

**NOT
RECOMMENDED**

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV2000-404-001568

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BETWEEN	CHINESE HERALD LTD First Plaintiff
AND	STEPHEN SIK FUN WONG Second Plaintiff
AND	STELLA HU Third Plaintiff
AND	NEW TIMES MADIA LIMITED First Defendant
AND	WEIJAN CHEN Second Defendant
AND	WEIMING CHEN Third Defendant
AND	WEIZHENG LIU Fourth Defendant
AND	DAVY WAI KEUNG KWOK Fifth Defendant

Hearing: 13 May 2004

Appearances: Mr Wong in person
D J T Watt for the Second, Third and Fourth Defendants

Judgment: 13 May 2004

ORAL JUDGMENT OF PATERSON J

Solicitors:

Brookfields, P O Box 240, Auckland
David Watt & Co., P O Box 7109, Auckland

[1] On 11 March last, judgment was given for the 2nd and 3rd plaintiffs against the 2nd, 3rd and 4th defendants for defamation. Mr Wong was awarded the sum of \$125,000 and Ms Hu the sum of \$25,000 damages. The defendants now apply to stay that judgment.

[2] The initial application was on the basis that the judgment should be stayed until two other matters are resolved. These are defamation matters in respect of which Mr Wong and Ms Hu are named as defendants.

[3] The application also noted that the defendants had instructed counsel to appeal the judgment, and counsel was currently researching the merits of any such appeal. I intend to treat this application as a stay, both under the provisions of r565 of the High Court Rules, and r9 of the Court of Appeal (Civil) Rules 1997.

Costs

[4] An unresolved matter is the fixing of costs in the defamation matter before me. In that judgment, I noted that Mr Wong and Ms Hu had sought full indemnity costs and I heard submissions on that application. However, neither counsel referred to s 43 of the Defamation Act 1992. In this case, the Chinese Herald Ltd had failed because it was unable to prove pecuniary loss, and as a result, the defendants may well be entitled to costs according to normal principles against the Chinese Herald. In respect of Mr Wong and Ms Hu, I expressed a provisional view that if s 43 did not apply, this may be a case for greater than Category 2 costs, but not for full indemnity costs. On the other hand, if s 43 does apply, the defendants will be entitled to full indemnity costs.

[5] This is a case where the plaintiffs sought damages of \$1m. They received a total award of \$150,000. In the circumstances, there must be some prospect that the provisions of s43 apply. If that were to be the case, the damages payable to the plaintiffs would be substantially offset by an award of damages in favour of the defendants, notwithstanding that the defendants for much of the time represented

themselves. It is surprising no application has been made by the defendants for costs and the only costs application I have is on behalf of the plaintiffs. The defendants filed a memorandum seeking to have the question of costs deferred, but this deferral may not, depending on the outcome of considerations of s 43, be to the defendants' benefit.

Grounds of Application

[6] The defendants' application for stay appears to be based on the following:

- a) The appeal to the Court of Appeal is, in effect, an application seeking leave to appeal earlier judgments of Harrison J when he denied the defendants the right to raise certain defences including truth, honest opinion, and qualified privilege. There must in respect of this application be an issue of whether or not leave will be granted.
- b) An issue is raised in respect of costs and I am told from the Bar that the plaintiffs' previous solicitors are suing them for costs. Whether this be correct, I do not know and I do not take it into account. Mr Watt complains that he needs full details of the plaintiffs' costs. In the circumstances it is difficult to see why there should be a stay because the defendants are seeking to obtain from the plaintiffs full details of their costs, particularly as those details will not be relevant if there is finally a costs award in favour of the defendants.
- c) The main ground appears to be that the stay should be deferred until two other proceedings in which Mr Wong and Ms Hu are defendants, and parties related to the defendants' in this case, are resolved. Those cases are CP328/01 and CP324/01. From the information I have, both the Chen Brothers, who are the 2nd and 3rd defendants respectively in this pleading, are plaintiffs in those proceedings. The other plaintiffs in those proceedings were not defendants in the current proceeding. The ground for deferral is that the defendants in this proceeding who are among the plaintiffs in the other two proceedings have a high chance of success in obtaining damages and costs against the plaintiffs.
- d) If the appeal were to succeed, the defendants will be able to run the defence of truth in the present pleading. This of course is related to (a) above.

Rule 9 Court of Appeal (Civil) Rules

[7] This Court does have a discretion to stay the execution of a judgment pending the determination of an appeal. There are, however, principles upon which the Court must exercise its discretion. While all the factors must be weighed, important factors are the right of a successful litigant to have the fruits of a judgment and the need to preserve the position in case the appeal is successful.

[8] In this case, there is no evidence before me which suggests that the defendants' right of appeal will be rendered nugatory if the stay is not granted. There is nothing to undermine the principle that the plaintiffs are entitled to the fruits of their judgment.

[9] Another matter I take into account is that if the appeal to the Court of Appeal is against the earlier judgment of Harrison J, then the appeal should have been made at that time, and not now.

[10] Applying the normal principles I see no reason to stay this judgment pending the determination of the appeal. There is no evidence adduced in a proper form before this Court which persuades me that the appeal rights, whatever they may be, will be rendered nugatory if the stay is not granted. No evidence has been adduced to indicate the strength, if any, of the defendants' cases in the other two cases. Indeed, no evidence has been adduced at all.

Rule 565

[11] The Court's discretion under r 565 is that it is normally only exercised upon the grounds that a substantial miscarriage of justice would be likely to result if the judgment were executed. This is a separate and distinct provision from the Court of Appeal provision referred to above.

[12] An applicant must establish both the likelihood and the substantial nature of any miscarriage of justice, and also needs to show that such a miscarriage is probable rather than possible. The onus is on the party applying to establish a substantial

miscarriage of justice as being the likely result. It is necessary to establish that a miscarriage of justice of a substantial degree would probably result if the judgment were executed.

[13] This is a case where the two other cases referred to were initiated in 2001. The defendants applied twice during the interlocutory stages of the present proceeding to have those two cases consolidated with the present proceeding. The first application was declined by Master Gambrell on 12 June 2002, and the second by Master Faire on 21 May 2003. The matter has twice been before the Court and the defendants having failed to satisfy the Court then of the need to consolidate, now seek to, in effect, obtain the same result by staying the execution of the present judgment.

[14] In respect of the submission that the defendants have very valid claims in these two actions, and there is a high chance of success in obtaining damages and costs against the plaintiffs, I repeat that there is no evidence before this Court backing that assertion. Also of relevance is that although some of the parties to those two proceedings are common with the parties to this proceeding, there are other parties to those two proceedings who are not parties in this proceeding.

[15] As already noted, I do not see that the costs position as advanced by the defendants assists their cause. They would have been more assisted if they had applied for costs in accordance with the invitation they were given in the earlier judgment.

[16] In these circumstances, the application for stay is dismissed.

Costs

[17] I cannot resolve the costs today because I have not had the submissions invited from the defendants. In fairness to them, they should be given an opportunity. They will have 14 days from today's date to file any submissions they wish to file in respect of those costs. The plaintiffs will have a further 14 days to file submissions in response. In this respect, I note that the Chinese Herald is a party

which is involved in the costs issue, and it should make submissions. Mr Wong has been advised that he cannot represent the Chinese Herald without the leave of this Court. That leave is generally not given but, in the circumstances of this case, leave is given for him to include in his submissions any submissions he wishes to make on behalf of the Chinese Herald. It should not be assumed that this leave will apply to any other steps which may need to be taken in this case or in the appeal on behalf of the Chinese Herald Ltd.

[18] If the defendants were to succeed on an application for costs, and this must be a prospect because the Chinese Herald succeeded in defending the matter, and because of the provisions of s 43 of the Defamation Act, the liability of the defendants may well be reduced when a costs award is made.

[19] In these circumstances there will be a limited stay only until the date of the judgment determining costs. It will be issued as soon as possible after submissions are received. The stay will lapse from the date that judgment is issued, or if the defendants do not comply with the timetable in paragraph 17 above.

A handwritten signature in black ink, appearing to read 'B J Paterson J', is positioned above the printed name.

B J Paterson J