

IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY

CP219-sd00

BETWEEN

MURRAY DOUGLAS ROSS

Plaintiff

A N D

TINA MARIE ROSS

Defendant

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Hearing: 28 February 2001

Counsel: PT Finnigan for the plaintiff/respondent  
K Wilson for the defendant/applicant

Judgment: 27 March 2001

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**(RESERVED) JUDGMENT OF MASTER KENNEDY-GRANT**

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Solicitors for the plaintiff  
John Burton  
PO Box 498 Papakura

Solicitors for the defendant  
Kevin McDonald  
PO Box 331065 Takapuna

## **Introduction**

[1] The plaintiff and the defendant were married on 1 December 1992. They separated on 13 January 2000. They have two children, aged six and a half and four and a quarter.

[2] The plaintiff sues the defendant for defamation. He alleges that on two occasions, the first in late February 2000 and the second in March 2000, the defendant made statements defamatory of him to one Earle Williams (with whom the plaintiff has been closely associated in the campaign of one Dennis Conner for the Volvo 2001 yacht race).

[3] The first statement is alleged to have been:

I should watch out for [the plaintiff] because he has it in for you

[4] The second statement is alleged to have been:

... that the defendant had sat in on many meetings between Dennis Conner and [the plaintiff] where also present possibly was Alan Drinkrow when [the plaintiff] had stated in a forceful manner that he categorically would not sail on board Dennis Conner's entry in the Volvo race if Earle Williams was the skipper because Earle Williams was not responsible enough.

[5] The plaintiff contends that these statements were defamatory of him because they meant and were understood to mean:

[a] that the plaintiff was a person who was prepared to and was spreading false statements denigrating a professional colleague, Earle Williams, to persons in world yachting circles, such as Dennis Conner, thereby prejudicing Earle Williams' prospects of enhancement as a professional international helmsman;

[b] that the plaintiff was of such character as being unwilling to express criticisms of the professional reputation of Earle Williams to Earle

Williams personally but was prepared to do so behind Earle Williams' back;

[c] that the plaintiff was no longer a person that could be trusted by Earle Williams;

[d] that the plaintiff who had been a long time partner of Earle Williams in yacht racing was prepared to conduct himself in a disloyal manner towards Earle Williams by denigrating Earle Williams' professional yachting reputation to others.

[6] The defendant denies making the statements. In the alternative, she pleads the defence of truth, stating that the plaintiff has on many occasions expressed the opinion that Earle Williams was too volatile to be the sole skipper of a boat in a race such as the Volvo 2001 race.

[7] At the request of the plaintiff, expressed in his statement of claim and made formally in a notice of interlocutory application, a conference under s35 of the Defamation Act 1992 was held in October 2000; but it was unsuccessful in resolving the matter.

[8] The defendant now applies for an order under s 51 of the Matrimonial Property Act 1976 (there also being a Matrimonial Property Act proceeding between the parties) staying this proceeding.

### **The defendant's application**

[9] The defendant's application is brought in reliance on s 51(2)(a) and (b) of the Matrimonial Property Act 1976. Section 51, so far as material, reads as follows:

#### **51 Proceedings In Tort**

(1) Subject to this section, each of the parties to a marriage shall have the like right of action in tort against the other as if they were unmarried.

(2) Where one of the parties to a marriage brings an action in tort against the other during the subsistence of the marriage, the Court

may at any stage of the proceedings, on application or of its own motion, stay the action if it appears that—

- (a) No substantial benefit, whether material or otherwise, would accrue to either party by the continuation of the proceedings; or
- (b) The proceedings are vexatious in character; ...

[10] Mrs Wilson, for the defendant, submits, in support of the application:

[a] That the plaintiff's success is by no means assured, because of the availability to the defendant of the defence of truth and the fact the decision on that issue will be entirely one of credibility as between the plaintiff and the defendant;

[b] That no substantial benefit to the plaintiff or to the defendant will accrue by the continuation of the proceeding because:

[i] The defendant is on a domestic purposes benefit and legally aided and there is therefore no prospect of the plaintiff being able to enforce any judgment for damages that he might recover if the matter proceeds;

[ii] The continuation of the proceeding will further exacerbate the relationship between the parties and, as a result, adversely affect any chances of their achieving a "co-operative parenting relationship" to the detriment of the children of the marriage;

[iii] Although the plaintiff initially sought substantial damages for defamation, he now (in his affidavit in opposition to the present application) states that:

A simple apology and retraction is all that I am really asking for

[iv] The defendant has offered to apologise if what she has said has caused any trouble for the plaintiff and to undertake not to make statements of the kind complained of in the future and

ought not to be expected (nor have pressure put on her) to go further than that and to retract what she says she never said;

[c] That the proceeding is vexatious because of the matters listed in [b] and in addition, because the relationship between the plaintiff and the defendant since their separation has been acrimonious, the plaintiff (who is in the stronger position financially) has placed obstacles in the defendant's way in respect of her obtaining property to which she believes she is entitled and has been entirely lacking in consideration for the defendant or the children of the marriage in his exercise of access rights and his attitude towards the defendant's exercise of her custodial rights and the defendant believes "that the proceedings were brought to upset and put fear into [her]" and that "[the plaintiff] has no intention of going to trial".

[11] Mrs Wilson relies, in support of her submissions under s 51(2)(a) of the Act, on the decision of this Court in *Berry v Berry* (High Court, Auckland, CP881/86, 31/10/86, Chilwell J).

### **The plaintiff's opposition**

[12] Mr Finnigan, for the plaintiff, submits that the plaintiff's reputation has been damaged by what the defendant has done and that, if she will not apologise and retract, the only way in which the plaintiff can undo the damage is to take the matter to Court. He accepts that the plaintiff has a responsibility to the children of the marriage – and that the effect on the children of the marriage of allowing the proceeding to continue is a factor which the Court is entitled to take into account in deciding whether to make an order under s 51 of the Act – but submits that responsibility for protecting the interests of the children rests also on the defendant and could be secured by her providing the apology and retraction that is sought.

### **Other matters of which I have been informed**

[13] I have been advised, from the Bar, that the plaintiff and Mr Williams are co-operating effectively in Dennis Conner's campaign for the Volvo 2001 yacht race,

notwithstanding the statements allegedly made by the defendant, because Mr Williams has accepted the plaintiff's denial that he made the statements and his assurance that he has every confidence in Mr Williams.

[14] I have also been advised, from the Bar, that there is a concern on the part of the plaintiff that, despite his resolution of the matter to the mutual satisfaction of himself and Mr Williams, the statements by the defendant of which he complains have now entered general circulation.

### **My findings**

[15] On the evidence before me, I am not prepared to make a finding that the proceedings are vexatious, having been brought for the purpose of "upsetting and putting fear into" the defendant and without any intention of going to trial.

[16] I find that no substantial benefit will accrue to either the plaintiff or the defendant by the continuation of the proceeding because:

- [a] Even if the plaintiff is successful in the proceeding, there can be no financial benefit to him because of the defendant's financial position;
- [b] The plaintiff will best dispel any doubts created about him as a result of the defendant's statements by the manner in which he conducts himself towards Mr Williams and towards others in respect of Mr Williams;
- [c] He already appears to have re-established a sound working relationship with Mr Williams and both he and Mr Williams, one would think, would be capable together of answering any continuing comment that may be made by third parties;
- [d] The holding of a trial in this proceeding will simply result in the fact of the statements and the questions as to the character of the plaintiff and the personality of Mr Williams being given far wider circulation than they have been to date;

[e] It is in the interests of the parties and of the children of the marriage that the financial and parental issues between them be resolved as soon as possible and not delayed by this proceeding directly or indirectly.

[17] In coming to this conclusion I have considered, but not been influenced by, the decision in *Berry v Berry*, ubi supra. The facts of that case are so very different from the facts of this case that I have not found it to add anything to my deliberation.

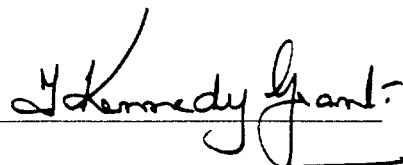
### Orders

[18] In the circumstances, I make the following orders:

[a] The plaintiff's proceeding against the defendant is stayed under s51(2)(a) of the Matrimonial Property Act 1976;

[b] The costs of the proceeding, including the plaintiff's application for a conference and this application, are reserved, to the intent that the question of costs will be determined by agreement between the parties or order of the Family Court.

[19] This judgment is signed at 10.53am on 27 March, 2001.

  
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MASTER T KENNEDY-GRANT