

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

CIV-2008-404-007576

BETWEEN SUSAN ANNE COPPING
 Plaintiff

AND THE NURSING COUNCIL OF NEW
 ZEALAND
 First Defendant

AND COURTENAY KENNY
 Second Defendant

AND MARION CLARK
 Third Defendant

AND WAITEMATA DISTRICT HEALTH
 BOARD
 Fourth Defendant

Hearing: 20 November 2009

Counsel: J Ussher for Plaintiff
 M McClelland for First and Third Defendants
 A H Waalkens QC for Second Defendant
 No appearance for Fourth Defendant

Judgment: 27 November 2009

JUDGMENT OF WILLIAMS J

*This judgment was delivered by me
On
27 November 2009 at 11:00 am
pursuant to Rule 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar
Date:*

- A. The applications by the first, second and third defendants for security for costs are granted and the plaintiff is ordered, within three months of the date of delivery of this judgment, to provide security for the defendants' costs in the sums of \$40,000 for the first defendant, \$25,000 for the second defendant and \$5000 for the third defendant.**
- B. The sums ordered are to be paid into Court (with notification to the defendants) and invested by the Registrar in an interest-bearing account pending further order of the Court.**
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Introduction

[1] The plaintiff, Ms Copping, lives in England. As a result, all four defendants seek security for costs against her.

[2] The plaintiff and the fourth defendant, the Waitemata District Health Board, have settled the latter's application with an agreed sum (\$15,000) to be paid. Counsel for the fourth defendant in a memorandum dated 5 November 2009 said that one of the terms of the agreement was that the fourth defendant will take no further steps until security is paid. That must, of course, be subject to the High Court Rules and any directions by this Court.

[3] As far as the remaining applications are concerned, Ms Copping is prepared to provide security for costs in the sum of \$15,000 for the first, third and second defendants but they seek security in the sum of \$40,000 each.

[4] It is, therefore, only the quantum of any security which needs to be fixed.

Claim

[5] The plaintiff has issued a moderately complicated claim. She was employed as a psychiatric nurse, nursing geriatric patients under a practising certificate issued

by the first defendant, the Nursing Council. She pleads that in 2006 she was prescribed an analgesic for pain arising from long term cancer and that on 1 October that year the Nursing Council's Director of Nursing and Midwifery referred her use of that analgesic to the Nursing Council on grounds set out in the claim. As a result, her practising certificate was restricted on 6 December 2006 and later suspended for 20 days. Reinstatements and further suspensions followed, the latest reinstatement being on 28 April 2008.

[6] She sues the Nursing Council for judicial review concerning the conditions imposed on her on the latest reinstatement of her practising certificate asserting the Council took irrelevant considerations into account, failed to exercise its statutory duties and made other findings. She particularly challenges meetings which preceded the latest reinstatement and tests she has undergone, plus the taking of specimens.

[7] She seeks declarations that the conditions on her practising certificate were invalid, together with compensation by way of costs incurred.

[8] The second cause of action against the Nursing Council is based on its alleged failure to observe the principles of natural justice under s 27(1) of the New Zealand Bill of Rights Act 1990 in which, in addition to declarations of invalidity, she seeks a written apology and damages of \$25,000.

[9] Her third cause of action against the Nursing Council is based in breach of statutory duty in relation to its discharge of its functions under ss 47, 49 and 50 of the Health Practitioners Competence Assurance Act 2003. Relief under that cause of action includes \$73,581 for loss of income, plus general damages totalling \$30,000 for stress, anxiety and humiliation.

[10] She brings the fourth cause of action against the Nursing Council and Ms Clark, its Chief Executive and Registrar and the third defendant, claiming to have been defamed in a letter written to four persons on 18 April 2007. In that cause of action she seeks general damages of \$100,000 plus aggravated and punitive damages at large.

[11] As against Dr Kenny, the second defendant, she alleges that whilst he was a specialist occupational physician employed by Waitemata District Health Board she was instructed to see him professionally. She claims his services were sub-standard in relation to lab test results which were apparently sent to the Nursing Council's Health Committee to be used in its consideration of her fitness to practise as a nurse. She asserts that Dr Kenny failed to ensure that the testing results were carried out using appropriate protocols, he failed to write a meaningful report for the Nursing Council, and did not commission an expert toxicologist to review the results. In that claim she seeks the same amounts for loss of income, testing costs and stress and anxiety.

[12] There is a further cause of action against the Waitemata District Health Board claiming that it was vicariously liable for Dr Kenny's actions.

[13] The defences of the Nursing Council and Ms Clark are, broadly speaking, a general denial, a dispute on the facts and an affirmative defence that the letter of 18 April 2007 expressed no more than an honest and genuine opinion. All were true or qualifiedly privileged.

[14] Dr Kenny's defence is a general denial and a challenge on the facts but, importantly, asserts that "at no time was he in a relationship of providing medical care for the plaintiff".

[15] The claim is still at a relatively early stage with discovery yet to be completed. That is forecast by counsel to be a significant job as far as the Nursing Council is concerned but will require much less time by Ms Clark and Dr Kenny.

[16] Because of the rather unusual combination of causes of action, the plaintiff is proposing that the defamation claim be severed from the rest of the action. Two five day trials are envisaged, different counsel will be involved in each and the first trial will not dispose of the necessity for a second.

Applications and submissions

[17] The application by the Nursing Council and Ms Clark, in addition to the usual grounds on which such applications are brought, asserted the plaintiff's chances of success against those defendants were low. Ms Copping, naturally, denied that.

[18] Counsel for both the first and third defendants, Mr McClelland, calculated that the scale costs for each of the trials was likely to be in the region of \$28,000. He accepted that, unless some unexpected circumstance arose, he would be able to appear for both clients at the trials. He noted the plaintiff had given no evidence as to her ability to meet any order for security, though, on the other hand, she had offered \$15,000 security for each group of plaintiffs. His submissions challenged some of the plaintiff's assertions and averments in her claim but he accepted, of course, that at this early stage of the proceeding and in an interlocutory application such as this, it was impossible for any view to be reached on that topic.

[19] Mr Waalkens QC, senior counsel for Dr Kenny, emphasised that, although the situation was not so clear-cut as to warrant an application being made to strike out the claim against his client, he was firm in his view that, at the end of the trial, Dr Kenny's assertion that he was not in a therapeutic or other relationship with the plaintiff, would be held to be justified.

[20] Both counsel contested the plaintiff's view that there was a public interest element in the assertions concerning the way in which the Nursing Council deals with issues such as those raised by the plaintiff.

[21] Mr Ussher, counsel for Ms Copping, made the point that the plaintiff's residence outside New Zealand is not determinative but would be merely a factor for the Court to be taken into account in ordering security for costs. Her offer of \$15,000 per group of defendants was, he submitted, demonstrative of her ability to pay. He suggested that if no greater security was ordered and the defendants were successful, it was relatively easy to enforce any judgment for costs in the United

Kingdom. However, it must be said, that ability to enforce a judgment by no means suggests enforcement will not be costly.

Discussion and decision

[22] The plaintiff's residency in the United Kingdom makes the provision of security for costs by her virtually inevitable, particularly given the cost of enforcement of any judgment in that country.

[23] She has chosen to issue a somewhat unusual set of claims which, particularly by reason of the defamation claim, will need to be resolved at two separate trials with varying counsel being involved.

[24] It is also not difficult to accept that, although Ms Copping may already have copies of a number of the discoverable documents, the period over which she is challenging the Nursing Council's actions and the number of meetings under review, inevitably mean that, as Mr McClelland said, discovery on the part of the Nursing Council is likely to be extensive.

[25] Discovery by Ms Clark would be very much less extensive and Mr Waalkens said his client has very few documents.

[26] Also to be borne in mind is that, with the exception of the damages claimed in the defamation action, the amounts sought are relatively modest, from which it may be inferred that the plaintiff's main concern is reputational, together with recovery of the costs she has incurred in dealing with the matters which are the subject of her action.

[27] In those circumstances, the Court's view is that the Nursing Council's application for security for its costs is reasonably assessed at \$40,000, particularly bearing in mind that it will face two trials. An order for that amount will be made.

[28] The order for security for costs for Ms Clark will, however, be much less in extent. It will be limited to \$5000 with the proviso that, if it eventuates that Ms

Clark requires separate representation, the issue of security for her costs will obviously need to be revisited.

[29] The claims against Dr Kenny are in a different category. They are reputational but, in a sense, an attack and defended in an effort to preserve his reputation. Seen in that light, the claims against him are complex in a rather different way from the claims against the Nursing Council and may be difficult to rebut. However, given that discovery will occupy much less time and effort on Dr Kenny's part than in relation to the Nursing Council and he will face only one trial, the Court's view is that the appropriate sum to order for security for his costs is \$25,000.

[30] It is not appropriate to stay the proceeding pending payment of the security ordered but it is appropriate to order that security be provided within a limited period given the amount of time and effort needed to be expended on discovery in the near future.

[31] Depending on the way the claim proceeds, it may also be necessary to revisit the issue of security when the hearing(s) are much closer and the claim(s) are on the verge of being set down, particularly if separate representation is required by Ms Clark.

Result

[32] In the result, the applications by the first, second and third defendants for security for costs are granted and the plaintiff is ordered, within three months of the date of delivery of this judgment, to provide security for the defendants' costs in the sums of \$40,000 for the first defendant, \$25,000 for the second defendant and \$5000 for the third defendant.

[33] The sums ordered are to be paid into Court and invested by the Registrar in an interest-bearing account pending further order of the Court.

[34] There will be no separate orders for the costs of these applications, they being subsumed in the security ordered.

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HUGH WILLIAMS J

Solicitors/Counsel:

J Ussher, PO Box 44-325, Pt Chevalier, Auckland
Fisher Lamberg, PO Box 9074, Auckland

M McClelland, PO Box 10-242, Wellington
A H Waalkens QC, PO Box 106215, Auckland

Case Officer: Sharon.Chivers@justice.govt.nz