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IN THE HIGH COURT OF NEW ZEALAND  
CHRISTCHURCH REGISTRY

CP30/02

16/1/02

BETWEEN                      HUDSON HILL

Plaintiff

AND                              ANTHONY MORRISON

First Defendant

AND                              MICHAEL MULGREW

Second Defendant

AND                              GARY CLIFF

Third Defendant

Hearing:                      12 December 2002

Counsel:                      J S Fairclough and M Clayton for Plaintiff  
P M James for First Defendant  
No appearance for Second Defendant  
K W Clay for Third Defendant

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ORAL JUDGMENT OF CHISHOLM J

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[1] The plaintiff seeks damages against the three defendants for defamatory statements alleged to have been made by them to the effect that the plaintiff was the secretary of the Harris gang and a "front" person for that gang. In the case of the first and third defendants exemplary damages are also sought. No steps have been taken by the second defendant. The first and third defendants seek security for costs.

[2] According to affidavits filed by the plaintiff he is the owner of a property worth approximately \$150,000 subject to a bank mortgage of approximately \$45,000. He also owns three motor vehicles which are said to be worth approximately \$110,000 in total. His income as a supervisor has been declared at \$324 per week from which the principal outgoing is his mortgage instalment of \$88 per week. Thus his net income per week is approximately \$236 per week.

[3] In terms of Rule 60(1)(b) the Court has the power to order security for costs if it is satisfied 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 ...”.*

It is, of course, necessary for an applicant to surmount this threshold before issues as to discretion arise. A broad overall assessment taking into account the reality of the situation, the nature and likely course of the proceedings, and also economic realities of the case is required: *Hamilton v Papakura District Council* 11 PRNZ 333.

[4] If this claim comes before a jury and the trial extends over three days, 2B costs would entitle the first and third defendants to costs against the plaintiff of approximately \$26,260 each. Given my perception that interlocutories still have some distance to go, that may well be a conservative estimate. Jury fees and setting down fees would add another \$5,000 and the Court also needs to be realistic and take into account the probability that the plaintiff would be required to meet his own costs up front. Added to that there is the possibility that the plaintiff could face solicitor/client costs if s40(3) of the Defamation Act 1992 came into play.

[5] Taking a broad view of the plaintiff's net asset and income position, and allowing some margin for the fact that the values expressed by the plaintiff are unverified estimates, I am satisfied that there is reason to believe that the plaintiff would be unable to pay the costs of the first and third defendants if the plaintiff was unsuccessful in this proceeding. In other words, I am satisfied that the initial threshold can be passed.

[6] Once the threshold has been passed there is, of course, no predisposition one way or other as to the exercise of the Court's discretion. Several factors indicate to me, however, that the discretion should be exercised in favour of ordering security. First, both defendants have acted promptly. Secondly, making the best I can of the information currently available concerning the merits of the plaintiff's case and a likely award of damages, it is difficult to see how a substantial award could be realistically anticipated. If the claim is to proceed the pleadings will probably have to

be amended and while it is not for me to determine whether the plaintiff is entitled to proceed further without specifying a figure for damages, that issue has arisen and, judging from the submissions I have heard, will probably be taken further. It is difficult to avoid the conclusion that this proceeding might have been more appropriately brought in the District Court. If the plaintiff is determined to pursue his claim in this Court before a jury, that is a factor that must favour an order for security. Thirdly, the plaintiff's present financial situation is not attributable in any way to the actions of the first and third defendants. Finally, an order for security at an appropriate level should not prevent the plaintiff pursuing his claim.

[7] Now I turn to quantum. *Breitmeyer v The Christchurch Press Company Ltd* 15 PRNZ 170 was cited. In that case security was ordered in the sum of \$10,000 for each defendant on the basis that the trial would take five days. I note, however, that that decision was delivered at a stage where the current High Court Rules as to costs had only recently come into force. The parties themselves had not attempted to calculate costs in accordance with the new regime.

[8] I do not think this is a case where the amounts claimed by the first and third defendant could be seriously considered. After taking all factors into account I have decided that the appropriate level is \$12,500 in relation to each defendant, being a total of \$25,000. That security is to be put in place by 31 March 2003. In the meantime the proceeding will be stayed.

[9] Mr Fairclough has raised whether if the matter was moved into the District Court the security ordered would necessarily stand. The order that I have made is on the basis that the proceedings are in this Court. If the proceedings are transferred to the District Court the plaintiff would be entitled to make application to that Court for the level of security to be reconsidered. These comments are not intended to convey, however, that such an application would necessarily be successful.

[10] Both defendants are entitled to costs according to the 2B scale.



Solicitors:

Cavell Leitch Pringle & Boyle, Christchurch for Plaintiff  
Saunders & Co, Christchurch for First Defendant  
Macfarlane: Stringer: Stringer, Christchurch for Third Defendant