IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP 92-SD00

BETWEEN **EDWARD TRAVERS**

Plaintiff

AND **TELEVISION NEW ZEALAND LTD**

Defendant

Hearing: 4 September 2001

Counsel: C LaHatte for plaintiff
W Akel and M Johnson for defendant

Judgment: 4 September 2001

ORAL JUDGMENT OF HON JUSTICE JOHN HANSEN

Solicitors:
Brannigans, PO Box 948, Manurewa for Plaintiff
Simpson Grierson, DX CX10092, Auckland for Defendant

[1] On 13 March 2000 the plaintiff issued proceedings in defamation against the defendant. The complaint related to a consumer orientated programme known as "Fair Go". The plaintiff's relationship with the programme goes back as far as 1993, although the complaints in the statement of claim relate to matters from 8 March 2000 forward.

[2] The essential allegations made against the plaintiff in his own name of Travers or in the name of Smithers and perhaps in the name of Parcells, is that he "cold called" on elderly people, namely women, offering painting services. Essentially the programme alleges that Mr Travers, or Smithers or Parcells, conned work and that the people concerned simply do not get value for money. They are heavily overcharged for what work is done and that work is of poor quality.

[3] Once the proceedings were issued, there was an application filed by the defendant for security for costs. That was filed on 5 May and came before Master Kennedy-Grant on 10 June and further on 16 June 2000. Mr LaHatte advised the Court that he was without instructions and that he did not seek an adjournment. The Master ordered security for costs in the sum of $20,000. It was to be provided by payment into Court or by the provision of a bond acceptable to the Court. All further steps were stayed pending security and costs of $1435 were awarded to the defendant. That order was sealed on 28 June.

[4] Since that time no steps whatsoever have been taken by the plaintiff. There have not even been communications with the defendant. Security has not been provided nor have the costs been paid. As a consequence, the defendant on 3 July 2000 filed an application pursuant to s 50 of the Defamation Act seeking to strike out the proceedings for want of prosecution. It is the opposed hearing of that application that is before the Court. Although it is clear beyond pure peradventure that no steps whatever have been taken by the defendant, the opposition is based on a number of grounds. Firstly, the defendant contributed to the inability of the plaintiff to pay security for costs. Secondly, the plaintiff will not be able to prosecute his claim unless requirement is varied or cancelled. Thirdly, the defendant is in a position to meet its own costs and would not suffer any real prejudice in the unlikely event that the plaintiff's claim fails. Fourthly, in issues of defamation the plaintiff should not be prevented from suing unless there is no case.

[5] The starting point is s 50 of the Act. It reads:

> (1) In any proceedings for defamation, unless the Court in its discretion orders otherwise, the Court shall, on the application of the defendant, order the proceedings to be struck out for want of prosecution if—
>
> (a) No date has been fixed for the trial of the proceedings; and
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> (b) No other step has been taken in the proceedings within the period of 12 months immediately preceding the date of the defendant's application.

[6] It is clear that this is a discretionary matter but it is not without significance that the legislature determined to use the term "shall" in s 50.

[7] The section has only been fully considered in one decision, that of McGechan J in *Mountain Rock Productions Ltd v Wellington Newspapers Ltd* [1997] 3 NZLR 31. At p 38 the Judge considered the exercise of the discretion and stated:

> "Clearly, indeed even more clearly than under R 426A, there is an onus upon a plaintiff to satisfy the Court the proceeding should not be struck out. The burden involved should not be exaggerated. The section does not impose an express threshold requirement in the nature of 'special circumstances' or the like. I agree that the report of the McKay Committee gives some assistance. Paragraph 479 states:
>
> > '479. We consider that where no step in the action has been taken by either party for 1 year, the defendant should ordinarily be entitled to have the action dismissed. Judges are generally reluctant to dismiss actions because of delay and we can see some advantage in fixing a period after which a plaintiff must show some adequate reason to justify an exception being made. A plaintiff who is really concerned at an injury to his reputation will not be dilatory.'
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> With all respect, reference to 'adequate' reason does not much advance matters. Testing by reversal, Judges hardly will grant leave if reasons are 'inadequate'. The term does, however, point to 'adequate' reason rather than 'compelling' reason as being the appropriate touchstone, and I prefer the former to the latter as between alternatives advanced by plaintiffs in submissions."

[8] It is also appropriate that the matter be looked at in the full context of the Defamation Act and to note concerns mentioned elsewhere in the judgment of

McGechan J of the so called "gagging" writ. Mr Akel in his succinct submissions also pointed to the fact that the Court is obliged to give full recognition to the full ambit of the freedom of speech section, that is s 14 of the New Zealand Bill of Rights Act. He pointed to the Court of Appeal decision in *Noonen v Film & Literature Board of Review* [2000] 2 NZLR 9 at paras 16 and 20 in that regard. He submitted correctly, in my view, that that does not marginalise a defamation action but simply acknowledges that it must be considered in the context of broader issues of fundamental freedom of expression values.

[9] Mr Akel in his submissions also pointed to the decision of Master Kennedy-Grant in *Woodroffe v TVNZ* (HC Auckland, CP 656/93, 18 August 1998) and the decision of Master Venning in *Phipps v Health Care Otago Ltd* (HC Dunedin, CP 39/95, 24 November 1998). I will return to those in a minute.

[10] On the other hand Mr LaHatte's submission is simply this. This man is on a benefit. He has no assets. He has no means to meet security for costs and he will be unfairly prevented from clearing his reputation if this order is made today. He also complains that he has been dogged by Fair Go and that is the reason he has no income that would enable him to reach a financial position of paying or securing the security ordered.

[11] That frankly is a little unrealistic. As is the comment in para 7 of the notice of opposition that this claim is unlikely to fail. It is not without significance that in the security for costs proceedings there is a good deal of evidence from three reporters from the programme dealing with the merits of the matter. The plaintiff has chosen not to respond to those in any way at all. In relation to his claim that it is the actions of Fair Go that have led to his precarious financial position, it is significant to turn to para 4 of that affidavit. He complains that two months ago he was doing a small job but someone from Fair Go rang the person he was working for and that when he was advised of this he felt he had no choice but to leave the job. He chooses not to identify who the person was, the details or anything else of the sort.

[12] The reality of this matter is that for good reasons the Master made an order for security for costs. No review was lodged against that. There is now a suggestion that an application will be lodged to waive security for costs if in fact the application before the Court is unsuccessful. I am afraid it is too late. This man has had every chance to advance these proceedings if he wished to do so.

[13] This case can be readily distinguished from *Mountain Rock*, from *Phipps* and from *Woodroffe*. In all of those cases active steps were being taken by the plaintiff to progress the case. In this particular case no steps whatsoever have been made. There was no communications with the defendant. No application made at any time over the past fourteen months for a variation or a waiver of the order for security for costs. Such a course would be available to the plaintiff if he had wanted to take it. The reality is, as I think Mr Akel has characterised it, this is a "gagging" writ. It has no prospect of going anywhere. The only information on the merits before the Court comes from the defendant and they are strong. The plaintiff could have addressed that in his affidavit but chose not to. He declined to identify the person he claims to have lost the job with because of the interference of TVNZ therefore preventing the defendant from checking on the accuracy of that story. As McGechan J noted, the onus is on the plaintiff to come up with adequate reasons why this matter should not be struck out. The reality is the plaintiff has not come up with any reasons at all.

[14] Accordingly, pursuant to s 70, the proceeding is struck out.

[15] There will be costs to the defendant, excepting the application for security of costs which has already been dealt with, in terms of Category 2 Band B of the Third Schedule High Court Rules (in other words in terms of the schedule annexed by Mr Akel to his submissions).

[16] Being a strike out, this matter has been heard in Chambers. However, given the context of the application and the contents of the claim it is appropriate that the normal order for suppression that applies to Chambers judgment are lifted and it has the effect of a judgment delivered in open Court. There are no reporting restrictions.