IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP 67 SD 02

[redacted]

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BETWEEN	STEPHEN DAVIS
	Plaintiff
AND	INDEPENDENT NEWSPAPERS LTD & ANOR
	First Defendant
AND	GERALDINE JOHNS
	Second Defendant
AND	INDEPENDENT NEWSPAPER SERVICES LIMITED
	Third Defendant

Date of hearing:	25 February 2003
Counsel:	Mr W Akel for plaintiff Mr J Tizard for defendants
Date of judgment:	12 March 2003

JUDGMENT OF MASTER LANG
[re application for security for costs]

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Introduction

[1] The defendant in this proceeding seeks an order requiring the plaintiff to provide security for its costs.

[2] The first defendant is the publisher of the *Sunday Star Times* newspaper. The second defendant is the author of an article which was published on 4 November 2001 and which has given rise to the present action in defamation. The third defendant is a company in the Independent Newspaper Group which makes available on the internet certain articles published in newspapers within the group.

Jurisdiction

[3] The defendants rely on Rule 60 of the High Court Rules which provides as follows:

> **60 Power to make order**
>
> [(1) Where the Court is satisfied, on the application of a defendant,—
>
> ...
>
> (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.]

[4] The Court must therefore be satisfied that there is reason to believe that the plaintiff will not be able to pay the defendants' costs if he is unsuccessful.

[5] In considering the issue of jurisdiction I bear in mind the comments of Hammond J in *Hamilton v Papakura District Council [Security for Costs]* (1997) 11 PRNZ 333 (at p 335):

> [The words of r 60(1)(b) which are the same as District Court Rule 61] necessarily raise a threshold test; but I respectfully agree with those authorities which hold that what is required is a broad overall assessment under that head. Further, in my view, that exercise is not one to be conducted in a vacuum: the Court has to have regard to the real situation of the parties, the nature of the proceeding, and to cast a realistic eye over the course which the proceeding has, and will likely take.

[6] In the present case the plaintiff has effectively accepted that he will not be able to meet the defendants' costs in the event that his claim is unsuccessful. He says in fact that if an order is made requiring him to provide security for costs he will be prevented from proceeding with his claim.

[7] Given that concession I consider that jurisdiction exists under Rule 60(1) to make an order requiring the plaintiff to provide security for the defendant's costs.

Discretion

[8] However, that is not the end of the matter. The authorities make it quite clear that, even if jurisdiction to make an order exists, nevertheless the Court has a discretion as to whether or not to order security. That discretion is to be exercised in accordance with a number of principles which have been established through a long line of cases including: *Bell Booth Group Ltd v Attorney-General (1986) 1 PRNZ 57; Rea v Jordan Sandman Were Ltd* (1992) 6 NZCLC 96-556; *Pascoe Ltd (in Liquidation) v DFC Overseas Investments Ltd (in statutory management)* (unreported, High Court, Wellington, CP 153/93, 13.10.93, Master Thomson; *Nikau Holdings Limited v Bank of New Zealand* (1992) 5 PRNZ 430, *Re Pacific Wools Ltd (in receivership and in liquidation)* (1990) 2 PRNZ 469.

[9] The authorities emphasise that in exercising the discretion the Court must take into account a wide range of factors. Moreover, there is no burden on either party and there is no predisposition either in favour of or in opposition to the granting of security.

[10] The interests of both the plaintiff and defendant must be considered and the Court should not allow the rule to be used oppressively to deny a plaintiff with limited means the ability to bring his case before the Court. On the other hand, an impecunious plaintiff must not be allowed to use its inability to pay costs so as to act oppressively or to place unfair pressure on a defendant. Overall, a balancing of a number of factors is required.

[11] In this regard I bear in mind a further passage from the judgment of Hammond J in *Hamilton v Papakura District Court* (1997) 11 PRNZ 333 where he (at page 336):

> From a defendant's economic perspective, there are two issues which often go unaddressed. The first is that light-handed control of a plaintiff's proceeds may

> enable a plaintiff to extract quite unworthy "nuisance value" settlements. The second is that surely a defendant, too, is entitled to be made whole, if successful.
>
> Indeed, the economic loss to a successful defendant – if unable to recoup costs – may well, in absolute terms, be greater. For, the successful defendant has no recovery sum to resort to; that defendant is entirely dependent on what it can extract from the plaintiff by an award of costs, and the enforcement of it. Under our rules, the successful defendant will *always* be out of pocket to some extent, even when utterly in the right, save in the very exceptional case where a Court orders solicitor and client costs.
>
> The short point being made here is that, 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.

[12] I now turn to consider the factors which I consider to be relevant to the present application.

Merits of the plaintiff's case

[13] One of the principal issues which the Court needs to consider in exercising its discretion is the strength of the plaintiff's claim. This is necessarily a difficult exercise, particularly when the proceeding is at a relatively early stage. In that situation the Court must reach a conclusion as to the merits of the plaintiff's claim without being able to assess the totality of the evidence which the plaintiff proposes to adduce in support of it.

[14] In the present case, however, a significant amount of material has been placed before the Court. Having considered all of that material, I am left with the impression that the plaintiff is likely to face some hurdles in proving his claim against the defendants.

[15] The plaintiff's claim is based on the publication on six occasions of articles which the plaintiff claims were defamatory of him. Two of those articles appeared in the *Sunday-Star Times* newspaper, on 7 October 2001 and 4 November 2001 respectively. Those articles were subsequently made available on the world-wide web.

[16] Up until October 2001 the plaintiff was the Editor of the New Zealand Herald newspaper. On 7 October 2001 the *Sunday-Star Times* published an article entitled "Editor quits after enquiry". This article contained an allegation that the plaintiff had resigned following an internal enquiry into allegations of sexual harassment which had been made against him. It quoted newspaper management as saying that the plaintiff was taking a "well earned break" to visit his three children

and to explore professional opportunities in the United Kingdom. The article went on to say, however, that it had been told that the plaintiff had resigned following an in-house investigation into allegations of sexual harassment on his part. It said also that the plaintiff had been told that he needed to separate his professional responsibilities from his admiration of staff and made reference to certain notes and emails which had allegedly been sent by the plaintiff to the complainant and which formed part of the internal investigation. It also quoted the Chief Executive of the Herald's publisher as saying that "there were no charges and no discussion". Finally, the article made reference to a quotation from a union delegate to the effect that if the allegations were as serious as had been suggested it was a pity that it had been "covered up" by management.

[17] The plaintiff maintains that this article was defamatory of him and he particularises the defamatory nature of the article in paragraph 7 of the amended statement of claim. The plaintiff claims that, by reason of the publication of the article, he has been gravely injured in his personal and professional reputation and that he has been exposed to public scandal and contempt and has suffered extreme embarrassment. He claims that he has also suffered special damage in that his future employment prospects have been severely diminished, although he is as yet unable to provide particulars of that special damage.

[18] A similar claim is made against the third defendant in respect of the same article which was published on the world-wide web.

[19] On 4 November 2001 the first defendant published in the *Sunday-Star Times* an article entitled "The Paper Boy". This was a lengthy article which made reference again to the fact that the plaintiff had resigned after an internal enquiry into allegations of sexual harassment. It said of the plaintiff that "personal dalliances clouded his work record". Reference was made to a Tenancy Tribunal dispute in which the plaintiff had been involved and alleged that the plaintiff's own private life could not have withstood the same scrutiny as he accorded to others. The article also went on to discuss changes which had occurred at the newspaper after the plaintiff had ceased to be employed there.

[20] The plaintiff has set out particulars of the defamatory nature of the article in paragraph 27 of the amended statement of claim. The plaintiff alleges that publication of the second article also gravely injured his personal and professional reputation and that he has suffered special damage of the same type as that which was caused as a result of the publication of the first article.

[21] The defendants have filed a detailed statement of defence to the amended statement of claim in which they have denied liability to the plaintiff. Each of the defendants advances the affirmative defence of truth, and extensive particulars supporting the defence pleaded.

[22] I have now read the articles in question on a number of occasions and I have also taken into account the documents referred to me by Mr Tizard after they were obtained by the defendants during the discovery process.

[23] I accept of course that I have not heard the plaintiff's case in its entirety. Nevertheless on the material which has been made available to me I am left with the distinct impression that the defendants are on strong ground in maintaining that the essential features of the articles which are the subject of complaint by the plaintiff are in fact true. At the very least, I consider that the defendants have established a prima facie case that the matters about which the plaintiff complains are in fact true. In particular, it needs to be borne in mind that the thrust of the articles was that the defendant resigned following an internal investigation which resulted from allegations of sexual harassment by members of the newspaper's staff. On the material available to me it appears to be undeniable that such an inquiry was in fact held. The focus of the inquiry was the allegations made by at least one staff member regarding the propriety of the plaintiff's behaviour. The inference to be drawn from the material which I have seen is that ultimately the plaintiff chose to resign rather than face dismissal as a result of the findings which were made at the conclusion of the investigation.

[24] The plaintiff for his part is endeavouring in this proceeding to assert that the true reason for his resignation was not the internal investigation but that it was brought about by a long vendetta which had been maintained against him by members of the newspaper's management. I have seen no evidence of any such vendetta. To the contrary, those responsible for conducting the enquiry appear to have been careful to ensure that it observed appropriate procedural standards. Similar standards also appear to have been met when the plaintiff was advised of the conclusions which Mr Ellis reached, and the consequences of those conclusions.

[25] I am forced to the conclusion that the plaintiff may not have a particularly strong case. This factor militates in favour of the making of an order requiring the plaintiff to provide security for the defendants' costs.

Impecuniosity of plaintiff

[26] The authorities establish that the Court should be cautious before requiring security to be given if the plaintiff's impecuniosity is alleged to have been caused as a result of the actions of the defendants. The plaintiff argues in the present case that his financial difficulties have arisen as a result of the publication of the articles which are the subject of this proceeding. As a result, he contends that security should not be ordered.

[27] I have some difficulty with the plaintiff's argument on this point. It is clear that when he resigned as Editor of the New Zealand Herald he received a reasonably significant (by New Zealand standards) lump sum payment. At least some of that payment appears to be intact. The plaintiff also apparently still owns a number of assets in this country.

[28] On the face of it, Mr Davis appears to be a plaintiff with limited means rather than an impecunious plaintiff. Moreover, the primary cause of any impecuniosity must in my view have arisen as a result of the plaintiff's resignation from his position as Editor. Once he took that step he lost a good income. Moreover, it was inevitable that he would thereafter face questions regarding the reasons which underlay his resignation.

[29] The plaintiff maintains that he initially encountered positive reaction when he applied for jobs following his departure to the United Kingdom shortly after his resignation. He says that he approached prospective employers "including Fleet Street papers, the Associated Press and a company setting up an internet new service in relation to suitable positions". He deposes that all of the discussions which he initially had with these prospective employers were very positive. Each, however, said that they wished to do a background check on him. He deposes that in each case, after the background check had been done, he was contacted by the prospective employer and told in very abrupt terms that there was no position available to him. The plaintiff believes that those prospective employers must have located the articles on the internet during the course of the background checks.

[30] If this is the case, the prospective employers can only have seen the first article. The plaintiff himself admits that he returned to New Zealand in early November 2001 and that on his flight to New Zealand the person seated beside him was reading the second article which was

published in the *Sunday-Star Times* on 4 November 2001. Prospective employers in the United Kingdom therefore cannot have seen the second article at the time that they dealt with the plaintiff.

[31] The plaintiff says that on his return to New Zealand he again struggled to find employment and that he was unemployed for four months. He says that prior to the publication of the articles he had not experienced any difficulties in seeking employment.

[32] There is, however, no independent evidence to corroborate the plaintiff's assertion that the prospective employers in either the United Kingdom or New Zealand had in fact read the articles or that the impression created by the articles caused them to rebuff the plaintiff. In fact, the affidavit filed in support of the application by Ms Chetwin tends to lend weight to the defendants' submission that the plaintiff does not appear to have made a determined attempt to find employment in the United Kingdom. On his own admission, the plaintiff returned to New Zealand within one month of his departure from this country.

[33] In summary, I do not consider that the plaintiff can realistically maintain that his present impecuniosity (if indeed he is impecunious) stems to any significant degree from the actions of the defendants in publishing the articles which are the subject of this proceeding. I consider that his present financial position has largely been brought about by the loss of his employment at the New Zealand Herald.

Oppression

[34] The authorities also establish that the Court should not make an order requiring a plaintiff to provide security if the application for security is being used as an instrument of oppression by the defendant. In particular, the Court should be cautious before making an order requiring security to be given in circumstances where such an order will effectively prevent the plaintiff proceeding with his claim.

[35] In the present case I do not consider that the defendants are acting oppressively. They are aware (no doubt from bitter experience) that the process of defending a claim for defamation can be a protracted and expensive exercise. They believe, with some justification, that the plaintiff's claim is not particularly strong. Given the plaintiff's recent employment history they have

concerns as to his ability to meet an award of costs. The plaintiff himself confirms that this concern is well founded.

[36] In those circumstances I do not consider that the defendants can be criticised in any way for bringing the present application. They are being required to incur considerable expense as a result of the claim which has, after all, been initiated by the plaintiff. It is only reasonable that they should seek some assurance that the plaintiff will be able to contribute to their costs in the event that his claim is not successful.

Likely costs

[37] One of the matters which the Court is required to take into account is the likely costs of the proceeding. As in any defamation proceeding, the onus of establishing the affirmative defences of truth will rest on the defendants. They carry the onus and expense of proving those defences.

[38] I accept also that defamation proceedings are recognised as being complex and that the management of such proceedings requires specific expertise.

[39] The defendants estimate that the scale costs (calculated on a category 3C basis) for a 14 day trial would be $55,200 for preparation and $27,600 for trial. This does not include any allowance for costs incurred to date. Obviously those are significant costs. Even on a category 2B basis the costs of preparing for and undertaking a 14 day trial would be considerable.

Conclusion

[40] Taking all matters into account I have reached the conclusion that this is an appropriate case in which security for costs should be ordered. I accept, however, that security should be provided on a staged basis. The amount which the defendants seek at this stage is $25,000, although they wish to retain the right to seek further security once the matter is set down for trial.

[41] I consider that the plaintiff must have some resources available to him. Certainly he has been able to meet his own costs up to the present time. I do not consider that the making of a reasonably modest order for security would effectively prevent him from proceeding further with his claim.

[42] I have reached the view that it would be appropriate to require the plaintiff to provide security for the defendants' costs in the sum of $20,000 in respect of all attendances up to the point at which the proceeding is set down for trial. At that point the position will need to be reviewed again in the light of the information which is then available.

Order

[43] The formal orders of the Court are:

[a] The plaintiff is to provide security in the sum of $20,000 for the costs of the three defendants up to the point at which the proceeding is set down for trial.

[b] Security is to be provided by paying that sum into Court or providing security for that sum to the satisfaction of the Registrar.

[c] Security is to be provided no later than 9 April 2003.

Costs

[44] The defendants have succeeded in this application and are entitled to costs. The defendants are to have a global award of costs calculated on a category 2B basis in relation to the preparation of the application for security and fifty per cent of the costs involved in preparing for the hearing on 25 February 2003. In addition, the defendants are entitled to costs on a category 2B basis for the hearing on 25 February 2003 (calculated at .2 of a day). The defendants are also entitled to any disbursements in relation to the application for security for costs.

Next event

[45] The proceeding will be called in the Chambers List on 11 April 2003 at 2.15 pm so that compliance with the above orders can be reviewed.

Master G Lang

Signed at: 12.50 ~~am~~/pm on: 12 March 2003