IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2009-485-2638

BETWEEN	LYSETTE LILLIAN DU CLAIRE Plaintiff
AND	MATTHEW SIMON RUSSELL PALMER First Defendant
AND	CROWN LAW OFFICE Second Defendant

Hearing: 14 September 2010

Counsel: Plaintiff in person
U Jagose and T I Hallett-Hook for Defendants in support

Judgment: 29 October 2010

In accordance with r 11.5 I direct the Registrar to endorse this judgment with a delivery time of 2pm on the 29th day of October 2010.

RESERVED JUDGMENT OF MACKENZIE J

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[1] There are two applications presently before the Court. The first is an application by the defendants for security for costs against the plaintiff. That application was first made on 23 March 2010, and amended on 13 July 2010. The second is an application by the plaintiff made on 26 August 2010, for summary judgment on the grounds of failure to file a statement of defence. The application for security for costs was set down for hearing by Associate Judge Gendall, at this hearing before me.

[2] A description of the background is required. The following description is substantially based upon a memorandum produced by CLO which is in evidence.

Some of the description may be in dispute. It is intended only as background, not as factual findings.

[3] The plaintiff is a lawyer who was previously employed in the Inland Revenue Department (IRD), as a solicitor in the litigation management unit. In 2009, she was working on a tax avoidance case in which IRD was involved. The case was one of a number of cases which IRD regarded as connected in that the structures alleged to constitute tax avoidance arrangements in the several cases were very similar. Crown Law Office (CLO) was instructed by IRD to conduct the litigation and was the solicitor on the record. IRD was required to complete an affidavit of documents by 16 March 2009. Personnel at both IRD and CLO were involved in the preparation of the affidavit of documents. Within IRD, the plaintiff was the lawyer principally responsible.

[4] There had earlier been criminal proceedings in the High Court at Auckland, prosecuted by the Serious Fraud Office (SFO) in which documents and other evidence which IRD considered to be relevant to the tax avoidance case had been produced at trial. Access to those documents, by an application for search of the Court records, was sought and successfully obtained by IRD, in about March 2008. The documents included some documents which had been obtained by the SFO from the Attorney-General for Jersey. An issue arose as to the way in which those documents should be disclosed on discovery, and in particular whether, because of an undertaking given by the SFO to the Attorney-General for Jersey, a claim for public interest immunity ought to be made. Late in 2008 a joint request was made by IRD and the SFO for a CLO opinion in relation to the proposed disclosure and use by IRD of the documents. The first defendant, Dr Palmer, the Deputy Solicitor-General (Public Law), provided a first draft of the CLO advice on 13 January 2009. The plaintiff and another IRD officer sent a memorandum in response to CLO on 23 February 2009 for consideration by CLO in finalising its advice. The advice was due to be finalised by 16 March 2009, the date by which the affidavit of documents was due to be filed in the proceedings. Before then, by e-mail on 11 March, CLO made clear its expectation that "all documents obtained from Jersey … should be listed as privileged on the grounds of public interest immunity (perhaps also referring to s 70 of the Evidence Act)".

[5] On 16 March the plaintiff sent a draft affidavit of documents to CLO with a request for comment within half an hour. The narration for the claim to privilege for that part of the draft affidavit in which the Jersey documents were listed included the statement by the intended deponent that "I am advised by the Solicitor-General that I must claim confidentiality for these documents, notwithstanding that a set has been previously released under the Official Information Act 1982 to the taxpayer to whom they related". That statement was of concern to CLO for two reasons: first, that the wording might have constituted a waiver of privilege over the CLO advice which had been obtained; second, that it implied that IRD did not agree with the advice. The plaintiff agreed, after some debate, to modify the statement so that it simply recorded that confidentiality and privilege was being claimed over the documents. The wording of the draft affidavit was amended by the plaintiff to read: "These documents are listed as confidential on the advice of the Solicitor-General". The affidavit was completed and filed with that wording. CLO remained concerned, first because CLO regarded it as arguable that that statement constituted a waiver of privilege over the CLO advice, and second because it regarded the statement as directly contrary to the advice given by CLO in relation to the contents of the affidavit, which CLO understood had been accepted and acted on by the plaintiff.

[6] On 13 May 2009 Dr Palmer wrote to IRD expressing concerns over actions of IRD subsequent to his advice dated 16 March 2009. In his letter he detailed the circumstances over the wording of the affidavit of documents which I have more briefly described. The letter read:

> 1. The purpose of this letter is to raise with you concerns that I have over actions of Inland Revenue ("IR") subsequent to my advice dated 16 March 2009 (given jointly to IR and the Serious Fraud Office) in relation to the above matter.
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> 2. As detailed in the attached annex IR officials prepared and swore, on behalf of the Commissioner of Inland Revenue, an affidavit for filing in court that fails properly to implement my advice, could be seen to undermine that advice, and appears to have been designed to embarrass the Solicitor-General.
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> 3. I consider that this is a serious matter. A new (replacement) affidavit will need to be prepared, at some cost to IR, and an explanation provided to opposing counsel. This will be managed by this Office with IR assistance where appropriate.

> 4. I do not believe this problem reflects the intentions of IR. Rather, it appears to be the result of the attitudes and actions of one IR official, Ms Lysette du Claire. It is unfortunate that her actions have caused unnecessary embarrassment to the Solicitor-General and unnecessary cost to IR. I consider that Ms du Claire has deliberately sought to undermine advice with which she did not agree. In so doing she has caused a formal court document, sworn (on oath) on behalf of the Commissioner and for which Crown Counsel are responsible, inaccurately to record the view of the Solicitor-General in such a way as to cause embarrassment to him and this Office.
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> 5. I am aware that one Deputy Solicitor-General has already indicated that she is no longer prepared to work with Ms du Claire. Similarly, I no longer have sufficient trust and confidence that Ms du Claire will act in the best interests of the Crown in her interactions with this Office. I therefore record my expectation that neither I nor any counsel in the Tax and Commercial team will be required to work with her again.
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> 6. You may wish to take my views of Ms du Claire's actions into account in any performance management process that may eventuate. If, contrary to my understanding, it transpires that her actions have been authorised at a higher level within IR, I would appreciate the opportunity to discuss this matter further.

[7] Dr Palmer subsequently raised another issue about the matter in an e-mail to IRD dated 18 May. That related to contact which the plaintiff had made with the High Court at Auckland concerning the use of the Jersey documents. The contact had prompted a direction from the trial Judge for counsel for the SFO and for IRD to appear before him in person to explain the circumstances. In that e-mail, Dr Palmer said:

> … It appears that Lysette du Claire of IR decided to email the court herself on this matter without reference to Crown Law. In so doing, she has disclosed that IR considers that the information is relevant to existing civil proceedings and potential criminal proceedings. (I note that Crown Law has not been advised of the latter, to my knowledge).

[8] Dr Palmer's complaints were investigated by IRD. A response was sent by the manager litigation, Mr Cook, to Dr Palmer by letter dated 6 August 2009. In that letter, Mr Cook said:

> During my indepth inquiry into the factual background, it did become apparent to me how on the information available to you at the time, you drew the conclusions as set out in your letter. My investigation, which resulted in my forming a very detailed picture of what happened, has brought to light a more complete sequence of events of which you were probably not aware but which have formed the basis for my conclusions.

[9] The letter then went on to deal with each of the allegations made by Dr Palmer and said:

> Although I have concluded that Lysette did not act deliberately to inaccurately record the view of the Solicitor-General or embarrass him or his office, I am very aware of the relationship breakdown between your office and Lysette. I would like to work with you in a way that addresses the needs of your office, and your staff, as well as the needs of the IR and its staff.

[10] Following a meeting to discuss that letter, Dr Palmer responded by letter dated 25 August 2009. He said:

> …
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> 3. I would have to say that I am not convinced by your conclusions. In particular, in relation to what you term "allegations one and three" your investigation appears to have focussed on the wording of the draft list as modified through discussions with Crown Law, and you have accepted Ms du Claire at her word in relation to her motivations. However it seems to me that Ms du Claire's original proposed wording in paragraph 8 of the draft list of documents (version marked 12:55), is reasonably capable of being characterised as Ms du Claire having "deliberately sought to undermine advice with which she did not agree". This is further reinforced by her email to Harry Ebersohn of 5 May 2009 at 17:00, (including the passage in which Ms du Claire states "We knew that a lot of that information was not, and indeed could not, have been covered by the undertaking …").
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> 4. I do, therefore, continue to hold significant concerns about Ms du Claire's actions, as identified in my letter of 13 May 2009. At the same time, I recognise that Ms du Claire's employment by the Litigation Management Unit of Inland Revenue is largely oriented towards litigation matters. I am willing to facilitate Ms du Claire having an opportunity to demonstrate that she is willing to work cooperatively and constructively with Crown Law, in the best interests of the Crown.
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> 5. My willingness in this regard depends on Ms du Claire and Inland Revenue being prepared explicitly to agree with Crown Law on a set of behavioural expectations. We can discuss these expectations further, and I am open to suggestions, but I would expect that such expectations might include:
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> 5.1 Explicit agreement by Ms du Claire to abide by the Protocols agreed between the Solicitor-General and Commissioner of Inland Revenue;
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> 5.2 Explicit agreement by Ms du Claire to seek to fulfil, and by Inland Revenue to manage her performance against, specific competencies (such as three expectations in Crown Law's

competency framework for Assistant Crown Counsel as attached).

6. If there is agreement on expectations then I would be prepared to agree to Ms du Claire working directly with specified Crown Counsel on specified cases, as determined by Crown Law, on a four to six month trial basis. We would need to discuss which counsel and which cases further. I would also expect that those Crown Counsel would be regularly and frequently consulted in the course of Inland Revenue's management of Ms du Claire's performance during this period. At the end of the six months Crown Law and Inland Revenue would jointly review the arrangement. Should there be a serious breach of the agreed behavioural expectations during the course of the six month period, such that Crown Law considers that the legal interests of the Crown are impeded, I would expect that the trial would cease immediately.

…

[11] In December 2009 the plaintiff issued these proceedings. She raises five causes of action. The first three are causes of action in defamation, arising from the letter of 13 May 2009, the e-mail of 18 May 2009, and the letter of 25 August 2009 respectively. The fourth and fifth causes of action allege misfeasance in public office by the first defendant arising from the letter of 13 May 2009 and the letter of 25 August 2009 respectively. The plaintiff alleges that the stress imposed on her by these events caused serious health issues for her, and that the ultimate consequence of the first defendant's actions was that she was dismissed by IRD on 13 November 2009.

[12] An order that a plaintiff give security for costs may be made under r 5.45 of the High Court Rules. The threshold test is that the Judge must be satisfied that there is reason to believe that the plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the proceedings. That threshold test is not in issue here. The plaintiff concedes that in the absence of a windfall, it will not presently be possible for her to pay the defendant's costs if she is unsuccessful in this litigation.

[13] That threshold test being met, there is a discretion to order security if it is just in all the circumstances. The principles to be applied in the exercise of that discretion are discussed by the Court of Appeal in *McLachlan v MEL Network Ltd*.[1] Whether or not to order security and the quantum of security are both discretionary

decisions. The discretion is not to be fettered by constructing principles from the facts of previous cases. Collections of authorities can be of assistance but 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. The rule contemplates that an order for substantial security may, in effect, prevent the plaintiff from pursuing the claim. An order to 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. The interests of the defendants must also be weighed. They must be protected against being drawn into unjustified litigation, particularly where it is over-complicated and unnecessarily protracted.

[14] I consider that it is likely that the plaintiff would be unable to meet a significant order for security, so that the effect of an order may well be that the plaintiff is unable to proceed. Counsel for the defendants did not suggest that this might not be the case, and the defendants' submissions are essentially directed to the proposition that no significant injustice to the plaintiff would result if the claims were unable to be pursued. That likely consequence means that I must give careful consideration to whether the claim has little chance of success, and whether the plaintiff is genuine.

[15] The essence of the defendants' submission that security should be ordered here is set out in counsel's submissions as follows:

> The defendants submit it is just to order that the plaintiff pay security here because:
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> 1. The plaintiff frankly admits to using the defamation proceeding to pursue an ulterior issue, that being an issue as to whether the Solicitor-General, the junior Law Officer of the Crown, can control Crown litigation. It is highly questionable whether the plaintiff has standing to bring such a challenge, even if the point were justiciable, which the defendants doubt.
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> 2. The expression of this motive shows the plaintiff misunderstands fundamentally the constitutional role of the Law Officers, and the second defendant, the Crown litigation.

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[1] *McLachlan v MEL Network Ltd* (2002) 16 PRNZ 747.

3. Accordingly, the plaintiff's claims in defamation and misfeasance lack merit.

4. Furthermore the plaintiff's motivation of pursuing this ulterior issue means that it is not in the interests of justice for the court to waive the security for costs which is ordinarily required to protect defendants from defending unmeritorious claims.

5. Properly understood, the real dispute is an employment dispute between the plaintiff and her former employer. The plaintiff has other, far more appropriate options available to her to challenge her dismissal from employment.

[16] It is convenient to address the question of whether an award of security would be just in all the circumstances by first considering each of those aspects.

[17] The defendants submit that the plaintiff openly admits that she is motivated, in bringing the claim, to pursue the ultimate issue described in paragraph 1. Counsel points to a number of forms of expression in the statement of claim which counsel submit indicate that that is the case. Ms Jagose submits that such an ulterior issue should not be permitted to be pursued in the guise of a defamation proceeding; one of the most technically and difficult forms of civil litigation. She submits that the defendants should not have to face the expense of defending this claim when the true motive in bringing the claim is arguably not even a justiciable matter.

[18] If the proceeding was directed to an ulterior issue, that is to say, one which could have no direct effect or impact on the plaintiff, then I would regard that as a powerful consideration in favour of an award of security. However, I do not consider that this is the case. The plaintiff submits that the defendants by their actions destroyed her reputation and her career, to her significant detriment. She seeks substantial damages, on the defamation and misfeasance in public office causes of action. On the defamation causes of action an essential question will be whether or not the letters and e-mails contained statements which are defamatory of the plaintiff. It is better that I do not express any substantial comment on that question. It is sufficient to observe that the plaintiff's case on that aspect is not so weak that it could be said, without a more detailed examination, that the claim has little chance of success, or that the litigation is unjustified. It may well be that questions as to the respective roles of the Solicitor-General and IRD in the conduct of tax litigation, may arise. If the defendants were to raise defences of qualified

privilege, truth or honest opinion, then those defences could raise questions as to the respective roles of IRD and CLO in the conduct of the litigation, so that the issue which is said to be ulterior would be directly relevant. On the misfeasance in public office causes of actions, similar questions may be relevant on the issues of whether the first defendant has exercised a public office, and if so what is the nature of that office, and what may properly be done in the performance of the office. In such cases, the respective roles will be directly relevant to the plaintiff's claims. That could not properly be described as a pursuit of the proceeding for an ulterior issue. If the plaintiff should in the course of these proceedings seek to pursue an ulterior issue not relevant to the determination of her claims for damages, then that could be managed through appropriate case management techniques to ensure that the pleadings and the evidence are confined to relevant matters. The consideration in paragraph 1 of the defendants' submissions would not by itself justify imposing a requirement for security which might prevent the plaintiff from pursuing her claims for damages.

[19] The defendants' submission in paragraph 2 is that there is a fundamental misunderstanding by the plaintiff of the constitutional role of the law officers of the Crown, and of the CLO, in the conduct of Crown litigation. Counsel for the defendants submits that it is the responsibility of the Attorney-General and the Solicitor-General, as law officers of the Crown, to determine the Crown's view of the law; that the Solicitor-General is responsible for providing the authoritative view of what the Crown considers the law to be and for conducting the Crown's litigation in the Courts, including litigation in the name of the Commissioner of Inland Revenue. The plaintiff disputes that proposition, and refers to the statutory independence of the Commissioner under the Tax Administration Act 1994. I do not regard the defendants' submissions as so self-evidently correct that I should treat the plaintiff's assertion to the contrary as so weak as to have little chance of success. The statutory responsibilities of the Commissioner under the tax legislation would need to be considered in determining the respective roles of IRD and CLO. Further, even if the defendants' submissions as to the respective roles are correct, I do not see those propositions as necessarily and unarguably fatal to the plaintiff's claims, particularly the defamation causes of action. The respective roles may be relevant to

the defences I have referred to, but the effect of those roles on the issues relevant to these defences would require further consideration.

[20] As to paragraph 3, I have already observed that it is better not to comment in detail. I do not consider that it can be said at this stage that the plaintiff's claim that the statements complained of were defamatory of her can be said to have so little prospect of success as to justify denying the plaintiff access to the Court. In the claims for misfeasance in public office, the plaintiff will have to establish the ingredients of that tort. These are that the defendant is a public officer; that the conduct complained of was to exercise power as a public officer, and either that the conduct was specifically intended to injure the plaintiff or that the defendant knew (or was recklessly indifferent as to whether or not) the action was not within his power and would probably injure the plaintiff. It appears to me that the plaintiff will face significant difficulty in establishing all of these ingredients. This tort is generally recognised as a difficult cause of action in which to succeed. However, I do not consider that they can be said to have so little chance of success that access to the Court should be denied. Further, the question whether or not security should be ordered must be considered having regard to the totality of the claims. It would not be appropriate to order security because only some, but not all, of the causes of action may have little chance of success.

[21] As to paragraph 4, I have already addressed the submission that the claim is directed to an ulterior issue. Beyond that, I do not consider it appropriate to speculate on what may motivate the plaintiff. I consider that the focus must be on the claim itself. The prospects of success are not dependent on the motivation of the plaintiff in pursuing the claim.

[22] As to paragraph 5, the issues raised in these proceedings are quite separate and distinct from any employment issues which may arise between the plaintiff and her former employer. Whether or not she may have any remedy against her former employer is essentially irrelevant to the question of whether or not she should be able to pursue the present claims.

[23] As counsel for the defendants acknowledges, one factor which may militate against an order for security is that there is a reasonable probability that the plaintiff's impecuniosity was caused by the defendants' actions. Counsel submits that there is no evidence that her dismissal by IRD was caused by the communication from the first defendant. The nature of the communications between CLO and IRD, and the timing of the plaintiff's dismissal, are such that the possibility that the communications from CLO may have had some bearing on the dismissal cannot be excluded. I consider that the possibility of a connection between the plaintiff's impecuniosity and the subject matter of the proceedings is sufficiently strong to weigh in the balance against an order for security.

[24] The plaintiff submits that there are significant public interest elements in this matter which count against the making of an order. I do not regard this as litigation with a public interest element which should be weighed in the balance against an order.

[25] I must weigh the potential injustice to the plaintiff if she is unable to pursue her claims against the potential injustice to the defendants if they are required to defend the claims, with no security for the costs which might ultimately be awarded in their favour if they are successful. The possibility to be addressed is injustice, not hardship. The first defendant is sued in his capacity as an officer of the Crown, and the second defendant is an entity of the Crown. The Crown may suffer an injustice if it is unable to recover costs if it is ultimately successful, but that injustice will not result in hardship, as it might to a defendant which is itself of limited means. That injustice is entitled to weight, but the weight is less than would be the case if hardship to the defendants might result.

[26] For the reasons I have given, I consider it likely that an order for security of an amount large enough to have any meaningful effect on the injustice which the defendants might suffer would mean that the plaintiff is unable to pursue her claims. I have reached the view that the potential injustice to the plaintiff from that outcome exceeds the potential injustice to the defendants from an inability to recover costs. The balance falls in favour of a refusal of security. The application for security is accordingly dismissed.

[27] It is desirable to refer to the other application which is extant, though it is not directly before me. The plaintiff has applied for summary judgment, based on the failure to file statements of defence. The defendants have not filed statements of defence, because of the application for security. In these circumstances, I consider it appropriate to extend the time for filing statements of defence to 28 days from the date of delivery of this judgment. That should render the application for summary judgment unnecessary.

[28] As the plaintiff is not represented, no order for costs seems appropriate. Memoranda may however be submitted if necessary.

"A D MacKenzie J"

Solicitors: Crown Solicitor, Wellington for Defendants