

**IN THE DISTRICT COURT
AT AUCKLAND**

**I TE KŌTI-Ā-ROHE
KI TĀMAKI MAKĀURAU**

**CIV-2016-004-002265
[2018] NZDC 18320**

IN THE MATTER OF	A claim under the Defamation Act 1992
BETWEEN	VINEETA DEVI PRASAD Plaintiff
AND	ROHIT CHAND Defendant

Hearing: 28 August 2018

Appearances: A Gilchrist for the Plaintiff
R Chaudhry for the Defendant

Judgment: 4 September 2018

**RESERVED JUDGMENT OF JUDGE A A SINCLAIR
[On application to dismiss or stay on the grounds of forum non-conveniens]**

[1] This is an application by the defendant for an order dismissing or staying the proceedings on the basis that New Zealand is not the forum conveniens to hear the plaintiff's claim but rather, Fiji is the most appropriate forum. The defendant was served in New Zealand and it is accepted that there is no issue as to jurisdiction.

The plaintiff's claim

[2] The plaintiff's claim is brought under the Defamation Act 1992. The plaintiff and defendant were previously married. Following their separation in about November 2015 the plaintiff was living with relatives at Takanini in Auckland. It is alleged that on 18 June 2016 the defendant published a statement against the plaintiff

on the Facebook page “[page name deleted]” with a photo of the plaintiff. The statement read:

[Alleged defamatory statement deleted].

The plaintiff claims that the statement made is defamatory and seeks various forms of damages together with costs and a declaration pursuant to s 24 of the Defamation Act 1992 that the defendant is liable to the plaintiff in defamation.

[3] The plaintiff returned to Fiji on 28 July 2016 and has been residing there since. The defendant resides and works in Auckland.

[4] It is further alleged that the readers of the publication include the plaintiff’s friends, relatives and members of the Fijian community. As a result of the publication, the plaintiff says:

- (i) she has been shunned by friends and many relatives in New Zealand and Fiji;
- (ii) she felt humiliated to meet friends and family in New Zealand and when she went back to Fiji in July 2016, she could not find any employment; and
- (iii) she has been exposed to hatred, ridicule and contempt.

A preliminary matter

[5] The proceedings were issued in December 2016. The defendant has not filed a statement of defence. However, in April 2017 he filed an application for security for costs which was subsequently resolved by agreement.

[6] Following the disposal of that application, the defendant proceeded to file the present application in September 2017. The plaintiff contends that as the defendant has already taken a step in the proceedings by filing the application for security for costs, he has submitted to the forum of the New Zealand courts. Further, even if it

was still possible to raise a forum non-conveniens argument, the delay in doing so should be taken into account when considering the application.

[7] I am not satisfied that this issue arises where the only issue is one of forum non-conveniens and not jurisdiction. In any case, having regard to the position I have reached on the defendant's application, this issue falls away.

Legal principles

[8] Where service of a proceeding has been validly effected within New Zealand, but New Zealand is not considered to be the appropriate forum for trial of the action, a defendant may apply for a stay or for a dismissal of that proceeding.

[9] A stay will only be granted on the ground of forum non-conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action. In other words, there is an available and competent forum in which the case may be tried more suitably for the interests of all the parties and the ends of justice.¹

[10] New Zealand courts apply this principle in the following manner²:

- (a) In general, the burden of proof to persuade the Court to exercise its discretion to grant a stay rests on the defendant not just to show that New Zealand is not the natural or appropriate forum for the trial but also to establish that there is another available forum which is clearly or distinctly more appropriate;
- (b) If the Court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial, the burden will shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial of the action should nevertheless take place in New Zealand;

¹ *Spiliada Maritime Corp v Cansulex Limited* [1987] 1AC 460 at 476 (HL).

² *Schnumacher v Summergrove Estates* [2014] 2 NZLR 599 at [29].

- (c) The natural forum will be the one with which the action has the most real and substantial connection, including factors affecting convenience or expense (such as availability of witnesses) the law governing the relevant transaction and the places where the parties respectively reside or carry on business; and
- (d) Special circumstances by reason of which justice may require a stay not to be granted will include consideration of factors such as the inability of the plaintiff to obtain justice in the foreign jurisdiction, advantages which the plaintiff may derive from involving a New Zealand jurisdiction and the application of any relevant limitation periods.

Present Application

[11] The defendant has focused on a number of factors in his application which I turn now to discuss.

Witness availability

[12] The defendant contends that, as the plaintiff left New Zealand shortly after the alleged defamatory comment was published, it can be assumed that it is her friends and members of her immediate family living in Fiji who knew her and who would be attesting to her reputation and impact of the alleged defamatory post. As these people and any potential employers, are based in Fiji, it would be more logical and cost effective for the proceedings to be heard in Fiji.

[13] The plaintiff does not agree and says that she has friends and relatives in New Zealand who will be witnesses. She has appointed a New Zealand based IT expert to give evidence. The property manager of the rental property will be required to give evidence. Other New Zealand based witnesses will also be required to give evidence as to the loss and damage suffered by her. As well, medical evidence with regard to her treatment for stress which she received in Auckland, will also be required.

[14] The plaintiff says that it would be highly inconvenient, impractical and more expensive for New Zealand based witnesses to have to attend or otherwise take part in a trial in Fiji. To the extent that there will be Fijian witnesses called for the plaintiff, it is submitted that these persons can either travel to New Zealand or give evidence by video link,

[15] The defendant has not identified any witnesses which he intends to call who are resident in Fiji.

Costs of proceedings in each jurisdiction

[16] Mr Chaudhry, for the defendant, submitted that it would be less costly for both parties to have the trial in Fiji. However, there is no evidence before this court as to the likely cost differential in pursuing the claim in Fiji rather than New Zealand. In the absence of such evidence, I place little weight on this factor.

[17] By way of general observation, I note that the expenses associated with having to bring witnesses from New Zealand or arrange attendance by video link, would likely seriously reduce any costs savings to the plaintiff. Furthermore, it is hard to imagine that a move to Fiji would not increase the costs - and also inconvenience - for the defendant and his New Zealand based witnesses.

Application of New Zealand Law

[18] Mr Chaudhry submits that the Fijian Defamation Act is similar to its New Zealand equivalent and there would be no disadvantage in the case being heard in Fiji. He also referred to a recent case in Fiji involving defamation via a Facebook posting and submitted that the Fijian courts are well able to determine such claims.

[19] While not questioning the competence of the Fijian courts, part of the relief sought in the amended statement of claim, is an order under s 24 of the Defamation Act 1924. Mr Gilchrist, for the plaintiff, submitted that this raises the issue as to whether a New Zealand expert would be required to give evidence as to the meaning and effect of this legislation if the claim was to proceed in Fiji.

Where judgment will be enforced

[20] As the defendant resides in New Zealand any judgment obtained in the proceeding will need to be enforced in this country. Mr Chaudhry contends that this can be done under the Reciprocal Enforcement of Judgments Act 1934 and Reciprocal Enforcement of Judgment Order 1940 which provides for the enforcement to Fiji Courts, judgments in New Zealand so that there will be no injustice to the plaintiff if the matter was to be tried in Fiji.

Discussion

[21] I agree with Mr Gilchrist that this is an unusual application where the basis of the application appears to be the defendant's contention that Fiji is the more appropriate forum principally because of matters relevant to the plaintiff and, the availability of witnesses.

[22] On the facts of this case, there is a strong and natural connection to New Zealand. The alleged defamatory statement relates to [defaming details deleted] during the time that the plaintiff resided in New Zealand. It was posted on Facebook in New Zealand while she was still living in this country. In addition, it is alleged that she suffered loss and damage both in New Zealand and Fiji. Furthermore, the defendant continues to reside in New Zealand.

[23] While there may be need for witnesses from Fiji to give evidence, it is clear from the plaintiff's affidavits filed in opposition to this application and Mr Gilchrest's submissions, that the plaintiff has assessed this issue and made her decision to proceed with the claim in New Zealand.

[24] In my view, the other items identified by the defendant also support the claim being heard in New Zealand. It makes little sense to potentially add costs relating to the need for expert evidence on New Zealand defamation law or in the enforcement in New Zealand of any judgment obtained in Fiji. While a reciprocal judgment procedure may be available, it adds further costs and delay and is an unnecessary step if the claim is heard in New Zealand.

[25] As I noted above, the burden is on the defendant to establish that some other available forum having competent jurisdiction, is clearly and distinctly more appropriate than New Zealand for the hearing and determination of this claim. The defendant has failed to discharge that burden. Weighing up the relevant factors, I consider that the most suitable forum having regard to the interests of all the parties and the ends of justice, is New Zealand.

Decision

[26] The defendant's application is dismissed. Costs are awarded to the plaintiff on a 2B basis.

[27] This matter now needs to be advanced and the following timetable orders are made accordingly:

- (i) a statement of defence is to be filed and served no later than 25 working days from the date of this judgment;
- (ii) the parties are to provide discovery in relation to the alleged defamation within a further 25 working days; and
- (iii) the matter is to be listed for a conference on the first available date after 16 November 2018.

A A Sinclair
District Court Judge