IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CP 175/99

BETWEEN **TANIA BREITMEYER**

Plaintiff

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AND **THE CHRISTCHURCH PRESS COMPANY LTD**

First Defendant

AND **THE ATTORNEY-GENERAL**

Second Defendant

Date of Hearing: 7 February 2001

Counsel: C J O'Neill for Plaintiff
J B Stevenson for First Defendant
D J Boldt for Second Defendant

ORAL JUDGMENT OF MASTER VENNING
On Defendants' Application For Security For Costs

Solicitors:
Glover Sewell, Christchurch for Plaintiff
(Counsel – C J O'Neill, Christchurch)
Atkinson Butterworth, Auckland for First Defendant
(Counsel – J B Stevenson, Wellington)
Crown Law, Wellington for Second Defendant

APPLICATIONS

[1] Both Defendants apply for orders for security for costs against the Plaintiff in this proceeding. The applications are opposed by the Plaintiff.

BACKGROUND

[2] These proceedings have previously been considered by the Court on the Defendants' applications for summary judgment. In a decision delivered on 30 June 2001 the Defendants' applications for summary judgment were declined.

[3] The background to these proceedings can be taken from that judgment:

> [3] On 10 October 1997 the Plaintiff pleaded guilty to the sale of a class C controlled drug, namely cannabis, and to possession for supply of the same class of drug. The offending related to a period from 1 January 1997 to 24 June 1997.
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> [4] Subsequently, in March 1998, the Plaintiff stood trial in the High Court at Christchurch in relation to more serious charges. She was acquitted of those charges. Following her acquittal on the more serious charges the First Defendant ran an article on 10 March 1998 under the headline "woman bitter over drug trial ordeal".
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> [5] On 2 April 1998 the Plaintiff was sentenced to two years imprisonment on the two charges that she had pleaded guilty to. On 3 April 1998 *'The Christchurch Press'* published another article under the headline "8 jailed after raid", detailing the sentences handed down to the Plaintiff and seven others. The Plaintiff makes no complaint regarding the articles of 10 March and 3 April.
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> [6] The article of 10 March was written by Elinore Wellwood. After the publication of Ms Wellwood's article of 10 March, *'The Christchurch Press'* received representations from the Police to the effect the article portrayed the Plaintiff in too favourable a light, and that she was in fact a person involved in matters relating to drugs. The Police indicated they were willing to discuss with the *'The Christchurch Press'* matters relating to operation "Comalco" which had led to the arrest and conviction of the Plaintiff and others. A discussion between Mr John Henzell, a court reporter, and Det Snr Sgt Greg Williams followed during July; which in turn led to the article published by *'The Christchurch Press'* on 28 July 1998 under the heading "Softly, softly approach nets police big gang drugs bust". It is that article which the Plaintiff alleges has defamed her in a number of ways.
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> [7] The Plaintiff complains of the following passages from the article:

"We quickly established that there were three independent syndicates operating in the Black Power set up and dealing in drugs."

"A third was organised by Tania Breitmeyer, a 23 year old beneficiary who had somehow managed to accumulate a Harley Davidson motor cycle and five cars."

"In some ways they were competing with each other and had sophisticated means."

Particularly the Breitmeyer one that was quite structured in what they were doing. They would rent a property, put someone in there as a shopkeeper, and have runners delivering cannabis foils and picking up cash."

"At one time the group was running nine shops. They were selling to anybody, including school kids, and they were turning over $3,000 - $5,000 per day."

"At one stage there were more than 50 arrests and a resulting string of trials. Altogether, there were 45 convictions. Breitmeyer, who had just given birth to a baby, was sentenced to two years in jail in April."

"Senior Sergeant Williams said that for devoting a core of 15 Police staff to Operation Comalco for three months, Police had been able to strike a significant blow to Black Power operations in Christchurch."

"Stage 4 of Operation Comalco is still underway – seizing dealer's assets under proceeds of crime legislation ... They (the Police) were seeking Breitmeyer's Harley Davidson and her bevy of cars."

"'It's all about money isn't it?' he said ... 'They don't really give a stuff about prison, but if you take assets and their bikes off them it really hurts.'"

[8] Following her release from prison the Plaintiff commenced these defamation proceedings against the First and Second Defendants. The proceedings were commenced in the District Court in September 1999. By consent the proceedings were transferred to this Court on 9 November 1999. Both Defendants have now brought applications for summary judgment."

[4] Following the delivery of the judgment declining the applications for summary judgment the proceedings were reviewed again before the Court on 7 September 2000. In the minute of that telephone conference it was recorded that:

"[1] The judgment delivered 30 June identified and recorded a number of defects in the Plaintiff's current pleading. Mr O'Neill accepts that an amended statement of claim will be required."

A direction was made requiring the amended claim to be filed and served by 22 September 2000.

[5] In the event the amended claim was not filed and served until 27 October 2000. Following consideration of that amended claim the Defendants have brought these applications for security.

RULE 60

[6] The applications for security are made under r60:

"(1) Where the Court is satisfied, on the application of a defendant,—

(a) That a plaintiff—
(i) Is resident out of New Zealand; or
(ii) Is a corporation incorporated outside New Zealand; or
(iii) Is, within the meaning of section 158 of the Companies Act 1955 or section 5 of the Companies Act 1993, as the case may be, a subsidiary of a corporation incorporated outside New Zealand; or]]

(b) That there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the plaintiff's proceeding,—

the Court may, if it thinks fit in all the circumstances, order the giving of security for costs.

(2) An order under subclause (1)—

(a) Shall require the plaintiff or plaintiffs against whom the order is made to give security for costs in respect of such sum as the Court considers sufficient—
(i) By paying that sum into Court; or
(ii) By giving, to the satisfaction of the Registrar, security for that sum; and

(b) May stay the proceeding until the sum is paid or the security given, as the case may be.

(3) This rule—

(a) May apply, if the Court thinks fit, although a plaintiff may be temporarily resident within New Zealand; and

(b) Shall apply notwithstanding that the defendant may have taken a step in the proceeding before making his application for security.

(4) The references in this rule to a plaintiff and a defendant shall be construed as references to the person (however described on the record) who is in the position of plaintiff or defendant, as the case may be, in the proceeding, including a counterclaim."

PRINCIPLES

[7] Insofar as r60(1)(b) requires a threshold to be established as to the Plaintiff's impecuniosity counsel for the Plaintiff conceded that the threshold test was met and that the Plaintiff was impecunious. That was a concession properly made. It is apparent on the evidence before the Court on this application that the Plaintiff has applied for legal aid. She is described throughout the proceedings as a beneficiary and there has been no effort on her behalf to set out her financial situation.

[8] The sole issue for the Court on these applications is whether in the exercise of the Court's discretion an order for security ought to be made or declined.

[9] Before dealing with the issue of the exercise of the Court's discretion I record that although there was a suggestion at one stage of the involvement of legal aid, the evidence before the Court confirms that legal aid was declined some time ago. Mr O'Neill also confirmed from the bar that although the application for legal aid was resubmitted he has heard as recently as 1 February this year that the second application for legal aid has been declined. The application can be dealt with on the basis that legal aid has not been granted to the Plaintiff and is not a consideration.

[10] The principles that the Court must apply when exercising its discretion are relatively settled and have been referred to in a number of decisions. There is no predisposition one way or the other. The Court's discretion must be exercised as is appropriate in all the circumstances of the case by maintaining a balance in the interests of justice and by endeavouring to avoid depriving a party from bringing a claim by the presence or absence of security for costs: *Nikau Holdings Ltd v BNZ* (1992) 5 PRNZ 430. However, in considering whether to make an order for security the Court must also take into account the interests of the Defendants facing a large claim with no prospect of recovery of costs against an unsuccessful impecunious person: *Hamilton v Papakura District Council* (1997) 11 PRNZ 333.

RELEVANT FACTORS

[11] In the present case the factors that are relevant to the exercise of the Court's discretion are the merits of the Plaintiff's case and the submission made by Mr O'Neill that the reality is that if security is ordered in this case the Plaintiff will not be able to provide security and it will be an effective end to the Plaintiff's claim.

[12] No issue was taken as to the delay in bringing the proceeding. Again that was a proper concession by Mr O'Neill given the history of this case and the proceedings to date.

Merits

[13] As to the merits of the case both counsel for the Defendants and also counsel for the Plaintiff referred to the earlier judgment on the application for summary judgment.

[14] The First Defendant brought the application for summary judgment relying solely upon a defence of qualified privilege. For the reasons set out in the judgment the Court found that the qualified privilege defence was not available to the First Defendant newspaper.

[15] In its application for summary judgment the Crown pursued a number of grounds – both a criticism of the Plaintiff's claim generally and it also raised a number of positive defences. A number of the criticisms of the Plaintiff's claim would have applied equally to the claim against the First Defendant. At the end of the day the Second Defendant was not able to bring the Court to the position where it could be satisfied that it had an absolute defence to the claim because of one allegation in particular. For that reason the entire application for summary judgment was declined.

[16] There are a number of comments made during the course of the judgment that are relevant to the question of the merits of the Plaintiff's claim:

> "[38] The criticism of the pleading is justified. A number of examples will suffice. It is apparent that a number of the comments complained of can not be attributed to the New Zealand Police. For example, the complaint that in its ordinary meaning the article meant and was intended

> to mean the Plaintiff owned a Harley Davidson motorcycle purchased from the proceeds of drug sales comes, according to Mr Henzell's evidence, from the sentencing report earlier published by *'The Christchurch Press'* on 3 April 1998. That was a statement made by the Crown Prosecutor, not the Police.
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> [42] I accept Mr Rennie's general point that the claim as it presently stands is poorly pleaded. However, this is not an application to strike out part(s) of the claim. It is an application for summary judgment. To succeed, the Second Defendant must satisfy the Court that the Plaintiff's cause of action in defamation can not succeed.
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> [56] In summary, while a number of the defamatory meanings complained of by the Plaintiff are either not capable of being defamatory, were apparently not issued by the Second Defendant, or otherwise are true or not materially different from the truth, the allegation that in its ordinary meaning the article meant the Plaintiff sold cannabis to school children is potentially defamatory of the Plaintiff, and at the present time on the information before the Court the Second Defendant can not satisfy the Court that it has an absolute defence to that allegation."

[17] It is apparent from the judgment that it was the Court's view that a large part of the claim as pleaded was not sustainable but that the allegation, particularly that the Plaintiff sold cannabis to school children, could be potentially defamatory.

[18] Despite the indications in that judgment and the subsequent telephone conference the amended statement of claim has largely repeated the matters that were criticised in the earlier judgment.

[19] In submission Mr Boldt addressed the evidence from the Plaintiff's trial in the High Court on the criminal charges. He noted that the Plaintiff in her own evidence had admitted that she had set up some "tinnie shops", that she had made the mistake of getting involved in the sale of cannabis, that she was found with two deal bags of cannabis and $4,000 cash about her person, that she was living with a member of the Black Power gang and knew many members of the Black Power gang. She also admitted to owning motor vehicles and having a half share in a Harley Davidson motor vehicle, and that she had travelled overseas during the period of offending despite remaining on a benefit.

[20] From her own evidence the Plaintiff was heavily involved in a sophisticated drug operation. Chisholm J, the Judge who presided at the criminal trial, the sentencing that followed of the Plaintiff and others, and on an application for forfeiture by the Crown noted in relation to the Plaintiff in his sentencing:

> "There has been some debate about your role. My interpretation of the evidence is that you played a key role in this operation. You implemented an efficient supply and distribution of cannabis. It is not without significance that when you were arrested you had on your person two ounce deal bags as well as $4,000 in cash. It is not so much a question of ownership of that cash as the fact that it was in your possession at the time you were arrested. Possession of that quantity of cash without explanation provides as pointer as to your role in the operation. In addition intercepted telephone conversations were able to fill in gaps as to your role."

And later:

> "... I am not prepared to allow you to hid behind Ms Nathan. I do not think that you were *'caught up'* in this operation. My assessment is that you entered it knowingly and quite deliberately."

[21] The Plaintiff was ultimately sentenced to two years imprisonment, the same sentence that was imposed upon Mr Phillips.

[22] In her substantive proceedings the Plaintiff seeks damages for allegedly defamatory statements. A consideration of the merits of the claim and the likelihood of the Plaintiff succeeding in the claim must involve a consideration of the Plaintiff's existing reputation. It has to be accepted by the Plaintiff that it is inevitable at any substantive hearing of this proceeding she will be found to be a drug dealer involved in a significant way in the sale of drugs in a sophisticated drug operation.

[23] As noted by the Court in the application for summary judgment, the principal basis for complaint by the Plaintiff is the suggestion in the article that she was involved in the sale of drugs to school children. As to that in the earlier judgment it was noted that the allegation in the report was:

> "At one time the group was running nine shops. They were selling to anybody, including school kids, and they were turning over $3,000 - $5,000 per day."

[24] Detective Fitzgerald's evidence is that the Plaintiff was not charged with selling cannabis to minors but surveillance revealed school children were customers and while the search warrant was being executed by the Police school children

arrived and produced cash to purchase drugs. While the Plaintiff was not specifically identified as having sold cannabis to minors the evidence the Police will be able to adduce at the substantive hearing is that school children were customers of the house and the Plaintiff was involved in the drug selling operation from that house.

[25] While on the evidence that was before the Court at the summary judgment hearing it could not be said the statement that she was involved was true or not materially different from the truth so that the Defendant could establish an absolute defence, the Plaintiff will have to accept at trial that she was involved in the operation that was itself involved in the sale of drugs to minors.

[26] The reality is that the Plaintiff's claim in defamation on this and any other possible basis that might remain in the amended claim is likely to lead to a modest award, if any award of damages is made at all. The Plaintiff will have to accept that she is a person whose reputation is, as Mr Boldt submitted, in relation to drug dealing "in tatters".

[27] In summary the Plaintiff's claim has little merit from a strictly legal point of view given her existing reputation, the claims that responsibly could be pursued on her behalf, and the evidence that is already before the Court about her actions.

Is the Plaintiff entitled to a hearing?

[28] That leaves the second issue for consideration in this case. Mr O'Neill submitted that if an order for security is made it will prevent the Plaintiff from pursuing her claim at all.

[29] While the Court is reluctant to make an order for security where such an order will prevent a Plaintiff from pursuing a claim, as noted by Hammond J in *Hamilton v Papakura District Council* (supra) the reality of the cost of litigation to the Defendants must also be considered. As Hammond J put it:

> "... in contemporary circumstances, it really will not do for Courts to approach these sorts of issues on a simplistic 'the plaintiff is entitled to a day in Court' thesis. The economic realities of a case must be looked to." P336

[30] Certainly if it could realistically be said the Plaintiff's claim had substantial merit or that the Plaintiff's impecuniosity had been caused by the Defendants then the Court would be very reluctant to make an order for security if such an order would be likely to prevent the Plaintiff from pursuing the meritorious claim and having her day in Court. However, here the Plaintiff does not have a particularly meritorious claim, nor can it be said her impecuniosity is as a result of the actions of either of the Defendants.

[31] Further, as Mr Boldt noted and as is the Court's experience, the Crown very rarely becomes involved in applications for security for costs and it is only because of the clear view taken by the Crown that these proceedings have no merit but could be very expensive for the Crown to defend that the Crown has brought this application for security.

[32] While a Plaintiff's right to have her day in Court is an important consideration, so also is the position of the Defendants. Defendants ought not to be effectively subject to economic blackmail so that to avoid the prospect of a one or two week hearing of a weak claim against them by an impecunious Plaintiff they are effectively compelled to settle on an economic basis. Such a situation does not serve the ends of justice any more than denying a Plaintiff his or her right to a hearing.

[33] It follows that the Defendants satisfy the Court it is appropriate to make an order for security for costs against the Plaintiff in this case.

QUANTUM

[34] Neither Mr Boldt nor Mr Stevenson had carried out the exercise of calculating what an order for costs on a 2B basis for a one or two week trial might be. Mr Stevenson's initial impression was the trial might take a week. Mr Boldt submitted two weeks was more likely, and I understood Mr Stevenson to accept that estimate was likely to be more realistic upon reflection.

[35] Given the change to the High Court Rules it is likely that any costs orders on interlocutory applications between now and the hearing will be fixed and be payable following the applications. The Court can approach the quantum in this case on the basis of a consideration of the costs of trial and preparation for trial as allowed by

schedule 3. A five day hearing with ten days allowed for preparation would give a total time of 15 days attributable to the hearing and preparation, apart from any interlocutory matters between now and trial. On my calculations on a 2B basis with a daily recovery rate of $1,300 that would lead to an order for costs of $19,500 to each Defendant. Obviously that would be doubled in the event of a 10 day hearing.

CONCLUSION

[36] In the circumstances of this case I do not consider security ought to be ordered at a level of full recovery but it should be a significant contribution. There will be an order that the Plaintiff provide security to the First and Second Defendants in the sum of $10,000 each. Such security to be provided by 30 March 2001 to the satisfaction of the Registrar of the High Court at Christchurch. In the event security is not provided the proceedings against the Defendants will be stayed and the Defendants will have leave to apply to dismiss the proceedings against them.

COSTS

[37] The Defendants having succeeded on this application for security are entitled to costs. There will be an order for costs in favour of each Defendant on a 2B basis together with disbursements as fixed by the Registrar. Disbursements to include the reasonable travelling expenses of counsel.

MASTER VENNING