J4

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

486

CP109/00

BETWEEN	**VONRICK CHRISFORD KERR**
	Plaintiff
A N D	**THE ATTORNEY-GENERAL (sued on behalf of the NEW ZEALAND POLICE)**
	First Defendant
A N D	**WELLINGTON NEWSPAPERS LIMITED**
	Second Defendant

Hearing:	8 April 2003
Counsel:	Plaintiff in person B. Horsley for First Defendant A. Hopkinson for Second Defendant
Judgment:	10 April 2003

JUDGMENT OF MASTER D I GENDALL

Solicitors:
Crown Law Office, Wellington for First Defendant
Izard Weston, Wellington for Second Defendant

Introduction

[1] This is an application for security for costs by the first and second defendants.

[2] Although the plaintiff has filed no formal opposition to these applications, he appeared before me to oppose them.

Preliminary matter

[3] In a Minute I made on this matter on 14 March 2003, I made the following Unless Order:

> "(a) Unless the plaintiff Mr Kerr files and serves upon the first defendant and the second defendant a notice of opposition to the applications for security for costs by 5.00pm on Tuesday 1 April 2003, and
>
> (b) Unless the plaintiff Mr Kerr serves upon the first defendant and the second defendant an address for service by 5.00pm on Tuesday 1 April 2003,
>
> then at 10.00am on Tuesday 8 April 2003 when this matter is called again, I will consider striking out these proceedings".

[4] It appears that the plaintiff has served an address for service in compliance with paragraph 10(b) of the Unless Order, but that no formal notice of opposition to the applications for security for costs have been filed.

[5] Notwithstanding this, Mr Kerr appeared before me on 8th April to oppose the applications, and I was prepared to have the matter proceed on that basis.

Background facts

[6] The plaintiff brings these proceedings against the first defendant the Attorney-General, and the second defendant Wellington Newspapers Limited, alleging that he

was defamed by an article published in the Dominion newspaper on 5 November 1998.

[7] The article reads in full:

> **"Police hunting for cliff drama man**
>
> A man freed from prison yesterday after serving a five month sentence for assaulting his wife went to her house and smashed his way in again last night, police said. Inspector Garry Allcock said Vonrick Kerr was arrested in March after a 45 minute cliff top standoff in Newlands when he threatened to drive his car, containing his three year old daughter, over the edge onto the Hutt motorway. He had breached a protection order taken out by his wife. Early today, police were hunting for Kerr. They said he should not be approached. Mr Allcock said Kerr obtained his wife's new address in Johnsonville and smashed a door with a rock about 9pm. Kerr, a 35 year-old dark-skinned man, then fled."

[8] With one reservation, it seems that the article is accurate. On 4 November 1998 the plaintiff had been released from prison after serving a five month sentence, but this technically was not for "assaulting his wife". The sentence had been one of two years imprisonment for burglary, and breaching the protection order that his wife had obtained a year earlier.

[9] Apparently on the evening of 4 November 1998 the plaintiff went to his ex-wife's address and smashed his way inside using a rock. He then fled the scene and was still at large at the time the article was published.

[10] Earlier in the year during March the plaintiff had been involved in a dramatic incident in Newlands in which he uplifted his daughter and drove to the edge of a steep bluff. He ignored directions from Police to release her, and a stand-off ensued.

[11] That 4th November 1998 incident apparently was the fifth occasion during 1998 on which the plaintiff had breached this protection order.

[12] As I understand it, the plaintiff had been in prison for each of the previous breaches – he was sentenced to four months imprisonment arising from the March

Newlands incident, and cumulative sentences of two months, four months and five months were imposed for breaches of the protection order that occurred in June 1998.

[13] The 5 November 1998 Dominion newspaper article was inaccurate, in that it said that the plaintiff had been released from prison, having been convicted of assaulting his wife. In fact the five month sentence was the most recent of the four prison terms the plaintiff had received for breaching the protection order.

[14] The plaintiff's Statement of Claim pleads in paragraph 7:

> "7. The statements contained within that passage that the plaintiff had assaulted his wife, that he had threatened to drive his car, containing his then three year old daughter, over the edge of the cliff, are defamatory of the plaintiff and untrue."

[15] The amended Statement of Defence of the second defendant:

(a) denies the meaning

(b) pleads truth to the whole of the article

(c) pleads qualified privilege – statutory and common law

(d) pleads honest opinion in relation to the statement relating to the plaintiff not being approached

(e) pleads prior reputation in relation in the protection and for breaches and a sentence imposed for actions on 4/5 November 1998

(f) alleges no injury to the plaintiff's reputation

(g) gives notice of intention to raise specific misconduct relating to bad reputation.

[16] In essence, the defendants together indicate that the Statement of Claim and amended Statements of Defence have put in issue the whole character and reputation of the plaintiff.

The parties' arguments and my decision

[17] Counsel for each of the defendants before me sought a sum by way of security for costs totalling $25,000 – that is $12,500 for each defendant.

[18] The defendants rely on Rule 60 High Court Rules which states:

> "**60. Power to make order** – [(1) Where a Court is satisfied, on the application of a defendant, -
>
> (a) ...
>
> (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.]
>
> (2) An order under subclause (1) –
>
> (a) Shall require the plaintiff or plaintiffs against whom the order is made to give security for costs in respect of such sum as the Court considers sufficient –
>
> (i) By paying that sum into Court; or
>
> (ii) By giving, to the satisfaction of the Registrar, security for that sum; and
>
> (b) May stay the proceeding until the sum is paid or the security given, as the case may be.

[19] There are two issues that arise under Rule 60:

(a) Whether there is reason to believe that the plaintiff, if unsuccessful, would be unable to pay the defendants' costs; and

(b) If the answer is yes, whether the Court should exercise its discretion to make an order for security.

[20] The threshold test in Rule 60(1)(b) as to the plaintiff's impecuniosity has been met here.

[21] Before me the plaintiff acknowledged that he is not employed. As a student his only income is from a benefit.

[22] Further, he acknowledged that he has no savings and very limited assets, and in his written submissions the plaintiff stated:

> "I do not have any capital to give the Court as security for costs within '21 days'.
>
> The best I can commit myself to be a minimum of $10 a week should costs go against me. I am prepared to do this for the rest of my life should it be deemed necessary."

[23] In effect, the plaintiff acknowledged before me that he would be unable to pay the defendants' costs if unsuccessful, and certainly within a reasonable period. The threshold test of impecuniosity is therefore met.

[24] Once this threshold test is crossed, the Court has to consider various discretionary matters. The manner in which the Court's discretion should be exercised was considered recently by the Court of Appeal in *AS McLachlan & Others v Mel Network Limited* (20 August 2002) CA 39/02. In delivering the decision of the Court Gault P stated at page 6:

> "... Whether or not to order security and, if so, the quantum are discretionary. They are matters for the Judge if he or she thinks fit in all the circumstances. The discretion is not to be fettered by constructing "principles" from the facts of previous cases.
>
> 14. While collections of authorities such as that in the judgment of Master Williams in Nikau Holdings Ltd v Bank of New Zealand (1992) 5 PRNZ 430, can be of assistance, they cannot substitute for a careful assessment of the circumstances of the particular case. It is not a matter of going through a check list of so-called principles. That creates a risk that a factor accorded weight in a particular case will be

> given disproportionate weight, or even treated as a requirement for the making or refusing of an order, in quite different circumstances.
>
> 15. The rule itself contemplates an order for security where the plaintiff will be unable to meet an adverse award of costs. That must be taken as contemplating also that an order for substantial security may, in effect, prevent the plaintiff from pursuing the claim. An order having that effect should be made only after careful consideration and in a case in which the claim has little chance of success. Access to the courts for a genuine plaintiff is not lightly to be denied.
>
> 16. Of course, the interests of defendants must also be weighed. They must be protected against being drawn into unjustified litigation, particularly where it is over-complicated and unnecessarily protracted."

[25] It is clear there is no presumption in favour of or against the granting of security, and the Court has to endeavour to strike a balance between the two competing interests noted above:

(a) The interests of plaintiffs to ensure they are not deprived of a potentially successful claim; and

(b) The exposure of defendants to the expense of defending a proceeding without any prospect of recovering their costs.

[26] In striking a balance between these two interests, I am required to examine the merits of the claim to the extent that it may be possible to do so prior to trial.

[27] I turn now to consider the merits of the plaintiff's claim.

[28] On the basis of the material before the Court, it seems clear to me that the defences put forward by the defendants of truth, honest opinion and/or qualified privilege, will be readily established for the whole of the 5 November 1998 article, with only one possible exception. This is the assertion that the plaintiff had been sentenced for "assaulting his wife".

[29] Accordingly, if this matter proceeds to trial, the issue would narrow to whether an assertion that the plaintiff has assaulted his wife in the context both of his behaviour on the day in question, and his general conduct in domestic matters, was defamatory of him.

[30] In asserting that the statement was defamatory, the plaintiff places his reputation generally and in domestic matters squarely in issue here.

[31] As to this aspect, the plaintiff's assertion is that although he has undoubtedly committed a number of criminal offences towards his wife, he has never assaulted her. It seems that the nub of the plaintiff's case is that whatever else he may have done, the assertion that he was prepared to use violence in a domestic context has unfairly damaged his reputation.

[32] The plaintiff argues that the allegation that the plaintiff had been in prison for assaulting his wife, as opposed to criminally harassing her, is inaccurate. Any suggestions by the plaintiff, however, that his reputation has been damaged as a result can not be determined without first establishing what that reputation in domestic matters may have been prior to the publication.

[33] If, for example, it was established that the plaintiff had assaulted his wife or family members on other occasions, it would be difficult for him to sustain his submission that his standing in the community had been unfairly lowered by the assertion that he had been convicted of a domestic assault.

[34] The plaintiff acknowledged before me that he had breached the protection order in question and was not proud of that fact. He contended, however, that never once had he assaulted his ex-wife.

[35] Counsel for the defendants indicated that if this matter was to proceed to trial, evidence would be led to show that the plaintiff has criminal convictions for:

1. Breaching protection orders – one of these convictions involved the plaintiff entering a women's refuge – *Police v*

Kerr (unreported sentencing decision of Judge Thompson, CRN8085014976, 10 July 1998, Wellington District Court).

2. Common assault.

3. Abusive language and behaviour causing fear.

4. Wilful damage.

5. Being unlawfully in an enclosed yard.

6. Aggravated burglary.

7. Driving a motor vehicle in a dangerous manner.

[36] Counsel for the defendants submitted that these convictions are relevant to the plaintiff's reputation for the purposes of this proceeding.

[37] Counsel for the second defendant indicated also that evidence will be led that the plaintiff's former wife has complained in Family Court proceedings that the plaintiff physically assaulted her.

[38] The defendants contend, therefore, that the plaintiff's reputation is seriously flawed. As to this, interestingly, Master Thomson in his Judgment in this proceeding dated 1 March 2001 on discovery proceedings found that the discovered records included information with respect to the plaintiff which contained:

> "Evidence of a history of bad behaviour, misconduct, and/or abuse by the plaintiff to his partner, such as to affect his current reputation." – Paragraph 28.

[39] At this point, s30 Defamation Act 1992 should be noted. It states:

> "30. In any proceedings for defamation, the defendant may prove, in mitigation of damages, specific instances of misconduct by the plaintiff in order to establish that the plaintiff is a person whose reputation is generally bad, in the aspect to which the proceedings relate."

[40] I am satisfied that there is significant material already before the Court to suggest that the plaintiff's reputation in both domestic and general matters is not generally good. That said, I am satisfied that the plaintiff's claim therefore has little prospect of success.

[41] Even if the plaintiff's claim here was to succeed, which I think unlikely, in *Hudson Hill v Antony Morrison & Ors* (unreported, High Court Christchurch, 12 December 2002, CP30/02) Chisholm J made an order for security for costs in defamation proceedings, and one of the reasons given for exercising the Court's discretion in favour of the defendants was that it was:

> "Difficult to see how a substantial award could be realistically anticipated."

[42] In my view, there is a very low probability of the plaintiff succeeding in this matter, and even so, in any event, if he was to succeed, a very low probability of a substantial award.

[43] A further matter requires comment. This relates to the course which this proceeding has taken.

[44] Counsel for the defendants contended before me that there have been substantial delays to date in the advancement of this proceeding, these delays being solely or in large part attributable to the plaintiff.

[45] The newspaper report complained of was published on 5 November 1998, and the plaintiff did not commence this proceeding until 5 May 2000. It is now almost three years later, and the matter still remains unheard.

[46] Counsel for the defendants argue that the plaintiff's delays in commencing and prosecuting this case must further mitigate any damage that might be payable by the defendants and should tell against him in the exercise of the Court's discretion.

[47] Further, the defendants noted that the plaintiff has repeatedly breached timetabling orders over the history of this proceeding.

[48] In my view, there is substance in these claims. Given all these matters, I am satisfied this is a clear case in which the Court should exercise its discretion under Rule 60 in favour of the defendants.

[49] The plaintiff's claim has already involved both the first and second defendants in considerable expenditure.

[50] As Hammond J. noted in *Hamilton v Papakura District Council* (1997) 11 PRNZ 333 at page 336:

> "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'. The economic realities of a case must be looked to."

[51] The economic realities here from the defendants perspective in my view must be taken into account, especially given my finding that the plaintiff's claim here has little merit.

[52] Accordingly, the defendants' application for security for costs against the plaintiff succeeds.

Quantum and payment orders

[53] As to quantum, counsel for each of the defendants contended that a reasonable amount for security for costs to be ordered here was $12,500 for each defendant, that is a total of $25,000.

[54] The plaintiff provided no real opposition to this contention.

[55] Given the history of this matter, and the likely course it might now take, I am satisfied that the $25,000 sought by the defendants is reasonable in the circumstances.

[56] As to payment of this sum, the plaintiff in his written submissions indicated that the best he could commit himself to would be a minimum of $10.00 per week. Before me, however, he claimed in oral submissions that he might be able to settle an order in the vicinity of $25,000 over a period of three years. On further questioning,

however, he indicated that this would require him to find full time employment and cease his university studies, in which event he should be able to find at least $8,000 per year from earnings.

[57] Notwithstanding this, it is important to give the plaintiff every reasonable opportunity to find the security for costs amount over a reasonable period.

[58] Given this, an order for staggered payment of the amounts sought by way of security for costs appropriate here. I outline that in paragraph [61] below.

Conclusion

[59] It will be apparent from the foregoing that the applications by the defendants for security for costs are successful.

[60] The following orders are made:

(1) The plaintiff shall give security for the costs of the first defendant and the second defendant in this matter in the total sum of $25,000.

(2) This sum of $25,000 shall be paid into Court by twelve equal consecutive quarterly instalments each of $2,083.33 commencing with a first payment three months from the date of this judgment, and quarterly thereafter.

[61] In the meantime, this proceeding is stayed until each of the sums specified above have been paid.

[62] Leave is reserved for any party to approach the Court for a further order in the event that any of the payments specified above shall not be made.

[63] Costs on this application are reserved.

Master J I Gendall

Delivered at 3·30pm on 10 April 2003.