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

**CIV 2009-485-603**

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| BETWEEN | PETER DANIEL VAUGHAN<br>Plaintiff |
| AND | GORDON BRIAN CHRISTIE<br>First Defendant |
| AND | PAUL THOMPSON<br>Second Defendant |
| AND | IAN WILLIAMS<br>Third Defendant |
| AND | CONNIE BARFOOT<br>Fourth Defendant |

Hearing: 3 June 2009

Appearances: P.D. Vaughan - Plaintiff in person
S.L. Bacon - Counsel for first to fourth defendants

Judgment: 11 June 2009

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**JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL**

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*This judgment was delivered by Associate Judge Gendall on 11 June 2009 at 3.30 p.m. pursuant to r 11.5 of the High Court Rules.*

Solicitors: Izard Weston, Solicitors, PO Box 5348, Wellington

Plaintiff: Peter Daniel Vaughan, 12 Hammond Street, Bulls

## Introduction

[1] The defendants seek an order for security for costs against the plaintiff and, if successful, a stay of these proceedings pending payment of the security for costs. The order sought is for a total sum of $60,000, being $15,000 for each defendant. The application is opposed by the plaintiff.

## Background Facts

[2] The plaintiff is a former employee of Christie Flooring Limited ("Christie Flooring"). It appears that he resigned from his position at Christie Flooring in June 2006.

[3] The first defendant is the sole director of Christie Flooring and the second, third and fourth defendants were employees of the company at the operative time.

[4] The plaintiff's claim in this proceeding relates to his allegations of statements made, and conduct engaged in, by the defendants during the period June 2006 to February 2009 which the plaintiff claims were defamatory of him. The overall nature of the plaintiff's claim seems to be that the defendants defamed him by stating that he had committed fraud, bribery and other criminal acts, and by claiming that the plaintiff was being investigated by police at a time when that was untrue.

[5] According to the plaintiff and a Mr. Alan Murray ("Mr. Murray") who until recently (when he was dismissed) was an employee of Christie Flooring, the defendants conspired to blame the plaintiff for fraudulent activities that they say were actually committed by the second defendant, Mr. Paul Thompson ("Mr. Thompson"). The nature of these fraudulent activities is not entirely clear to me, but appears to relate to at least two contracts negotiated on behalf of Christie Flooring which effectively are said to be "underhand".

**Parties' Arguments and My Decision**

[6] The power to make an order for security for costs is contained in r 5.45 of the High Court Rules. It provides in part:

> "5.45 Order for security of costs
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> (1) Subclause (2) applies if a Judge is satisfied, on the application of a defendant,—
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> …
>
> (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.
>
> (2) A Judge may, if the Judge thinks it is just in all the circumstances, order the giving of security for costs.
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> (3) An order under subclause (2)—
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> (a) requires the plaintiff or plaintiffs against whom the order is made to give security for costs as directed for a sum that the Judge considers sufficient—
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> (i) by paying that sum into court; or
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> (ii) by giving, to the satisfaction of the Judge or the Registrar, security for that sum; and
>
> (b) may stay the proceeding until the sum is paid or the security given."

[7] The Court of Appeal provided a useful summary of the general approach to be applied in such applications in *A S McLachlan Ltd v MEL Network Ltd* (2002) 16 PRNZ 747 at [13] and [14]:

> "[13] Rule 60(1)(b) High Court rules provides that where the court is satisfied, on the application of a defendant, that there is reason to believe that the plaintiff will be unable to pay costs if unsuccessful, "the court may, if it thinks fit in all the circumstances, order the giving of security for costs". 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."

[8] Rule 5.45 provides for a threshold requirement which is to the effect that the plaintiff is impecunious. In the present case, the plaintiff has conceded that he is impecunious, and the threshold test is therefore clearly satisfied.

**Discretion**

[9] I now turn to consider the other relevant factors the Court is to consider in exercising its discretion as to whether an order for security for costs should be made.

[10] Although the Court of Appeal warned in *A S McLachlan v MEL Network Ltd* against constructing "principles" from the facts of previous cases, it is clear that certain factors have been regarded regularly as relevant in dealing with security for costs applications.

[11] The first requires the balancing of the interests of plaintiff and defendant. The Court in *McLachlan* at [16] stated with reference to the interests of defendants that "[t]hey must be protected against being drawn into unjustified litigation, particularly where it is over-complicated and unnecessarily protracted". On the other hand, in considering the interests of plaintiffs, the Court stated:

> "[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."

[12] Defamation suits are complex and costly by nature. The present proceeding is likely to raise a range of complicated issues particularly in relation to the pleadings, and the general nature of the plaintiff's many claims suggests that the defendants will be put to considerable expense in defending them. And here, the plaintiff represents himself. The defendants contend that the fact that the plaintiff is a self-represented litigant who is unfamiliar with Court requirements will increase costs to the defendants. Due to serious defects in his original statement of claim, the plaintiff was ordered to file and serve an amended statement of claim properly particularising his claim against the defendants. The defendants now say that the amended statement of claim still does not comply with the High Court Rules or the Defamation Act 1992, and that they therefore should not be exposed to the risk of what they consider to be an unjustified proceeding.

[13] Although the amended statement of claim now includes particulars to the extent that it specifies times, places, verbatim records of oral statements and names of persons, it is still deficient in that it does not clarify which statements the plaintiff alleges to be defamatory. The statement of claim is effectively a 21-page record of various conversations between the plaintiff, the defendants, Mr. Murray and others, setting out in detail the plaintiff's belief that he is the victim of a conspiracy, the purpose of which was to cover up the real culprit's offending. While this account of events includes some statements by the defendants which, I assume, form the basis for the plaintiff's defamation suit, they are not as such identified. It is also not always expressly stated to whom those statements were published, although this is mostly evident from the narrative.

[14] The defendants further criticise the amended statement of claim on the basis that it does not identify the meanings the plaintiff alleges the statements to bear. But, at the present point of the proceeding, this particular criticism is, in my view, broadly unfounded. Section 37(2) Defamation Act 1992 provides that the plaintiff shall give particulars of every meaning that the plaintiff alleges the matter bears, unless that meaning is evident from the matter itself. Assuming that the statements that the plaintiff seeks to rely upon as being defamatory are the ones that picture the plaintiff as a criminal, the defamatory meaning of the statements is self-evident and does not necessarily require particularisation.

[15] Another factor that may be of some significance is that, pursuant to s 43(2) of Defamation Act 1992, the Court must make an award of solicitor and client costs in the defendant's favour in situations where judgment is given for the plaintiff, but the damages claimed are grossly excessive. The plaintiff in the present case claims general and punitive damages against the second to fourth defendants totalling $1,850,000, and special, general and punitive damages against the first defendant amounting to about $2,000,000. The defendants suggest also that these claims are for vastly overstated amounts and this must count against the plaintiff here - *Sadiq v Baycorp (NZ) Ltd* High Court Auckland, 5 November 2008, CIV-2007-404-6421 (Doogue AJ).

[16] It is clear that security may be ordered against a litigant in person such as the plaintiff here: *Mihaka v Attorney-General* HC WHA CP 3/00 1 November 2000. The fact that the plaintiff's unfamiliarity with procedural and legal requirements will no doubt result in an increase in costs to the defendants is a factor that may tend to weigh against the plaintiff here – *Bevan-Smith v Team New Zealand Limited*, High Court Auckland, 5 April 2004, CIV 2003-404-468, Sargisson AJ.

**Merits**

[17] The next factor to be considered relates to the merits of the plaintiff's claim. *McGechan on Procedure* at HR5.45.03(2) sounds a note of warning with respect to this matter:

> "As far as possible, bearing in mind the early stage of the proceeding, the Court will endeavour to assess the merits and prospects of success of the claim. There is, of course, a very real limit as to how far such an inquiry can be made, particularly at an early stage of the proceeding: *Meates v Taylor* (1992) 5 PRNZ 524 (CA)."

[18] It is very difficult to assess the merits of the plaintiff's case on the current pleadings. The plaintiff makes a number of factual allegations against the defendants, which are rejected by the defendants. Contested factual issues of course must be dealt with in evidence and are not matters that can be appropriately considered in an interlocutory application such as the present application.

[19] Before me, counsel for the defendants contended that the plaintiff's causes of action would have little chance of success. The defendants not only deny the plaintiff's allegations, but also claim affirmative defences. No defences have as yet been pleaded because the defendants consider the deficiencies in the amended statement of claim to be too great an obstacle. At the hearing of this application, however, counsel for the defendants indicated that a defence of truth at least is to be pleaded. The defendants are also concerned that the plaintiff's allegations are almost exclusively based on Mr. Murray's affidavits, who the defendants say is scarcely a credible witness, and that the statement of claim is merely the work of two disgruntled former employees of Christie Flooring.

[20] Counsel for the defendants also emphasised that a substantial number of the plaintiff's allegations appear to relate to incidents that occurred before March 2007, and that these allegations are thus statute barred by virtue of s 4 of the Limitation Act 1950 unless the Court's leave is obtained. The plaintiff has applied for leave to be granted, but there is little before the Court at this stage to show any justification for the granting of such leave.

[21] In essence, the plaintiff's claim seems to be that the defendants were all part of a conspiracy to cover up the second defendant's fraudulent activities, blaming the plaintiff instead and thereby defaming him. The statement of claim in my view includes some claims that, leaving aside the Limitation Act defences, might provide grounds for an arguable claim in defamation. For example, it is alleged that:

- on 29 June 2006, the first defendant told Mr. Murray that the plaintiff "stole hundreds of thousands" from him and that he would "go to prison for years";
- on 23 October 2007, the first defendant showed a letter containing allegations of criminal conduct against the plaintiff to one of his employees, a store-man called Mr. Mollo. The wording of the letter, however, is only set out in other parts of the pleadings;
- on 26 June 2006, the second defendant told Mr. Matthew Head and Mr. Elijah Kaiolo, two employees of the company, that the plaintiff "stole the money [and] blackmailed and bribed you guys";
- on 7 September 2006, the second defendant told Mr. Brett Larson, another employee, that the plaintiff "stole off the company";
- on 13 March 2008, the third defendant told Mr. Matthew Head, Mr. Brett Larson and Mr. Ian Jepson that the plaintiff "had committed fraud, blackmailed, bribed and intimidated staff and clients";
- on 10 May 2007, the fourth defendant told Mr. Murray that the plaintiff "committed the fraud", and that he was "guilty as sin", while in the presence of Mr Mollo and Ian Jepson.

[22] The statement of claim, however, appears only to plead statements that were made to a limited group of people, making proof of defamation potentially difficult.

As I have noted above, generally considering the merits of a plaintiff's claim on an application such as the present is necessarily a difficult exercise, particularly where, as in the case before me, the proceeding is at a relatively early stage. In these circumstances, the Court is required to reach some preliminary conclusion on the merits of the plaintiff's claim, without being able to assess the totality of the evidence that the plaintiff proposes to adduce in support of it. On balance, however, I am of the view here that the plaintiff's present claim against the defendants lacks proportionality and also cannot be described as a particularly strong one.

**Cause of Plaintiff's Impecuniosity**

[23] The final matter for consideration concerns the question of whether there is a "reasonable probability" that the conduct of the defendants in the present case has caused or contributed to any impecuniosity the plaintiff may have suffered. If this has occurred then the authorities establish that it is a factor which militates against application for security: *Bell Booth Group Ltd v Attorney-General* (1986) 1 PRNZ 457.

[24] Before me, the plaintiff contended that his present impecuniosity was caused by the defendants' actions. In his statement of claim, he refers to the defendants' actions as having ruined his health and his employment opportunities. It is not clear, however, to what extent the plaintiff's financial problems are alleged to have been caused by the defendants' defamatory statements as opposed to the decision the plaintiff alleges against them that they "conspired against him".

[25] Further, there is nothing before the Court to suggest that there is a "reasonable probability" established by persuasive evidence that the plaintiff's impecuniosity results from the defendants' actions complained of in the proceeding. Mere assertions to this effect are not sufficient: *Davy v Howell* (1993) 7 PRNZ 141, and *Weld Street Takeaways and Fisheries Ltd v Westpac Banking Corporation* [1986] 1 NZLR 741.

**Other Factors**

[26] One other factor to consider in applications such as the present might be questions of public interest. But, clearly here, I can see no public interest aspect in this case such as was present in *Ratepayers and Residents' Assoc. Inc v Auckland CC* [1986] 1NZLR 746(CA). This factor does not assist the plaintiff here.

[27] A final factor relevant to the Court's exercise of its discretion here relates to the question of whether other persons interested in the plaintiff's present proceeding may have sufficient means to meet any security for costs which might be ordered – *Attorney General v Transport Control Systems (NZ) Ltd* [1982] 2 NZLR 19 and *National Bank of New Zealand Limited v Donald Export Trading Limited* [1980] 1 NZLR 97.

[28] In the present case the plaintiff appears to be assisted by Mr. Murray who, as I have noted, was also a former employee of Christie Flooring. Mr. Murray as mentioned earlier has filed affidavits in support of the plaintiff's claim. Although there is nothing definitive before the Court at this stage, it is reasonable in my view to presume that Mr. Murray as an ex-employee of Christie Flooring and someone who through his affidavits is assisting the plaintiff in his present claim is a person who might have some interest in the present proceeding. Whether Mr. Murray may have a sufficient interest or the means to meet any security ordered against the plaintiff is another matter. As there is no evidence before the Court on this aspect I must leave it to one side. Suffice to say, however, that, even if an order for security is made here, I am not persuaded that this would necessarily prevent the plaintiff from pursuing his present claim.

[29] For all the reasons outlined above, I reach the conclusion that the defendants' security for costs application must succeed. Although access to the Courts for a genuine plaintiff is not lightly to be denied, the proper balancing of the parties' interests, in my view, must fall on the side of the defendants who have an interest in being protected to some extent (by a security order) against being drawn into protracted litigation.

**Quantum**

[30] As to the quantum of security sought here, the defendants seek an order for $60,000 in total, or $15,000 in respect of each defendant. They say that a costs award in favour of each defendant would likely exceed $25,000.

[31] As to the amount of security to be ordered, McGechan at HR5.45.07 states:

> "The amount of security is equally in the Court's discretion. It is not necessarily to be fixed by reference to likely costs awards. Rather, it is to be what the Court thinks fit in all the circumstances: *A S McLachlan Ltd v MEL Network Ltd* (2002) 16 PRNZ 747 (CA).
>
> Those circumstances include the:
> (a) Amount or nature of the relief claimed;
> (b) Nature of the proceeding, including the complexity and novelty of the issues, and therefore the likely extent of interlocutories;
> (c) Estimated duration of trial; and
> (d) Probable costs payable if the plaintiff is unsuccessful, and perhaps also the defendant's estimated actual (ie solicitor and client) costs.
>
> Insofar as past awards of security are a legitimate guide, they generally represent some discount on the likely award of costs as calculated under Schedule 3."

[32] Defamation proceedings are by their very nature complex. The present proceeding does not appear to be an exception. The plaintiff indicates in his amended statement of claim that he intends to call 60 witnesses in support of his claim. While the plaintiff argued before me that the trial would only take one to two weeks given his insistence that he will call 60 witnesses, I consider the defendants' estimate of eight weeks a more realistic estimate.

[33] It is likely also here that considerable time will need to be spent between now and trial to resolve issues relating to the pleadings and also possibly in relation to discovery and interrogatories. All these matters are likely to add to the expense of the present proceeding.

[34] The plaintiff also seeks a very substantial award in damages, amounting to over $3,000,000 in total. It is appropriate to take into account s 43(2), which I have already noted previously, and which could well result in an award for solicitor and client costs in favour of the defendants should the plaintiff be only moderately successful at trial.

[35] Bearing all these factors in mind, I agree that it is appropriate to award security for costs in the total sum of $60,000.00 amounting effectively to $15,000 for each defendant (even if they may not be separately represented).

**Conclusion**

[36] The defendants' application for security for costs against the plaintiff therefore succeeds.

[37] An order is now made that the plaintiff is to give security for costs to the defendants in the total sum of $60,000 by paying this sum into Court or by giving to the satisfaction of the Registrar proper security for this amount.

[38] The security ordered by this judgment is to be provided no later than 11 September 2009.

[39] An order is now made staying this proceeding until such time as security for costs as outlined above has been given.

[40] As to costs on the present application, the defendants have succeeded in opposing this application and they are entitled to an order for costs against the plaintiff. Costs are awarded to the defendants on a category 2B basis together with disbursements (if any) as fixed by the Registrar.

**'Associate Judge D.I. Gendall'**