

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M 1415sd00

5.6.0

IN THE MATTER of the Defamation Act 1992

BETWEEN **RW DOUGLAS**

Plaintiff

AND **SD McKENZIE**

Defendant

Hearing: 24 July 2001

Counsel: SJ Tee for plaintiff
IM Gault and SJ McVicar for defendant

Judgment: 25 July 2001

JUDGMENT OF MASTER FAIRE

Solicitors:

Morton Tee, PO Box 331 133, Takapuna for plaintiff
Bell Gully, PO Box 4199, Auckland for defendant

[1] The plaintiff applies for an order staying this proceeding. The plaintiff relies on the combined operation of Rule 477 of the High Court Rules, s 78 of the Friendly Societies and Credit Unions Act 1982 and Rule 62 of the Onehunga Workingmen's Club's Rules.

[2] The plaintiff has been a member of the Onehunga Workingmen's Club Inc since 1948. He has served as its president and as its trustee. The defendant has been a member since 1992. He has served on a committee in each year since 1996. He has been the Chairman of the Inquiry Subcommittee since 1998.

[3] In about 1993 and 1994 substantial funds were misappropriated from the Club. The plaintiff alleges that on 31 May 1999 the defendant made a statement to Belinda Kyne and Bruce Bolton and others. He alleges that they are both members of the Club. He alleges that the comments were made within the precincts of the Club. The comments that are alleged to have been made by the defendant are the following:

Bob Douglas should never have been appointed trustee of the Club and he should be banned (from the Club) for life. He has supported the appointment of the same auditors (as had been appointed previously) at the AGM, and anyone who supports those auditors, who for some time have failed to inform the Club that it had been ripped off, leaves one wondering if that person has his finger in the pie.

[4] The plaintiff issued this proceeding alleging that the statement was untrue and defamatory of him. The plaintiff claimed a declaration that the defendant is liable in defamation. He seeks damages and costs.

[5] It is appropriate that I now record the specific basis advanced for this application for stay. In the first place, reliance is placed on Rule 477 of the High Court Rules which provides:

Where in any proceeding it appears to the Court that in relation to the proceeding generally or in relation to any claim for relief in the proceeding—

- (a) No reasonable cause of action is disclosed; or
- (b) The proceeding is frivolous or vexatious; or
- (c) The proceeding is an abuse of the process of the Court,—

the Court may order that the proceeding be stayed or dismissed generally or in relation to any claim for relief in the proceeding.

[6] In the second place the application relies on s 78 of the Friendly Societies and Credit Unions Act 1982. It is common ground that that Act applies to the Onehunga Workingmen's Club. The relevant parts of s 78 of the Friendly Societies and Credit Unions Act 1982 in relation to this proceeding are the following:

- (1) In this section, the expression dispute—
 - (a) Includes any dispute arising on the question whether a member or person aggrieved is entitled to be, or to continue to be, a member or to be reinstated as a member;
 - (b) In the case of a person who has ceased to be a member, does not (except as provided in paragraph (a) of this subsection) include any dispute other than one on a question between him and the registered society or branch, or an officer thereof, which arose when he was a member, or arises out of his membership of that society or branch.

- (2) Subject to this Act, every dispute between—
 - (a) A member, or person claiming through a member or under the rules of a registered society or branch, and the society or branch or an officer thereof; or

...

shall be decided in the manner directed by the rules of the society or branch (including the appointment of an arbitrator or umpire); and the decision so made shall be binding and conclusive on all parties.

[7] The third matter relied upon is Rule 62 of the Rules of the Onehunga Workingmen's Club Inc. That Rule provides:

Every dispute between a member or person claiming through a member, and the Club or an Officer thereof shall be decided by the Committee, and the decision so made shall be binding and conclusive of all parties without appeal, and shall not be removable into any court of law or restrainable or injunction, and application for the enforcement therefore may be made to a District Court.

[8] The first question that requires examination is whether this is a dispute between a member and an officer of the Club. Unfortunately the statement of claim does not plead the time when the alleged statement was made. Rule 27 of the Club's Rules requires the Annual General Meeting to be held on the fourth Sunday in May of each year. In the 1998/99 year, the defendant was elected to the Committee. He stood for the office of president at the Annual General Meeting in 1999 but was not elected. He did not separately stand for a Committee in 1999. The first meeting of the new Committee following the Annual General Meeting in May 1999 was scheduled for Monday, 31 May 1999 at 5.30pm. The defendant retained his office as Committee Member pursuant to Rule 19 of the Club's rules. Rule 19 provides that the:

Club Committee shall remain in office ... until the first meeting of the ... Club Committee.

Rule 23 of the Club's Rules permits the Committee to fill any vacancy until the next Annual election. I was provided with a set of Minutes which indicate that the Committee in fact voted at the meeting on 31 May to appoint the defendant a Committee Member.

[9] Counsel concede that there was a problem with this application in relation to the status of the defendant on or about 31 May 1999 and, in particular, whether he held office at that time. Mr Tee, for the plaintiff, sought leave to file a declaration from a Mr GJ Kyne, who was elected a Committee Member at the 1999 Annual General Meeting. He attended the first meeting but left part way through. His declaration does not provide precise evidence as to whether he was present at the time when the resolution was put appointing the defendant a Committee Member.

The Minutes of the meeting which were produced in a further affidavit from the defendant, in respect of which I gave leave to file having regard to the plaintiff having filed the declaration of Mr Kyne, indicates that at least Mr Kyne's vote was counted in relation to the resolution to appoint the defendant a member of the Committee.

[10] There may be some doubt as to whether the defendant was appointed a Committee Member. The likelihood, however, is that for a short period of time, that is from the time of the commencement of the meeting until the passage of the resolution appointing him a Committee Member, he was not an officer of the Committee. Herein lies a problem. It arises from the fact that there is, at least in the evidence, an implication that the statement which is the subject of this proceeding was made after the commencement of the meeting and before the appointment. I say an implication. The evidence is far from clear and I indicated to counsel that if this application turned on whether or not the defendant was an Officer of the Club I would adjourn the application and allow further evidence to be introduced first by the plaintiff and then with a right of reply by the defendant. The evidence would have to cover:

- [a] The time when it is alleged the statement referred to in the statement of claim was made;
- [b] The time when the Committee Meeting opened (presumed to be 5.30pm having regard to the minutes);
- [c] The time when the meeting appointed the defendant a Committee Member or whether he could be appointed because of a lack of a quorum.

[11] For reasons which I shall outline, in my view, it is not necessary to decide that particular point. That is because I have reached the view that Rule 62 of the Club Rules and s 78 of the Act do not embrace all disputes which exist between persons who are members of the Club on the one hand and who may be the holder of Office of the Club on the other hand. Indeed, Mr Gault accepted that there had to be

some link between the type of dispute and the parties to it, to the overall objects of the Club before the Club's Rule and the section in the Act will apply.

[12] Both counsel referred me to the only two authorities that their researches had discovered. In *Osborne v Wilson* (1902) GLR 268 a question arose as to the jurisdiction of a stipendary magistrate to hear a claim by a surgeon for payment of his fees. The Society had secured the services of two surgeons to attend on its members. One of the members of the Society, who was on one of the surgeon's lists, required urgent aid for a child. The surgeon could not attend as he had met with an accident. Another surgeon attended. He recommended that the child be removed to a public hospital for an operation. The parent of the child objected on the grounds that the Society's doctor would not then be in charge. The child was then taken by the surgeon and removed to a private hospital. The surgeon then sued for his fees on the basis that his attendance was on a private capacity basis and not on behalf of the Society. The Supreme Court, in hearing an appeal, considered the question of whether the stipendary magistrate who heard the claim for recovery of the surgeon's fees in fact had jurisdiction to hear the case. The issue was whether or not the case fell within the compulsory arbitration provisions of the Society's Rules and the provisions of the then s 27 of the Friendly Societies Act 1882. At page 270 of the report the Court said:

This is a claim by one who is, it is true, an officer of the court [sic, Society] but the claim is not qua officer and is, in my opinion, outside the Rules of the District Society. Nor does it come under s27 Friendly Societies Act 1882. It is not a dispute between a member of the Society and the Society's officer. The dispute is as to a bargain not made between the member as a member and the officer as an officer.

[13] In the second case, *Fussell v Amos & Others* (1936) GLR 87, the Supreme Court had to consider whether a member's claim in negligence against a club following an accident on the club's premises should be referred to the club. The Court held that the dispute did not concern the plaintiff as a member. Northcroft J at page 89 referred to *Marson v Glover* 19 LJ Ex 20 where Pollock CB said:

Now, we are of opinion that if any other rule be established than that the dispute must be with the party as member – if we go beyond that one step – the consequence would be that any extraneous matter of

any sort that might happen to arise between the society and any of its members, having no connection with the society, would become the subject matter of reference. It appears to us, therefore the words “matter in dispute” must be read matter in difference between the society and the members as members, and not in any other capacity.

His Honour later referred to a passage from Halsbury’s Laws of England (2nd ed) Vol 15, para 698 where the authors stated:

Disputes between a society and a member not in his capacity as member – eg a claim by a society against one of its officers for misappropriation of funds, or as to the title of the administrator of a deceased member to represent the member, or a dispute with a member as mortgagor or mortgagee – are not disputes within this class.

[14] His Honour then held at page 89:

This present dispute does not, in my opinion, involve a member as a member as would be the case where it concerned a claim by him of rights and privileges as such. The action here would be equally maintainable were the plaintiff not a member. For instance, a brewer’s carrier might have been in the position and sustained the same injuries as are alleged by the plaintiff.

[15] In my view, that reasoning applies to the present proceeding. This is a proceeding in defamation. Whilst it is true that the statement complained of was made to Club members by a member of the Club and in the precincts of the Club, it seems to me that the proceeding itself is not a claim by a member in his capacity as member against an officer of the Club in the officer’s capacity as an officer of the Club. It is not a dispute about membership. It is not a dispute concerning compliance with the rules of the Club or the running of the Club. Nor is it a dispute covered by the Rules for this particular Club.

[16] I do not overlook the fact that Rule 45 of the Rules of the Club permit the Committee to hold a judicial inquiry into the

alleged misconduct or conduct prejudicial to the peace and harmony of the club ...

In my view, this claim is not such a claim. I put to counsel that it would be difficult to see how a specific dispute could be framed in terms of the Club’s Rules that

would justify the Club making some determination in relation to a claim for defamation of the type now before the Court. The reason for that is that it is a claim not made by a person in his capacity as a member of the Club against an officer of the Club in that person's capacity as an officer of the Club.

Conclusion

[17] Accordingly I reach the view that this claim is not barred by the Rules of the Club and the operation of s 78 of the Friendly Societies and Credit Unions Act 1982. Accordingly, there is no basis for my ordering a stay of this proceeding.

Orders and directions

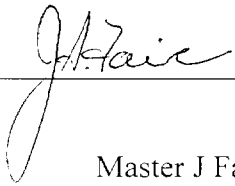
[18] I canvassed with counsel what further steps were required in respect of this proceeding if I reached the conclusion I have. They agreed that a period of 28 days should be allowed for discovery and a further 14 days for inspection. They also concurred that a directions conference was appropriate for this proceeding.

[19] Accordingly, I make the following orders:

- [a] The defendant's application for an order for stay is dismissed;
- [b] Each party shall file and serve verified lists of documents by 24 August 2001;
- [c] Inspection shall be completed by 7 September 2001;
- [d] A directions conference shall be held at 11.45am on 30 October 2001. Counsel are reminded of the obligation to file and serve memoranda dealing with the items listed in Appendix C to the Civil Case Management in the High Court Practice Note three working days before the conference. The parties shall attend that conference with counsel.

Costs

[20] The plaintiff has been successful and is entitled to costs. The defendant shall pay the plaintiff's costs on this application based on Category 2 Band B together with disbursements as fixed by the Registrar.



Signed at 2.45 ~~am~~/pm on 25.7. 2001