not to produce the document; and that subsequently the Solicitor-General, his deputies, and other Crown Law counsel have deliberately taken various procedural steps to cover up what occurred. Various individuals have tampered with the evidence. The plaintiff, so he submits, is no longer concerned about his 2006 convictions and his subsequent imprisonment. Rather, his focus is on alleged impropriety. Dangerously for him, the plaintiff's submissions suggest that certain judicial officers may not have been true to their judicial oath. I put that aspect entirely to one side for the purposes of this judgment. It would be surprising and indeed regrettable if any further submissions of that ilk from the plaintiff were not met by contempt proceedings and condign punishment.

[10] The "irregularity" which the plaintiff has raised is sufficiently described in the Court of Appeal's judgment of May 2009:[7]

> [9] Before discussing the law, we need to describe briefly how it came to pass that Ms Gibbs's evidence came in unsworn. Ms Gibbs was to be the last Crown witness. She was in the final stage of a pregnancy. There were complications of such a magnitude that her medical advisor said that she could not safely travel to Hamilton to give evidence; indeed, she was not even to travel across Auckland to a facility with a video-link. Neither side wanted an adjournment until Ms Gibbs had given birth and was able to travel again.
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> [10] In the end, counsel agreed how to deal with the matter. Ms Gibbs's evidence came in in two parts:
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> (a) a brief of evidence; and

[5] *Slavich v Judicial Conduct Commissioner* [2012] NZCA 31.
[6] *Slavich v Judicial Conduct Commissioner* [2012] NZCA 117.
[7] *R v Slavich* [2009] NZCA 188.

(b) a transcript of a teleconference call.

[11] Both parts require further explanation. We deal first with the brief of evidence. Ms Gibbs had given a deposition statement, which was, of course, supplied to Mr Slavich. Prior to the High Court hearing, however, that deposition statement was expanded. We shall call that document Ms Gibbs's "brief of evidence" to distinguish it from her deposition statement. It is clear that that brief of evidence somehow or other found its way on to the High Court file; there is also no doubt that a copy of it was given to Mr Slavich.

[12] The teleconference call (which we shall shortly describe in more detail) took place on 20 September 2006. It is apparent from the transcript of that teleconference call that counsel discovered that Ms Gibbs, following her marriage, was now calling herself Mrs Calder. It is also apparent from that transcript that Mr Slavich's trial counsel, Mr McIvor, had Ms Gibbs's brief of evidence. Immediately after the teleconference call, Mr Douch, the Crown Solicitor at Hamilton, who was leading for the Crown on this prosecution, made one change to Ms Gibbs's brief of evidence. That was to change the first paragraph of the brief, so that, instead of reading "My full name is Carolyn Anne GIBBS", it read:

> My full name is Carolyn Anne CALDER. My maiden name was Carolyn Anne Gibbs.

[13] Mr Douch then sent what we shall call the revised brief of evidence to Ms Gibbs for signature. The next day (21 September), Ms Gibbs signed the revised brief of evidence, which concluded with the following attestation:

> This statement is true to the best of my knowledge and belief and I make this statement knowing that it might be admitted at a preliminary hearing, and that I could be prosecuted for making a statement that is known by me to be false and intended by me to mislead.

[14] Ms Gibbs returned the revised brief to Mr Douch. Mr Douch believes that he caused the original of the revised brief to be filed in the High Court. He thinks that because he now holds only a photocopy of the signed revised brief on his file. He annexed a copy of that photocopy to an affidavit.

[15] Unfortunately, no original of the revised brief appears on the court file. All the court file has is an unsigned copy of the original brief of evidence. In the end, we do not think it matters. It is quite clear that Ms Gibbs's brief of evidence did come into evidence on 21 September: the court transcript expressly refers to the brief of evidence as having been "read" and forming part of the evidence. There is no difference between the brief of evidence and the revised brief of evidence save for the inconsequential amendment to paragraph 1. It is clear that Ms Gibbs did sign the revised brief, although unclear whether the original signed copy has been mislaid in the High Court or in Mr Douch's office.

[16] We now turn to the second part of Ms Gibbs's evidence, namely the transcript of the teleconference call. We need to describe how that transcript came into existence. Counsel suggested a procedure by which Ms Gibbs's evidence (as contained in her brief) could be tested. On 20 September, the judge provisionally approved it. The agreed procedure was in brief this.

> The court set up a conference call with Ms Gibbs. Present in court were counsel, Mr Slavich, the registrar, and Heath J's associate – but not Heath J himself. Counsel then had the opportunity to ask Ms Gibbs questions, as if she were present in court and they were conducting a supplementary examination-in-chief and cross-examination. The question and answer session was recorded and later transcribed by Heath J's associate. The transcript was then given to counsel – but not, at that stage, to Heath J. Counsel then checked the transcript. It was only at that point that counsel agreed that Ms Gibbs's brief of evidence and the transcript would both go into evidence. Following that agreement, counsel gave Heath J the transcript, and at that point, on 21 September, Ms Gibbs's brief of evidence and the transcript became part of the evidence of the trial.
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> [17] It is important to emphasise certain features. First, everything occurred with Mr Slavich's consent. Indeed, he was keen to have the transcript in evidence, as he considered some of Ms Gibbs's answers to be supportive of the defence he was running. Secondly, none of Ms Gibbs's evidence became evidence in the trial until the entire process was completed and both sides had consented. Thirdly, there is no suggestion that Mr Slavich's trial counsel exceeded his authority or was in any way incompetent in suggesting or agreeing to the procedure followed. Fourthly, at no stage did anyone request Ms Gibbs to be sworn. Fifthly, both sides, in their final submissions, relied on parts of Ms Gibbs's evidence.

It is Mr Douch's role described in [14] that particularly excites the plaintiff, along with the Court of Appeal's assessment in [15].

[11] At the outset of the hearing Mr Soper, as he was helpfully outlining the procedural background and answering questions from the Bench, accepted that the revised brief (or transcript) of Ms Gibbs' evidence was missing from the Court's trial file. The plaintiff appears to have seized on this "concession" as being both novel and significant. It is not. The evidence-tampering which the plaintiff alleges, directed at Hamilton Crown Solicitor Mr Douch, is that Mr Douch improperly withheld the amended brief from Heath J. It is additionally contended by the plaintiff that in subsequent affidavits and/or reports (see [14] of Court of Appeal's judgment (supra [10])) Mr Douch has misled the Court of Appeal.

[12] The mere fact that the revised brief cannot be located on the plaintiff's 2006 criminal trial file falls well short of proving the plaintiff's assertions. Higher Court judges will be well aware of the clutter of folders and documents which can be generated during the course of a criminal trial. Particularly would this be the case in a series of long-running trials involving a number of accused and allegations of documentary fraud. At the conclusion of the trial (this essentially being a judge

alone trial) trolley loads of folders and documents, sorted often haphazardly by Court staff, are then removed to the Judge's chambers where inevitably they will be spread around. Whether the amended brief or "correct evidence" as the plaintiff chooses to call it, was misfiled, bundled up in other folders of the notes of evidence, missorted into the Judge's handwritten notes or counsel's submissions, misplaced in the courtroom or misplaced in the Judge's chambers is of no consequence. The Court of Appeal's conclusion was that it had indeed been placed before Heath J who had considered it.

[13] Evidence before the Court of Appeal from the plaintiff's trial counsel Mr McIvor makes it clear that the original brief of Ms Gibbs together with a transcript of questions and answers taken during a telephone conference could be admitted. Mr McIvor's evidence was that Heath J had accurately summarised the relevant procedure in his judgment.

[14] There is absolutely no evidence (and never will be) that the Hamilton Crown Solicitor or other law officers have tampered with the evidence. The fact that it is unfortunately missing from the trial file (or cannot be located which is not the same as "missing") goes nowhere near establishing improper conduct. Indeed, the evidence of Mr Douch, Mr McIvor, and a perusal of the relevant judgments of Heath J and the Court of Appeal, in my view, totally exclude the impropriety for which the plaintiff now contends.

Discussion

[15] The approach taken at the hearing by the plaintiff and Mr Soper are essentially self-evident from the previous section of this judgment. The plaintiff contends that Crown counsel did *not* file the amended brief or signed transcript and has misled appellate courts in that regard. The plaintiff contends that his convictions are irrelevant. He is not trying to make a collateral attack or revisit his conviction. Rather he is trying to visit sanctions on law officers who he says have misled the Court of Appeal about the filing of the amended brief or transcript. The plaintiff contends that the Court of Appeal failed to answer the question posed by his counsel in that forum, Mr Haigh QC, whether Heath J, as trial Judge, erred by taking into

account one brief of evidence but not the revised brief of evidence.[8] The latter, submits the plaintiff, was never filed.

[16] Far from the plaintiff trying to attack collaterally his convictions, he submits the Crown is trying to attack collaterally the Court record which omits the "correct" brief.

[17] The issue of whether or not Heath J actually saw the amended brief, which the plaintiff submits was wrongly and improperly withheld, was dealt with succinctly by the Court of Appeal in its judgment dismissing the plaintiff's appeal against conviction:[9]

> [46] During the trial, a particular incident occurred which was handled by the High Court Judge in a most unusual way. There may be an appeal point arising out of this which counsel did not raise before us, but which we felt obliged to remark on during the course of the hearing.
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> [47] The Crown Solicitor had intended to call a Ms Gibbs. She was to give evidence about the Hannon transactions. She was going to give oral evidence at trial in the usual way. But shortly before the hearing began, she gave birth and the medical advice as to her post-birth condition meant she was not able to travel to Hamilton or attend at some other location to give evidence by video link.
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> [48] It seems that counsel then got together. They agreed that Ms Gibbs' "evidence" could be provided in written form based on a transcript of answers given to questions put to her by Mr Douch and Mr McIvor in the course of a telephone conference held during the hearing. The Judge said that neither counsel required her answers to be verified on oath as neither seemed to have thought there were likely to be any credibility issues arising with respect to Ms Gibbs. The Judge would not be part of this process in case there was some disagreement between counsel as to the transcript. The Judge's Associate would be present and would make a shorthand note of the discussions. She would then produce a comprehensive document which the Judge would take in as trial evidence (see Minute No. 7). This process was actually effected, in this manner.
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> [49] Initially, Mr Haigh was of the impression that the Judge might not have seen this "transcript", and taken it into account. At an earlier point of time he asked this panel to direct a report from the trial Judge, prior to the hearing on 17 April, as to whether he had seen the transcript and taken it into account. Mr Haigh now accepts that there are passages in the reasons for verdict judgment which suggest that the Judge had done so.

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[8] But the Court of Appeal in fact deals with this issue and Mr Haigh's approach in [49] of its judgment. See infra [17].

[9] *R v Slavich* [2008] NZCA 116.

The Court then went on to consider relevant provisions of the Evidence Act 2006 and the issue whether Ms Gibbs' evidence needed to be sworn or affirmed.

Strike out considerations

[18] The jurisdiction to strike out a proceeding is found in r 15.1 of the High Court Rules, which provides:

> **15.1 Dismissing or staying all or part of proceeding**
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> (1) The court may strike out all or part of a pleading if it –
> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
> (b) is likely to cause prejudice or delay; or
> (c) is frivolous or vexatious; or
> (d) is otherwise an abuse of the process of the court.

[19] The plaintiff's most recent statement of claim alleges as facts the various private prosecutions filed by the plaintiff and the stays which the first defendants filed pursuant to their delegated authority from the second defendant, the Attorney-General. There is clear authority that, if the pleaded facts (which are seen to be true) give rise to a cause of action which is clearly untenable, then a strike-out is appropriate.[10]

[20] Quite apart from the r 15.1(1)(a) limb, a proceeding can be struck out under r 15.1(1)(d) if it is otherwise an abuse of process. I consider both limbs are engaged. Scrutinising the three declarations (the originally pleaded orders) the plaintiff seeks (supra[4]) there is no basis on which this Court could properly restrain the first defendants from seeking stays in the District Court under s 159 of the Summary Proceedings Act 1957. The statement of claim and the background to related proceedings dealt with in the strike out judgment of Andrews J[11] paint a picture of serial private prosecutions initiated by the plaintiff. As each one was stayed, similar to the appearance of Hydra's heads, further prosecution would be launched. There is absolutely no basis in the pleadings or in the context of the plaintiff's private prosecutions on which the application for the first declaration could succeed. The

[10] *Attorney-General v Prince & Gardner* [1998] 1 NZLR 262 (CA) at 267; *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].
[11] Above n 4.

underlying factual matrix for both the private prosecutions and this proceeding depends solely on an aspect of the plaintiff's 2006 criminal trial. That aspect has been dealt with exhaustively by appellate courts and is at an end.

[21] With regard to the second declaration sought, for obvious constitutional reasons this Court would not attempt to order or direct the Attorney-General as to the source of his legal advice. Nor on the basis of either the pleadings or the factual context is there any prospect of this Court directing the Registrar of the Wellington District Court from filing a further stay of proceedings.

[22] I am thus satisfied that, in terms of r 15.1(1)(a) no reasonably arguable cause of action is disclosed. Furthermore, focusing on r 15.1(1)(d), I am firmly of the view that this proceeding is an abuse of process. The plaintiff has advanced a beguiling argument that he is not mounting a collateral attack on his 2006 conviction. Rather he is submitting that he is trying to expose and sanction improper conduct on the part of the Hamilton Crown Solicitor and senior Crown Law officers. This reconstruction of the criminal process in which the plaintiff was involved is regrettably a distortion and, for the reasons set out in this judgment, is an edifice based on foundation stones which have been rejected by appellate courts. The law and public policy do not permit those matters to be revisited.

[23] For these reasons clearly the defendants' strike out application must succeed.

Subpoenas

[24] An interlocutory matter was also called before me over which I had a brief discussion with the plaintiff. Prior to the strike out hearing the plaintiff caused the Registry to issue and service subpoenas seeking the attendance of the Hamilton Court Manager, the Hamilton Crown Solicitor Mr Douch, a partner of Mr Douch's firm, and an associate solicitor. The defendants for their part sought to have the subpoenas set aside on the grounds that they were an abuse of process and that the matters on which the potential witnesses could give evidence had been conclusively decided against the plaintiff in various court proceedings.

[25] The plaintiff explained to me that he wished the witnesses to attend so that he could produce evidence about the relevant phase of his trial before Heath J, the process whereby the brief of Ms Gibbs' evidence was amended, and hopefully any recording of the trial which might establish when and how the amended brief was produced. In particular, the plaintiff was anxious to demonstrate by evidence that the document was not on this Court's trial file.

[26] It seemed to me that the subpoena issue raised identical considerations to the strike out application. I indicated that if I considered I might be helped by evidence from any of the four potential witnesses I would rule on that issue.

[27] However, I uphold the written submissions of Mr Soper that issuing the subpoenas would in the circumstances be a clear abuse of process. The strike out application can be easily determined without witnesses being compelled to come to court to give evidence-in-chief (as opposed to being cross-examined) at the plaintiff's behest.

Result

[28] The plaintiff's proceeding is struck out.

Costs

[29] Mr Soper indicated that, in the event of his application succeeding, the defendants would be seeking indemnity costs. Certainly the defendants are entitled to costs.

[30] Whether the plaintiff is worth pursuing for costs will be for the defendants to decide. I note that Andrews J awarded 2B costs against the plaintiff in her July 2011 strike out judgment. I am unaware whether those costs have been paid or enforced.

[31] If the defendants wish to seek costs they should file a short memorandum stipulating the amounts claimed and reasons therefore (if more than 2B costs are sought) within 15 working days of the release of this judgment. The plaintiff is to

file any written reply (dealing solely with the costs issue) ten working days thereafter.

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Priestley J