IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2009-409-001529

BETWEEN	BRENDON DOUGLAS FORREST Plaintiff
AND	ROSS DONALD MARTIN Defendant

Hearing: 26 May 2010 (by telephone conference)

Appearances: B D Forrest in person
G P Tyrrell for Defendant

Judgment: 2 June 2010

JUDGMENT OF ASSOCIATE JUDGE DOHERTY

Preliminary

[1] With the consent of the plaintiff I granted leave for the defendant to file a further affidavit.

Threshold crossed

[2] The plaintiff admits he will be unable to pay the costs of the defendant if he is unsuccessful in this proceeding. Thus the threshold test of r 5.4(5) of the High Court Rules is met.

[3] The Court must therefore exercise a discretion as to whether or not security of costs should be awarded and if so, for what amount.

Principles of exercise of discretion

[4] There is no argument as to the principles which apply in this case:

i) The ultimate test is what "the Judge thinks is just in all the circumstances" (r 5.45(2)).

ii) There requires a careful assessment of the circumstances of each particular case (*McLachlan v MEL Network Ltd* (2002) 16 PRNZ 747).

iii) Where an order would prevent a plaintiff from pursuing the claim, such an order should only be made after careful consideration and in a case in which the claim has little chance of success (*McLachlan*).

iv) Matters that might be assessed in undertaking the balancing exercise include:

a. merits and bona fides of the plaintiff's case;

b. any "reasonable probability" that the impecuniosity of the plaintiff has been caused by the acts of the defendant;

c. the means of anyone associated with the proceeding which might assist with the provision of security;

d. whether the making of an order might prevent the plaintiff from proceeding with a bona fide claim.

v) The amount fixed must be appropriate in the interests of justice and having regard to all the circumstances of the case.

(*Bennett v Wells & Co* HC Auckland CP635-SD00, 10 June 2002, Heath J)

Merits

[5] The major focus of the applicant is on the merits and bona fides of the plaintiff's case.

[6] The plaintiff was a sentenced prisoner. On 5 August 2003 he was released from Christchurch Prison and placed in a residential facility at Spring Grove Street, Christchurch. This facility was operated by Martros Limited. The defendant is a director of Martros. Martros contracted with the Ministry of Health to provide a residence for people with certain disabilities. The plaintiff had such a disability. The plaintiff alleges that between 5 August 2003 and 19 March 2004 the conduct of the defendant and/or his employees gave rise to a number of causes of action.

[7] Eight causes of action are pleaded:

i) False imprisonment – an allegation that the plaintiff was locked in his room and unable to exit it at various times.

ii) Assault and battery – on two occasions an employee of the defendant (named "Joe") grabbed the plaintiff by the throat and pushed him into a wall.

iii) Trespass – the defendant and two police officers searched the plaintiff's room without legal authority.

iv) Absence of necessities of life while in care – between 5 August 2003 and 6 February 2004 the defendant denied the plaintiff access to "the essential necessities of life" (in particular, the plaintiff was locked out of that part of the house that contained such necessities).

v) Breach of duty of care – in argument the plaintiff recognised that this is not a separate cause of action, but one bound up with a claim of negligence.

vi) Defamation – the defendant and an employee, for the purpose of discrediting the plaintiff, disclosed to various parties an untrue allegation that the plaintiff had had an unlawful sexual relationship with a named person.

vii) Negligence – the first defendant failed to implement a complaints system for residents and provide procedures for the making of complaints and failed to explain that process.

viii) Unlawfully opening, and withholding and disclosing postal correspondence to third parties – between 5 August 2003 and 6 February 2004 and between 1 March and 19 March 2004 the defendant withheld and disclosed postal correspondence to third parties without the plaintiff's knowledge or consent.

[8] In respect of each cause of action general damages (ranging from $5000 to $15,000) and exemplary damages (ranging from $5000 to $25,000) are sought.

[9] The defendant submits that none of these causes of action are sustainable. The defendant's affidavits filed in support of the application allege that the complaints are simply not true, and not sustainable on the facts.

[10] The thrust of the defendant's evidence on the merits of the claim can be summarised as:

i) None of the claims has any merit.

ii) The plaintiff was never mistreated whilst in the care of Martros.

iii) It was impossible to lock anyone in the sleepout (false imprisonment claim).

iv) There was never any complaint of assault at the time (assault and battery claim).

v) No search was ever made of the plaintiff's room whilst he was at Martros (trespass claim).

vi) A key was always available to staff and clients (including the plaintiff) to access the main house, and in fact the plaintiff used the key to get on numerous occasions to get his own breakfast and medication before he left for work at 5 a.m. daily (lack of necessities claim).

vii) Because the allegation against the plaintiff was of rape against an intellectually disabled complainant, there was no option but to call the police (defamation claim).

viii) There was an appropriate complaints procedure (negligence claim).

ix) No letters addressed to the plaintiff were ever opened (invasion of privacy).

[11] The plaintiff's response to the defendant's denials provides some specifics, first as to physical configuration (eg locks on doors); secondly as to detailed time and circumstance (eg date and mode of complaints of alleged assaults and/or other formal complaints).

[12] No documentation has been produced by the plaintiff, nor has there been specific identification of those who might support his claim evidentially, notwithstanding a number of references to "evidence from ex-employees of Mr Martin".

[13] At a preliminary stage, and upon a dearth of evidence, the Court must proceed on its impression of the merits of a claim (see *McLachlan* at [21]). In complex cases where it is difficult to discern the competing merits, and where a plaintiff's allegations could only be sustained by the trial process, an assessment of the merits might not bear upon the question of security in favour of either party (*Meates v Taylor* (1992) 5 PRNZ 524, 528).

[14] This is not a complex case, and whilst the plaintiff is entitled not to disclose documents or other information, it is not helpful when it could have been produced in support of his case to give a flavour of its merits. In the consideration of the merits in an application such as this I consider the application of principles enunciated in *Eng Mee Yong v Letchumanan* [1980] AC 331, 341 is appropriate:

> Although in the normal way it is not appropriate for a Judge to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however unequivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.

[15] In *Bilbie Dymock Corporation Limited v Patel* (1987) 1 PRNZ 84 the Court of Appeal endorsed "the appropriateness of a robust and realistic judicial attitude when that is called for by the particular facts of the case". The assessment of the merits of the plaintiff's case in an application for security of costs is akin to the assessment of whether the defendant had an arguable case in a summary judgment context.

[16] If easily attainable evidence and documentation exist (eg in the hands of a deponent) then the fact this has not been put in evidence could well lead to an inference that the particular deponent's case is not strong.

[17] In the case of the plaintiff, I am not prepared to draw such an adverse inference. Whilst the plaintiff has referred to undisclosed documentation, it seems to me discovery will have little to do with the likely outcome, other than perhaps to bolster the veracity of one party or the other. The issues are likely to be resolved on the veracity of the plaintiff when weighed against the evidence of the defendant.

[18] I have my doubts as to the merits of the claim in defamation. The plaintiff acknowledges that a complaint was made by a third party, and if it was made to the defendant, he would have had a duty to report such complaint to the police (*Stuart v Belli* [1891] 2 QB 341). In any event, there may also be a defence of privilege available (*Bowles v Armstrong* (1912) 32 NZLR 385).

[19] The pleading of the cause of action referred to by the plaintiff as "failing to provide the necessities of life" is somewhat obscure. It might possibly come within the expanding arm of the tort of invasion of privacy, but on the facts of this case the tests to be applied (namely, the existence of facts in respect of which there is a reasonable expectation of privacy and that publicity given to those private facts would be considered highly offensive to an objective reasonable person) would not be met.

[20] In regard to this pleading, the facts might disclose an action for breach of confidence. There is debate as to whether or not this action is founded in contract, or is a tort, or is analogous to a tort (Todd et al *The Law of Torts in New Zealand* (5^{ed} 2009) 14.45 and following). In some cases the action has been used to protect personal information (see *Campbell v MGN Ltd* [2004] 2 AC 457).

[21] The cause of action of "absence of necessities of life while in care" might be a crime (see s 151 Crimes Act 1961).

[22] It has not been raised by the defendant, but there is also the question of whether a principal can be variously liable for the actions of his employee so as to found exemplary damages, nor was the question of whether the plaintiff has sued the correct entity. It appears that Martros, not the defendant, was the contracting party.

[23] It is possible that the causes of action in false imprisonment, assault and trespass are sustainable, and those of breach of contract and negligence might be. It is too early to tell on the information available, just as it is too early to tell on the likelihood or otherwise of success. The merits on those causes of action are therefore neutral in terms of this application.

Other considerations

[24] The only other applicable consideration in the balancing exercise identified in *Bennett* is whether the making of an order might prevent the plaintiff from proceeding. On his evidence it certainly will. He is a sentenced prisoner with a release date in 2015. He is impecunious. There is no indication that he can have help from third parties.

[25] The defendant views this litigation as another arrow in a concerted effort by the plaintiff to harass him. It is clear the plaintiff is unhappy as result of his time at Martros. This manifested itself in a threat to kill the defendant, an arson attack on his place of business, threatening the defendant with a knife and trying to ignite kerosene poured around the defendant's vehicle. The plaintiff has been imprisoned for these acts. The defendant deposes the plaintiff has made a number of applications to the Courts and withdrawn them at the last moment. Examples, are an application by the plaintiff under the Harassment Act 1997 where, when faced with a cross-application, the application was withdrawn and the plaintiff consented to a restraining order against him. Even then, the plaintiff sought to extend the order indefinitely, but then later sought its discharge. The defendant views this as a continued harassment.

[26] Another is that the plaintiff is currently attempting to prosecute the defendant (from the papers it appears this is an allegation of attempting to pervert the course of justice), notwithstanding that the defendant says this issue has already been dealt with by the Court of Appeal, in his favour.

[27] There is no explanation as to why this proceeding took nearly six years to be brought before the Court. The fact that it has gives some credence to the harassment allegation of the defendant.

[28] The defendant says these actions by the plaintiff have cost him, either directly or indirectly, tens of thousands of dollars in legal fees dealing with and defending these various applications. He says he has not had the opportunity to recover costs because of the impecuniosity of the plaintiff or the fact that the plaintiff has been legally aided.

[29] In my view, another consideration is the ultimate outcome, should the plaintiff be successful. It seems to me that the only possibility of exemplary damages might be for false imprisonment, and even then an award is likely to be modest, as would any award of general damages. This is not a situation where the defendant might have a semblance of redress by way of Calderbank letter; the plaintiff would be undeterred as he has no means to pay anyway.

[30] I can see no wider public interest in the outcome of the proceeding.

[31] The concerted conduct of the plaintiff against the defendant in a number of guises over a number of years cannot be ignored. The defendant asks why he should have to incur the costs of defending a claim which might be seen in a wider context as part of a concerted harassment of the defendant, a claim which is likely to yield little by way of damages, yet one where there is the certain prospect that he could not recover any costs should the plaintiff be unsuccessful. It is a good question.

[32] It is the answer to this question that leads me to the view that there should be an order for security for costs. I make that decision in the full knowledge that it will mean the plaintiff is unlikely to be able to continue the proceeding.

[33] The defendant made no submissions as to the amount of any security; no doubt because the plaintiff deposed that he could not meet any order no matter its quantum. In such circumstances the setting of any amount might be seen as academic

[34] Rather than refer the matter back, I have made my own assessment of an "order of magnitude" of costs that might be awarded should the defendant be successful by an assessment of schedule 2B costs for a three-day case.

[35] The application is granted. I set the security for costs at $20,000, to be paid into Court by bank cheque or a cheque drawn on a solicitor's trust account. The proceeding is stayed until payment of that amount into Court.

[36] In the circumstances the defendant is entitled to costs on this application on a schedule 2B basis.

Associate Judge Doherty

Solicitors:
Weston Ward & Lascelles, Christchurch

Copy to Plaintiff