CITATION: Platnick v. Bent (No. 2), 2016 ONSC 7474
COURT FILE NO.: CV-15-520683
DATE: 20161201

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Howard Platnick, Plaintiff/Responding Party

AND:

Maia Bent and Lerners LLP, Defendants

BEFORE: S. F. Dunphy, J.

COUNSEL: *H. Winkler and E. Pond*, for the Defendant/Moving Party Maia Bent

N. Holmberg, for the Defendant Lerners LLP

T. Danson for the Plaintiff/Responding Party

HEARD: November 17, 2016

ENDORSEMENT RE: PRELIMINARY MOTION

[1] This is my ruling on a preliminary motion brought prior to hearing argument on a Notice of Constitutional Question itself brought in the context of a motion to dismiss a defamation claim pursuant to s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. The subject notice of motion sought: (i) to record and transcribe oral argument at the hearing on November 17-18, 2016, (ii) to require the defendant to answer a question refused at cross-examination on June 8, 2016, (iii) to grant leave to amend the statement of claim and to file a reply and (iv) to grant leave *nunc pro tunc* to file further affidavits in the form of a "Second Supplementary Responding Motion Record".

[2] At the conclusion of argument on the preliminary motion, I took the leave to amend aspect of the motion under reserve but denied the balance of the relief sought with reasons to follow. This

is my decision on the amendment motion and my supplementary reasons for refusing the other relief sought.

Procedural background and overview

[3] The defendant Ms. Maia Bent brought a motion pursuant to s. 137.1 of the *CJA* on April 27, 2016 to dismiss the plaintiff's defamation action. On April 28, 2016 I scheduled the hearing of that motion for June 27, 2016, being the 60th day following the filing of the motion, in accordance with s. 137.2(2) of the *CJA*. The respondent plaintiff had objected to the "early" hearing date by reason of prior travel plans that would see him return to town only a few days before the scheduled hearing date but declined to agree to a schedule for a hearing prior to his departure on June 19, 2016 either. In light of the draft Notice of Constitutional Question challenging the constitutional validity of s. 137.1 of the *CJA* that the plaintiff indicated the intention of finalizing, I also set aside June 9, 2016 to consider scheduling in respect of any interventions that might be received in response to such Notice.

[4] Pursuant to the timetable established before me on April 28, 2016, the plaintiff finalized his responding affidavit and cross-examinations were conducted in early June 2016. The draft Notice of Constitutional Question that had been placed before me was also finalized.

[5] On June 9, 2016 it appeared that the Attorney General for Ontario was the only party that had responded to the Notice of Constitutional Question. The plaintiff renewed his attempt to defer the hearing date on this occasion with a formal motion seeking an adjournment of the hearing due to his travel schedule (the same travel schedule that had been discussed in April).

[6] I did not grant the plaintiff's request for an adjournment on June 9, 2016. Whether or not I have jurisdiction to ignore s. 137.2(2) of the *CJA* as was urged upon me by the plaintiff, I was not satisfied that the circumstances for doing so existed in this case. My endorsement reads as follows:

> "Mr. Danson's motion to reconsider is dismissed. I am prepared however to allow Mr. Danson to present his case without prejudice to the Constitutional Question of which he

has served notice. If necessary, that question can be argued in September. If Mr. Danson intends to present his case in this fashion, he shall notify all parties by June 10, 2016."

[7] Mr. Danson so elected and the motion under s. 137.1 of the *CJA* was accordingly heard on the merits on June 27, 2016 without argument on the constitutional issues. At the conclusion of that hearing I delivered the following endorsement:

> "This is a motion for an order pursuant to s. 137.1 of the *Courts of Justice Act*. Mr. Danson has delivered a Notice of Constitutional Question to challenge the validity of s. 137.1 under the *Charter*. On June 16th [sic – should read June 9] I permitted Mr. Danson to bifurcate his argument dealing with s. 137.1 today on its merits while addressing the *Charter* issues if needed in September. Having heard the argument of the parties on the merits of the s. 137.1 motion, it is apparent to me that I cannot properly dispose of this motion without also addressing the *Charter* issues that have yet to be fully briefed before me. I am accordingly taking this matter under reserve and direct the parties: (i) to finalize a case timetable to prepare the "*Charter* issue" for a hearing in September by Friday of this week; and (ii) to book an appointment through the Motions Office for a one-day appointment before me in September 2016".

[8] It transpired that the constitutional questions raised by the plaintiff were not able to be scheduled before me until November 17 and 18, 2016.

[9] On November 9, 2016, the plaintiff filed this notice of motion to be heard prior to the commencement of argument on the matters raised by the Notice of Constitutional Question. I am releasing these reasons concurrently with my reasons on the main motion (*Platnick v. Bent,* 2016 ONSC 7340) and shall not repeat here the factual background to the main motion under s. 137.1 of the *CJA* that is described in greater detail there.

Issues to be decided

[10] The notice of motion for this preliminary motion raised the following four issues:

a. Should a recording and transcript of the oral argument at the hearing on November 17-18, 2016 be prepared?

b. Should the plaintiff be granted leave to amend his Statement of Claim and to file a Reply?

c. Should Ms. Bent be compelled to answer a question refused on her cross-examination?

d. Should retroactive leave be granted for the filing of the Second Supplementary Responding Motion Record?

[11] As noted above, I dismissed the motion in respect of (a), (c) and (d) at the hearing with reasons to follow and took item (b) under reserve.

Discussion and analysis

(a) Should a recording and transcript of the oral argument at the hearing on November 17-18, 2016 be prepared?

[12] The plaintiff suggested that a recording and transcript of argument would be beneficial in supplementing an eventual appeal record since the matters raised by the defendant's motion are novel, the case has aspects of a "test case" likely to be appealed by the unsuccessful party and because a transcript would help to demonstrate to the Court of Appeal some of the practical problems with the application of the statute to be raised by the plaintiff in oral argument.

[13] I dismissed the plaintiff's application.

[14] There is a fundamental difference between evidence and argument. Evidence must be based on facts established through a court record. Argument may suggest conclusions to be drawn from the evidence, but it is not evidence itself. A judgment of the court founded upon material facts not in evidence on the record is a judgment that is vulnerable to reversal on appeal, a vulnerability that is not mitigated if those "facts" were related in the course of oral argument. Many things are said and suggested in oral argument. Its object it both to explain the evidence *and* to test the limits of the application of the law to it. However, only material facts on the court record can securely ground findings made by the court.

[15] It is not the court's practice to record argument or to prepare a transcript of argument although clearly it lies within my discretion to depart from that practice if there appears to be good reason to do so. Argument forms no part of the Appeal Record should either party decide to appeal. I am aware of the relative novelty of the some of the issues raised on the main motion. I also understand the likelihood that appeals of my ruling are both possible and even likely given the circumstances of a relatively new and untested (on appeal) statute. However, a transcript of *argument* will be of no utility to the appeal process.

[16] I was also of the view that a transcript would be of no assistance to me in considering the defendant's motion. Both parties (and the Attorney General) fully briefed that motion with detailed facta and voluminous books of authority. I saw no utility to me in supplementing my own notes of the argument with a verbatim transcript. There may well be cases or circumstances where this would prove beneficial. This was not such a case in my view.

[17] I therefore declined to order a recording and transcript.

(b) Should the plaintiff be granted leave to amend his Statement of Claim and to file a Reply?

[18] The proposed amended statement of claim addresses three separate issues. Firstly, it would add the plaintiff's professional services corporation ("Platnick Medicine Professional Corporation" or "PMPC") as a party plaintiff. Secondly, it would amend the pleading in respect of the December 29, 2014 issue of *Insurance Business* magazine by admitting that Ms. Bent merely confirmed her authorship of the email leaked by others to the magazine but pleading that in so doing she failed to take any positive steps to discourage or prevent its publication by the magazine. Finally, it provides additional particulars of the defamation pleading that were lacking in the original statement of claim including further particulars of facts that might support the plaintiff's allegation of malice.

[19] The plaintiff's statement of claim was issued on January 27, 2015. Ms. Bent's statement of defence was delivered on March 31, 2015. Pursuant to Rule 25.04(3) of the *Rules of Civil Procedure*, a reply shall be delivered within ten days following the delivery of the statement of defence. Pursuant to Rule 25.05(a) of the *Rules of Civil Procedure*, pleadings are closed when the

time for delivering a reply has expired. Pursuant to Rule 26.02 of the *Rules of Civil Procedure*, leave of the court is required to amend pleadings after the close of pleadings or when it is sought to add or substitute a party. Pleadings are thus closed and the proposed amended statement of claim seeks to add a party plaintiff. There is no question that leave of the court is required in this case both to authorize the filing of the reply and to authorize the various amendments sought to be made to the statement of claim.

[20] Apart entirely from the requirements of Rule 26.02 of the *Rules of Civil Procedure*, section 137.1(6) of the *CJA* also requires leave of a judge in this situation:

> (6) Unless a judge orders otherwise, the responding party shall not be permitted to amend his or her pleadings in the proceeding,
>
> (a) in order to prevent or avoid an order under this section dismissing the proceeding; or
>
> (b) if the proceeding is dismissed under this section, in order to continue the proceeding.

[21] I therefore have discretion both under Rule 26.02 of the *Rules of Civil Procedure* and s. 137.1(6) of the *CJA* to permit the pleadings to be amended as requested. Motions seeking leave required by Rule 26.02 of the *Rules of Civil Procedure* are governed by Rule 26.01 that provides that leave *shall* be granted on terms that are just unless there is non-compensable prejudice. Section 137.1(6) of the *CJA* is not so constrained and other considerations, including the purpose of the statute and the timelines prescribed by s. 137.2(2) of the *CJA* may also enter into consideration.

[22] Ought my discretion to be exercised in the circumstances of this case under either provision?

[23] The plaintiff candidly admitted that his primary reason for seeking to add his professional services company as a plaintiff was to avoid a possible limitations issue that might preclude him doing so in future should the action be permitted to proceed. The second anniversary of the email that gave rise to the defamation allegation occurred on November 14, 2016. In order to preserve his position vis-à-vis a potentially expiring limitation period before his motion could be hear, Dr.

Platnick caused a Notice of Action to be issued on November 8, 2016 that, though spare in particulars, appears to be a duplicate of the existing statement of claim.

[24] My leave was neither sought nor required to issue that Notice of Action. Whether that action – if perfected by issuing a statement of claim and serving it within the time limits prescribed – would be struck as an abuse of process is not before me. The fact that it is an apparent duplicate of an existing (and now dismissed) action rather speaks for itself. I shall leave the parties to sort out a common sense resolution of the status of this "placeholder" action should an appeal of my order dismissing the main action be successfully brought. The overall objective of preserving the status quo as far as limitation periods are concerned while the defendant's motion to dismiss the action outright and any appeals arising are pending appears to me to be a reasonable one that ought to be accommodated in some pragmatic fashion.

[25] In the context of this action, I must consider whether the proposed amendments ought to be permitted.

[26] The plaintiff's *notice of motion* claims that PMPC is a necessary party since he has had the practice of following his accountant's advice to incorporate PMPC and bill his clients even though insurers and vendor companies "retain Dr. Platnick, not Platnick Medicine Professional Corporation". The plaintiff did not file *any* evidence in support of this aspect of his preliminary motion. While evidence of the merits of proposed amendments is not normally required under Rule 26.01 of the *Rules of Civil Procedure,* different considerations may apply to motions under s. 137.1(6) of the *CJA.*

[27] The evidence of the plaintiff in the "main" motion was that he suffered a catastrophic falling off in his earnings as an expert in the personal injury compensation field in the weeks following the initial November 14, 2014 publication of the email relative to what they had been. The corporation PMPC was not mentioned in Ms. Bent's email. There is no allegation or evidence of any agreement between Dr. Platnick and PMPC whereby he is required to allocate all or some specified portion of his professional engagements to the corporation. There is not, for example, an allegation of exclusivity in favour of PMPC.

[28] The proposed amended statement of claim contains the following allegation supporting the necessity for the addition of PMPC as a plaintiff:

> "The plaintiff PMPC is the corporate entity though which Dr. Platnick bills insurers, vendor companies and lawyers for the preparation of medical reports. *All of the income of PMPC is the income of Dr. Platnick*" (emphasis added).

[29] As pleaded, the corporate plaintiff is a mere agent or flow through vehicle with no interest in the underlying business at all. If the income is that of Dr. Platnick, it is not that of PMPC. It does not contract with insurers, vendor companies or lawyers. It is simply the company "through which" bills are sent. While I suspect that Dr. Platnick's admissions in this civil case have rather thoroughly undone whatever tax planning his accountants sought to accomplish with PMPC, the pleading effectively denies that PMPC has any beneficial interest in the income that it bills.

[30] Based on the facts as alleged by Dr. Platnick, I can see no basis whatsoever for his personal services corporation having standing in its own right to pursue Ms. Bent for damages arising from her alleged defamation of Dr. Platnick personally. An amendment must at least state a tenable cause of action. In my view, there is no tenable cause of action stated for which PMPC can claim to have suffered discrete damages separate and apart from those alleged to have been suffered by Dr. Platnick.

[31] Whatever the standing of PMPC to be added as a plaintiff viewing the matter solely through the lens of Rule 26.02 of the *Rules of Civil Procedure*, it is clear that leave ought not to be granted pursuant to s. 137.1(6) of the *CJA*. The corporation is not alleged to have suffered any damages or to have been involved in the facts of the claim except as an alter ego of Dr. Platnick. The cause of action is the same. Given my finding that the claim of Dr. Platnick is to be dismissed, it is clear that an amendment to add his alter ego to pursue the very same claim would frustrate the purpose and intent of s. 137.1 of the *CJA*. In my view, leave ought not to be granted pursuant to s. 137.1(6) of the *CJA* except in cases where granting the amendment sought would not directly or indirectly frustrate the purposes of the enactment.

[32] Adding a new party to the proceeding on the eve of its dismissal based and after full argument on the merits (of s. 137.1 of the *CJA*) has already taken place premised upon facts that the plaintiff has had before it for more than a year would be an abuse of process. It represents a transparent attempt to prevent this court from issuing an order under s. 137.1 of the *CJA* at the last minute. The language of s. 137.1(6) of the *CJA* is mandatory and I am satisfied that no satisfactory grounds exist for me to order otherwise in this case.

[33] I would therefore deny the motion to add PMPC as a party plaintiff to this action pursuant to Rule 26.02 of the *Rules of Civil Procedure* and pursuant to s. 137.1(6) of the *CJA*.

[34] The remainder of the allegations sought to be added by way of amendment to the statement of claim or by way of reply have been reviewed by me very carefully.

[35] The amendments plead additional details of the alleged "interview" given by Ms. Bent to *Insurance Business* magazine preceding the publication of the article quoting Ms. Bent's email in the December 29, 2014 issue. It is to be noted that the appearance of the article post-dated both Ms. Bent's dissemination of the email to the limited group of OTLA "Listserve" members on November 14, 2016 *and* the occurrence of the great bulk of the alleged damage to the plaintiff's expert witness practice that had manifested itself with cancelled bookings and a catastrophic tail-off in future bookings in November and early December according to Dr. Platnick.

[36] The plaintiff had 18 months to pursue that issue before argument of the s. 137.1 motion on its merits on June 27, 2016. The issue of the alleged "interview" given my Ms. Bent and Ms. Bent's position with respect to it was plainly joined in the pleadings by March 31, 2015. It was also squarely raised in Ms. Bent's affidavit filed on this motion that that affidavit was the object of cross-examination. The magazine article itself made clear that Ms. Bent's email was leaked to the magazine and by whom (the president of a public advocacy group named "FAIR" who included the email in a public advocacy letter to certain MPP's). Dr. Platnick's failure to cross-examine on that issue reflects his own tactical choices but cannot form the basis of a last-minute request to open new avenues for resisting the making of an order under s. 137.1 of the *CJA*. Permitting such a late amendment would substantially frustrate the intent of s. 137.1(6) in my view and ought not to be permitted.

[37] Other proposed amendments simply introduce into the pleading arguments or evidence already in the record or amplify pleadings already contained in the statement of claim. The speculation about what explanations Dr. Platnick may have been able to offer Dr. King had he testified at the Carpenter hearing pleaded in paragraphs 28-29 of the proposed amendment are nothing new and are already pleaded in summary fashion in paragraph 24 of the existing statement of claim in any event. Ms. Bent's failure to obtain Dr. Platnick's side of the story is already pleaded in paragraph 7 of the statement of claim. The facts pleaded in the proposed reply were substantially addressed in Dr. Platnick's affidavit in response to the motion and in cross-examination.

[38] The fact of the matter is that (i) *all* of the fresh allegations are matters that were either known or readily discoverable by the plaintiff in the 18 months between his action being commenced and the hearing of the motion to dismiss it; and (ii) all or substantially all of the matters raised in the amended pleadings are addressed in the pleadings already or referenced in the record that was already before me on June 27, 2016. The proposed amendments can form no basis to request argument on the motion to be re-opened or the process to be started afresh.

[39] In light of the foregoing, I cannot see that such amendments ought to be allowed given the clear policy of s. 137.1(6) of the *CJA*. The moving party on a motion brought pursuant to s. 137.1 of the *CJA* is not required to play a game of "whack-a-mole" with a constantly evolving pleadings landscape. The issues have all been squarely raised for a long time. Procedural fairness means that the defendant is entitled to have its day in court as well. Compelling reasons and evidence ought to be required to depart from the procedures established by statute in this case – neither is present before me.

[40] The plaintiff knew a "showdown" was imminent when the plaintiff announced her intention to bring summary judgment proceedings in January and learned that this was to become a s. 137.1 *CJA* motion instead almost one month before the motion was actually filed. Even the alleged late-breaking revelations of the statement of defence received in the parallel litigation against the publisher of the *Insurance Business* magazine article were received two weeks before

argument of the motion on June 27, 2016. The time to re-think how his claim was framed has long since passed.

[41] I would therefore decline to grant leave to amend the statement of claim or to authorize the late filing of a reply.

(c) Should Ms. Bent be compelled to answer a question refused on her cross-examination?

[42] The plaintiff sought an order requiring Ms. Bent to answer a refusal given on her June 6, 2016 cross-examination "to disclose the name of the individual who leaked the defamatory communication that is the subject matter of these proceedings to the Fair Association of Victims for Accident Insurance Reform".

[43] The plaintiff takes the position that the "entire factual matrix" surrounding the leaking of the email from the closed-circle of OTLA members to outsiders (including, eventually, to the Chair of FAIR who provided it to the author of the *Insurance Business* magazine) is claimed to be of central relevance to his case. Its relevance is alleged to be of particular importance to address the defence of qualified privilege and the question of malice. The importance of this piece of information acquired greater importance, according to the plaintiff, when the publisher of the *Insurance Business* magazine alleged in its own statement of defence (delivered on June 13, 2016) that it had contacted Ms. Bent about her leaked email prior to publishing it and Ms. Bent had confirmed both her authorship of it and its truth.

[44] The plaintiff's motion in my view is simply a case of too little being done far too late.

[45] Whether the statement of defence received from the publisher of the *Insurance Business* magazine can be considered "new" information or not, it was received on June 13, 2016 – two weeks before the motion was fully argued before me. The article in question disclosed who had leaked Ms. Bent's email to the journalist by name (the chair of FAIR) but did not disclose who had leaked it to her. The Chair of FAIR was not an OTLA member. Ms. Bent denied having given an "interview" to the journalist who wrote the article but confirmed that the OTLA member who had originally leaked the email had confessed to her. She also stated that she did not know if

that person (the OTLA person who leaked the document) had given it to FAIR directly or if the email passed through other hands before being given to FAIR. She declined to name the person who confessed to the original leak for the stated reason of not wishing to allow the plaintiff "the opportunity to go fishing for a cause of action against anybody else". Nothing in the affidavit of Mr. Reich filed in support of this motion (and apart entirely from its manifest infirmity) leads to any direct contradiction of any evidence given by Ms. Bent.

[46] Mr. Danson chose to leave the subject of the *Insurance Business* article almost entirely unexplored on cross-examination. The plaintiff now takes the position that this information is "crucial" to understand the full factual matrix and in particular to explore the subject of malice. Its relevance to malice is said to lie not in what is known but what is not known. The evidence *might* lead to the name of a witness who, if examined, *might* contradict Ms. Bent's testimony about not knowing how the email was given to FAIR and the journalist leading the way to an inference that she played a greater role in the dissemination of the email than claimed, in turn possibly suggesting an inference of malice.

[47] There is another term for that mental exercise: pure speculation. Pure speculation is the antithesis of "credible and compelling information" leading to the conclusion that the offered affirmative defence is not valid.

[48] I can see no valid reason for re-opening the evidence-gathering phase of a case that has been fully argued in order to permit the plaintiff to explore speculative avenues that he chose not to explore in depth or at all when he had the opportunity to do so.

[49] I declined to order the question to be answered at this late stage.

(d) Should retroactive leave be granted for the filing of the Second Supplementary Responding Motion Record?

[50] On October 4, 2016, the plaintiff filed its "Second Supplementary Motion Record". It contained the affidavit of Mr. Stephen Reich, a lawyer in Mr. Danson's office, and a further affidavit of Dr. Platnick. The plaintiff sought retroactive leave for having done so.

[51] The defendant cites Rule 39.02(2) of the *Rules of Civil Procedure* and claims that the plaintiff, having cross-examined on Ms. Bent's affidavit, is precluded from filing new evidence without leave. I agreed with the defendant's position and dismissed this aspect of the plaintiff's motion at the hearing.

[52] It is in my view important to distinguish between two potential uses of the affidavits contained within the Second Supplementary Motion Record of the plaintiff. Clearly leave is required if they are to be used for the hearing of the same motion for which the plaintiff has filed evidence and already conducted a cross-examination of the adverse party: Rule 39.02(2) of the *Rules of Civil Procedure*. That conclusion would apply to the motion of Ms. Bent under s 137.1 of the *CJA* that was heard on June 27, 2016 and its continuation to hear the Charter issues on November 17, 2016 to the extent the affidavits might be relevant to that motion. Leave is *not* required however to file the affidavits in support of the preliminary Notice of Motion heard at the outset of the hearing on November 17, 2016.

[53] It is clear to me that the Second Supplementary Responding Motion Record was intended at least to some degree for both purposes..

[54] The affidavit of Dr. Platnick sworn September 30, 2016 is nothing more than an attempt to add evidence relevant to the motion argued on June 27, 2016. Indeed, that purpose is clearly stated in paragraph 3 of the affidavit that makes it clear the genesis of the affidavit is Dr. Platnick's desire to respond to questions and issues raised in argument on that day. His affidavit is of no conceivable relevance to the preliminary motion heard on November 17, 2016.

[55] Mr. Reich's affidavit on the other hand, rife with double and triple hearsay though it may be, is nevertheless aimed primarily at the relief sought in the preliminary motion and is clearly admissible for that limited purpose. No leave on my part was required to file it *for that purpose* (apart from the fact it was premature because the plaintiff did not file the present Notice of Motion for the preliminary motion until November 9, 2016).

[56] I shall address here only the issue of whether leave ought to be granted to file the two affidavits for the purposes of the record of the defendant's motion pursuant to s. 137.1 of the *CJA*.

[57] The Divisional Court in *First Capital Realty Inc. v. Centrecorp Management Services Limited*, 2009 CanLII 75631 (ON SCDC) summarized the issues to be considered when leave to introduce affidavit evidence following cross-examination is sought pursuant to Rule 39.02 of the *Rules of Civil Procedure* as follows (at paras. 9-10):

> 1) Is the evidence relevant?
>
> 2) Does the evidence respond to a matter raised on the cross-examination (not necessarily raised for the first time)?
>
> 3) Would granting leave to file the evidence result in non-compensable prejudice that could not be addressed by imposing costs/terms/an adjournment?
>
> 4) Did the moving party provide a reasonable or adequate explanation for why the evidence was not included at the outset?
>
> 5) Is it in the interests of justice to do so even where these criteria are not met?

[58] Is the proposed evidence relevant? I do not think it necessary to embark upon a paragraph by paragraph review of the two affidavits. Some of the evidence is arguably irrelevant. Much is double or triple hearsay. However, clearly there is *some* relevant evidence contained in the affidavits.

[59] Does the evidence respond to matters raised on the cross-examination? While the matters addressed by the new affidavits need not necessarily have been raised "for the first time" on cross-examination, the fact that something was not raised for the first time may well impact the adequacy of the explanation offered for not having adduced evidence from the outset.

[60] The plaintiff has not alleged nor attempted to show me how the affidavits address issues raised on cross-examination. I have read the cross-examination transcripts. While clearly some aspects of the subject matter of one or the other affidavit were also addressed in cross-examination to some degree, it cannot fairly be alleged that the substance of either affidavit is in *response* to any matter raised on cross-examination nor does either affidavit allege that it is so. Dr. Platnick's affidavit purports to be in response to oral argument heard on June 27, 2016 and consists of evidence he might easily have included had he thought it necessary or advisable. Mr. Reich's affidavit ostensibly explains exchanges arising following receipt on June 13, 2016 of the statement

of defence of the publisher of the Insurance Business magazine but otherwise relates to matters barely touched upon in cross-examination of Ms. Bent.

[61] In my view *neither* of the two affidavits can fairly be described as responding to matters raised on cross-examination.

[62] Would granting leave lead to non-compensable prejudice? I can see no basis on the evidence before me to allege that granting leave would create non-compensable prejudice in this case in a narrow sense.

[63] If granting leave opened the substance of the June 27 hearing for re-argument, further costs would certainly be incurred. Such costs are compensable and there is nothing before me to suggest that Dr. Platnick would be unable to pay such costs if assessed against him. While further delay in dealing with the substance of the s. 137.1 motion would have the potential to produce added "libel chill" effects that the statutory reform was intended to mitigate, I can see no basis to presume that the additional "chill" would be so material as to be non-compensable.

[64] I am however required to consider that a re-opening of the matters heard on June 27, 2016 would take the hearing of this motion far beyond any semblance of adherence to the mandatory 60 day timeline prescribed by s. 137.2(2) of the *CJA*, a prescription that counsel for the plaintiff has clearly found inconvenient, even extremely inconvenient. At the very least, that prescribed timeline requires me to consider whether it was reasonably possible to have introduced the evidence in the prescribed time. It is plain and obvious to me that all or substantially all of the evidence introduced could, with reasonable diligence, have been introduced in a timely fashion. The *Charter* hearing scheduled for November 17, 2016 was not a departure from s. 137.2(2) of the *CJA* since the issue before me at that hearing was, among other things, the validity of s. 137.2 of the *CJA* itself and in no way concerned the merits (exclusive of the *Charter*) of the motion heard and taken under reserve on June 27, 2016. Whether this consideration be characterized as "non-compensable prejudice" or more properly an argument to be considered under the heading "reasonable or adequate explanation" is of lesser importance than the fact that this consideration weighs in the balance against granting the leave sought.

[65] Has the plaintiff a reasonable or adequate explanation?

[66] Dr. Platnick's affidavit is nothing more than a grab bag of *ad hoc* responses to various and sundry arguments and issues that arose or occurred to him during the course of oral argument. There is no explanation offered for why those issues were not addressed earlier.

[67] In *Brock Home Improvement Products Inc. v. Corcoran*, 2002 CanLII 49425 (ON SC), Stinson J. raised the spectre of the never-ending motion if leave were granted too readily. I agree with his admonition. Leave ought to be granted sparingly and the explanation for the omission must be carefully scrutinized to guard against this risk. Regrets about arguments not made and evidence not led are part of the life of an advocate. However, decisions must be made and hearings must end.

[68] The plaintiff has offered no explanation whatsoever for why any of the evidence contained in Dr. Platnick's affidavit was not introduced earlier. There can be no suggestion that the affidavit addresses newly discovered evidence. All of it addresses matters known to him for some time.

[69] Mr. Reich's affidavit largely attaches correspondence between counsel that took place after the completion of argument on June 27, 2016. While such correspondence between counsel is rarely "evidence" of anything beyond procedural history, it does at least chronologically post-date the hearing of the motion. That crude fact of timing however is not sufficient to qualify the issues addressed in the correspondence as "newly discovered evidence".

[70] The *issue* addressed by Mr. Reich's affidavit relates primarily to the role played by Ms. Bent in confirming her authorship of the email that was leaked (through an unknown number of hands) to the Chair of FAIR and from her to the journalist writing the *Insurance Business* magazine article published in late December 2014. That issue is one that was squarely raised in the pleadings in this action more than a year prior to the affidavit and was touched upon only slightly in cross-examination.

[71] I do not find that the plaintiff has offered a reasonable explanation for the failure to place the evidence contained in the two new affidavits before the court prior to conducting his cross-examination of Ms. Bent.

[72] Is it otherwise in the interests of justice that I allow the evidence to be filed at this stage? In my view it is not. To the contrary, allowing these two affidavits to be added to the record of a motion already fully-argued and taken under reserve would be a clear abuse of process.

[73] Accordingly, I declined to grant leave *nunc pro tunc* to permit the two affidavits contained in the Second Supplementary Responding Motion Record to be filed as evidence for the defendant's motion pursuant to s. 137.1 of the *CJA*. The affidavit of Mr. Reich only is permitted to be filed and solely for the purposes of the plaintiff's preliminary motion heard on November 17, 2016.

Disposition

[74] For the foregoing reasons, I decline to grant leave pursuant to s. 137.1(6) of the *CJA* and Rule 26.02 of the *Rules of Civil Procedure* to the requested amendment to the statement of claim and the request to file a reply after the close of pleadings.

[75] At the conclusion of the hearing of this preliminary motion on November 17, 2016, I dismissed the balance of the plaintiff's motion for the brief reasons given and the more detailed reasons that I have now delivered. As is clarified in these reasons, the affidavit of Mr. Reich is admitted into evidence solely for the purpose of the plaintiff's preliminary motion as outlined in his notice of motion dated November 8, 2016. Leave to file the Second Supplementary Motion Record as part of the record of the defendant's motion pursuant to s. 137.1 of the *CJA* is specifically denied and that record is not part of the record of that motion.

[76] Ms. Bent is entitled to her costs of this motion. Having already awarded her costs of the motion under s. 137.1 of the *CJA* and of the action that I have dismissed, no further order on my part is required. For greater certainty, the costs of this motion are included in that costs order. No

other party responded to this preliminary motion substantively and no other costs orders are required.

S. F. Dunphy J.

Date: December 1, 2016