IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CIV-2015-419-224
[2016] NZHC 342

UNDER	the Defamation Act 1992
BETWEEN	PHILIP CHRISTOPHER PARKER Plaintiff
AND	MEGAN ELIZABETH OWEN Defendant

Hearing: 3 March 2016

Appearances: No appearance of the Plaintiff
GHJ Brant for the Defendant

Judgment: 3 March 2016

ORAL JUDGMENT OF MUIR J

Solicitors:
GHJ Brant, Stace Hammond, Hamilton

Copy to the Plaintiff

Background

[1] Mr Parker sues Ms Owen in defamation. In his amended statement of claim dated 9 November 2015 he seeks damages of $325,000 and a permanent mandatory injunction.

[2] Mr Parker is impecunious. He is an undischarged bankrupt. He was adjudicated on 18 February 2001. Discharge by fluxion of time was opposed by the Official Assignee with the result that Mr Parker made an application for discharge for bankruptcy which was heard before Associate Judge Doogue on 28 July 2015 and 2 September 2015.

[3] In his Honour's judgment delivered on 26 November 2015 he declined to discharge Mr Parker from bankruptcy and ordered that no further application be made before 18 February 2017.[1]

[4] As a result of the plaintiff's status the defendant applied on 18 August 2015 for orders that the plaintiff pay security for costs on such terms as the Court thinks fit and that there be a stay of the proceedings until such time as a security was given.

[5] On 8 September 2015 the plaintiff filed a notice of opposition.

[6] The matter first came before the Court on 9 September 2015 when Mr Parker sought an adjournment on the basis that he had, within the previous 24 hours, briefed counsel who was to apply for legal aid. Asher J accordingly adjourned the matter until Tuesday 27 October 2015 for a one hour fixture. He imposed a timetable whereby affidavit evidence in opposition from Mr Parker was to be filed by 29 September 2015 and his submissions filed by 13 October 2015.

[7] On 16 October 2015 Mr Parker applied for a further adjournment of the application. He said that he was "still processing and therefore awaiting the outcome of his application for legal aid from Legal Services".

---

1 *Parker (Bankrupt) v Official Assignee* [2015] NZHC 2871.

[8] Toogood J convened a telephone conference on 20 October 2015. At that conference Mr Parker said that he had had some difficulty in arranging legal representation but that he was now represented by a Wellington barrister in substitution for the Auckland counsel he had previously identified before Asher J. He said that a legal aid application had not yet been filed but that his solicitor and proposed counsel were working on the matter.

[9] Toogood J said he was satisfied that it would be unreasonable to require Mr Parker to undertake any effective opposition to the application for security for costs without the assistance of counsel, if that could be obtained from a grant of legal aid. Accordingly, he adjourned the matter to Thursday 3 March 2016. He directed Mr Parker to file any application for legal aid without unreasonable delay and to inform both the Court and the defendant's solicitors by memorandum of the outcome of the application as soon as the decision was received. He further directed that Mr Parker was to file any affidavits in opposition by Friday 5 February 2016.

[10] No memorandum has been filed in accordance with Toogood J's direction. Nor has Mr Parker filed any affidavit in opposition.

[11] In response to inquiries from the Court, Mr Parker advised by email dated 10 February 2016:

> Unfortunately Mr Philip Parker (sic) serious ongoing health issues means he is presently unable to presently undertake/part-take (sic) in this proceeding Moreover, to date, no definitive conclusions have been made with regard to any formal Legal Aid representation for Mr Parker.
>
> Not sure of the procedure from here but unfortunately the situation (as above) leaves Mr Parker unable to presently conclude any justice.

[12] As indicated in Asher J's minute of 9 September 2015, the matter cannot be allowed to drift against the uncertain prospect of whether a legal aid application is to be made, or, if made, granted.

[13] In my view the appropriate course is to make orders today in terms of the defendant's application but with leave reserved to Mr Parker to apply for a variation of the same in the event of a grant of legal aid.

[14] In assessing the quantum of the security I am mindful of the conundrum which typically arises in respect of any application under r 5.45, namely that the poorer the plaintiff the more exposed the defendant is to costs and the greater the apparent justification for security. But by the same token, the poorer the plaintiff the less likely it is that security will be able to be provided and thus the greater risk that a worthy claim cannot be prosecuted.

[15] In the present case only a preliminary assessment can be made of the merits of the claim. The defendant has not yet filed a statement of defence. The orders made by Toogood J on 20 October 2015 specifically relieved her of her obligation to do so and she adopts the understandable position that she should not be put to the expense of a pleading without the issue of security being first addressed. Her application does, however, claim that the proceedings are prima facie unmeritorious and her affidavit gives some background to the proceeding. In essence, she says that the claim arises out of a failed investment made by her in a company under the plaintiff's control and that it is retaliatory for assistance she has been giving to the Official Assignee in his investigation of the plaintiff's affairs. In a memorandum filed contemporaneously with the application, Mr Brant further submits that the alleged defamatory comments are equivocal and lend themselves to defences of honest opinion and truth.

[16] Ms Owen gave evidence on behalf of the Official Assignee in the context of Mr Parker's application for discharge.

[17] In [83] of his judgment on that application Associate Judge Doogue described her evidence as "voracious"[2] and capable of being accepted "at face value".[3] Such evidence related to the circumstances of Ms Owen's and her husband's investment in the relevant company, which circumstances are referred to in the Facebook posting which forms the basis of the plaintiff's claim.

---

2 *Parker (Bankrupt) v Official Assignee* avove n 1 at [83].
3 At [89].

[18] His Honour then went on to describe Mr Parker as "an unsatisfactory witness" in that "he was evasive and belligerent".[4] He recorded Mr Parker's insistence that he was at all times acting under the direction of the directors of the company and that his involvement was that of a consultant only. He rejected that evidence on the basis of Ms Owen's evidence as to the extent of Mr Parker's involvement in the solicitation of capital for the company. Significantly, the Associate Judge stated that he was:[5]

> … in no doubt that because of his past track record and in particular his involvement in the Steppeland venture [being the venture in which Ms Owen invested], Mr Parker appears to be a person who because of lack of judgment, business prudence or integrity – or indeed all of those elements – represents a commercial risk to the community.

[19] He concluded that Mr Parker was a "genuine commercial hazard".[6]

[20] Against this background and in the absence of any affidavit evidence from Mr Parker, I am unable to accept the proposition in his notice of opposition that his case is "highly tenable".

Discussion

[21] I consider the Court's discretion appropriately exercised by way of a grant of security. I do so on the following bases:

(a) The evidence of Mr Parker's impecuniosity is clear.

(b) The co-incidence in timing between initiation of these proceedings and assistance by the defendant to the Official Assignee gives some support to the defendant's allegation the proceedings are retaliatory.

(c) If the proceedings are considered to have sufficient merit for legal aid counsel to certify accordingly and for a grant to follow, then a re-assessment of the security position can be made by way of an application for variation.

---

4 At [97].
5 At [107].
6 At [108].

(d) The defendant is entitled to have her application for security determined, particularly in the context of two previous adjournments and Mr Parker's failure to adhere to the orders made by Toogood J on 20 October 2015.

(e) In his notice of opposition the plaintiff states that "whanau and friends" are prepared to provide him with financial support. Security at an appropriate level would not therefore appear to preclude continuation of the proceedings.

(f) The plaintiff has some history of bringing unmeritorious arguments before the court as detailed in Ms Owen's affidavit.

(g) A denial of security would be oppressive to the defendant. The background to the proceedings is relatively complex involving investment by the plaintiff in a Hong Kong registered company purportedly itself investing in a dairy farm operating in the Ukraine. Significant costs can be expected in properly articulating a defence.

(h) Insofar as I am currently able to assess the merits of the plaintiff's claim, I consider that he faces some difficulty in making out his allegation of defamation. My assessment in that regard is primarily based on the conclusions reached by Associate Judge Doogue in the judgment referred to.

(i) For as long as the plaintiff is self-represented the defendant is likely to incur additional costs (identified as a relevant factor in Sims Courts' Practice HCR 5.45.7(d) referring to *Vaughan v Christie*).[7]

[22] As to quantum, the defendant at this stage seeks security on a 2B basis for all interlocutory steps through to the completion of inspection. It calculates such costs at $15,164 on which it seeks an uplift of one third. Accordingly, it seeks total security in the amount of $20,000.

---

7 *Vaughan v Christie* HC Wellington CIV-2009-485-60311, 22 June 2009.

[23] In my view the Court should be wary of placing a litigant in person at any significant disadvantage in a security for costs context by allowing for an uplift which may or may not be justified on the basis of the efficiency with which the self-represented party approaches the litigation.

[24] However, the procedural history in this case indicates, in my view, some uplift is justified. I consider a 10 per cent allowance to be appropriate.

Result

[25] I make the following orders:

(a) In respect of the preparation of the defendant's statement of defence, memorandum for and attendance at the first case management conference, discovery and inspection, Mr Parker is ordered to give security for costs in the amount of $16,500.

(b) Such security is to be given by paying that amount into court or giving security for it in any other form satisfactory to the Registrar.

(c) Leave is granted to the defendant to apply for further security for costs in the event the security ordered by this judgment is paid and the matter progresses beyond the procedural step identified in the defendant's application (the conclusion of inspection).

(d) The claim is stayed until such time as security is given.

(e) Leave is granted to the plaintiff to bring an application for variation of these orders in the event a grant of legal aid is made in respect of the proceedings.

(f) If the security ordered in terms of this judgment is not given to the satisfaction of the Registrar within six months of the date of this judgment the proceedings are to be deemed to be struck out.

Costs

[26] The interlocutory application dated 18 August 2015 does not, in its terms, seek costs on the application. Mr Brant makes an oral application in that respect. I consider that because Mr Parker is not present today and has not been otherwise alerted to an application for costs it is appropriate that they be reserved.

Muir J