IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

I TE KŌTI MATUA O AOTEAROA
AHURIRI ROHE

CIV-2019-441-6
[2019] NZHC 2289

UNDER	the Defamation Act 1982
IN THE MATTER OF	an appeal under s 124 of the District Court Act 2016
BETWEEN	BRIAN DAMIEN HUNTER Appellant
AND	PHILLIP NICHOLAS ROSS First Respondent
	CLIFFORD ERNEST CHURCH Second Respondent

Hearing:	On the papers
Counsel:	C J Tennet for Appellant P Ross for Respondents
Judgment:	12 September 2019

JUDGMENT OF COOKE J

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[1] These proceedings involve an appeal against two decisions of the District Court dated 20 February 2018 and 20 January 2019.[1] The first decision upheld the respondents' defamation claims against the appellant, with damages totalling $84,000 awarded with costs. The second decision declined an application to recall or set aside the judgment.

[1] *Ross v Hunter* [2018] NZDC 22579, *Ross v Hunter* [2019] NZDC 319.

[2] By application dated 6 September 2019 the appellant seeks orders:

(a) Declaring that the time for fixing security for costs has been deferred and remains deferred under r 20.13;

(b) Declaring that, as a matter of law, the applicant/appellant has a current and existing application for Legal Aid under the Legal Services Act 2011;

(c) Under r 20.13(2) it is in the interests of justice that no security be required; and

(d) Such other Orders as this Honourable Court seem just.

[3] The orders are opposed by the respondents.

[4] By minute dated 2 September 2019, and after hearing from counsel, Grice J ordered that the application be dealt with on the papers. She indicated at the time that the fixing of security had been deferred until the determination of the application. The position taken by the appellant is set out in a memorandum dated 4 September 2019. That has been responded to by memorandum from the respondents dated 5 September 2019, with a memorandum in reply dated 6 September 2019.

Is the fixing of security deferred?

[5] The relevant Rule in the High Court Rules 2016 provides as follows:

> **20.13 Security for appeal**
>
> (1) This rule applies to an appeal other than an appeal for which the appellant has been granted legal aid under the Legal Services Act 2011.
>
> (2) The Judge must fix security for costs at the case management conference relating to the appeal, unless the Judge considers that in the interests of justice no security is required.
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> (3) The amount of security must be fixed in accordance with the following formula, unless the Judge otherwise directs:
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> $$(a \div 2) \times b$$

where—

a is the daily recovery rate for the proceeding as classified by the Judge under rule 14.4; and

b is the number of half days estimated by the Judge as the time required for the hearing.

(4) Security must be paid to the Registrar at the registry of the court no later than 10 working days after the case management conference, unless the Judge otherwise directs.

(5) Except in the case of an appeal under the District Court Act 2016; and (where non-compliance with the security order results in a deemed abandonment of the appeal under section 126 of that Act), if the security is not paid within the time specified under subclause (4), the respondent may apply for an order dismissing the appeal.

(6) The Judge must defer the fixing of security until the application for legal aid has been determined if—

(a) an appellant has applied for legal aid under the Legal Services Act 2011; and

(b) at the time of the case management conference, the application has not been determined.

[6] In the present case the appellant has applied for, but has been declined legal aid. The appellant has, however sought reconsideration of that decision under s 51 of the Legal Services Act 2011. The argument advanced by Mr Tennet is that the statutory right of reconsideration, and of review by the Legal Aid Tribunal under s 53, mean that the fixing of security for costs must still be deferred under r 20.13(6) because the application for legal aid has not yet been determined. In effect Mr Tennet is arguing that the reference to the application being determined in r 20.13(6) should be interpreted to mean finally determined.

[7] In advancing that argument Mr Tennet indicates that the appellant has previously been in receipt of legal aid, meaning that he is "eligible", and he indicates that the reason for the adverse decision was a lack of financial information, although he has not actually provided the Court with a copy of the decision.

[8] I do not accept Mr Tennet's argument. A consideration of the provisions of the Legal Services Act 2011, and of r 20.13 make it apparent that there is no continued deferral of the fixing of security for costs because there are rights to challenge an

adverse decision. The Court is able to consider any relevant matters in the exercise of the discretionary powers under the rule, but the automatic suspension of the rule does not arise.

[9] Whilst the appellant has sought a review of the decision made against him, it is clear that such a reconsideration only exists when an adverse determination has been made. The relevant provision in the Legal Services Act 2011, s 51, begins as follows:

> (1) A person (who may be an aided person or an applicant for legal aid) who is aggrieved by a decision of the Commissioner that affects that person, may apply in the prescribed manner to the Commissioner for a reconsideration of the decision.
>
> …

[10] In my view in those circumstances the application has been determined for the purposes of r 20.13(6)(b). The right to apply for a reconsideration only arises when there has been such a determination.

[11] Mr Tennet's argument also proceeds on the basis that an adverse decision on the reconsideration still does not trigger r 20.13(6) because there is then an ability to have the decision reviewed by the Legal Aid Tribunal. Whilst that Tribunal can reverse a decision, it can only do so if the initial decision was manifestly unreasonable or wrong in law (s 52(1)). Again, that applies only when there has been a determination adverse to the applicant.

[12] Even a decision of a Tribunal does not finally dispose of an applicant's rights to challenge adverse decisions under the Act. Under s 59 an unsuccessful applicant can appeal a decision of the Tribunal to the High Court on the basis that it is wrong in law, and under s 60 an applicant has further rights of appeal to the Court of Appeal, and to the Supreme Court. It is unrealistic to suggest that it would have been within the scheme of r 20.13 to defer the fixing of security for costs to allow a party to proceed through all steps of the reconsideration/review/appeal processes. This is reiterated by r 20.13(1) which provides that the rule applies unless a person has been granted legal aid.

[13] If a reconsideration, review, or appeal by an applicant is successful, and the applicant is subsequently granted legal aid, then r 20.13(1) will apply and the rule will no longer be operative. In those circumstances any such security that has already been paid can be refunded.

[14] For those reasons I do not accept that the fixing of security is automatically deferred under r 20.13(6) because an applicant has a right to seek reconsideration of an adverse decision. It is also relevant that from a practical point of view a decision to fix security does not dispose of the appeal even if security is not lodged. If security is not paid after it is fixed the other party may apply for the appeal to be dismissed under r 20.13(5). The overall justice of the position can be considered at that point. Moreover the fact that fixing of security is not automatically deferred under r 20.13(6) does not prevent the Court determining that in the interests of justice no security is required under r 20.13(2).

What should now be directed here?

[15] It is accordingly necessarily to make the relevant decisions in relation to security contemplated by r 20.13.

[16] The appellant's application includes an application under r 20.13(2) that security be dispensed with. There is no basis on the materials before the Court to conclude that the interests of justice require that no security be fixed under r 20.13, however. If the appeal is pursued without the grant of legal aid, the appellant will be liable to pay costs if the appeal is not successful. The amount contemplated by r 20.13 involves security for those costs. Nothing has been advanced to suggest that providing that security should not be required. Moreover, there is no material before the Court to show that there is a level of impecuniosity that would prevent security being provided. I note in that connection that Mr Tennet has suggested that the Legal Services Commissioner has not currently granted legal aid because of the absence of financial information.

[17] Security is fixed in accordance with the formula set out in r 20.13(3). The proceedings have been categorised as a Category 2 proceeding by Clark J on 2 April

2019. The daily recovery rate is $2,230. The appeal has been given a one-day fixture. The relevant amount fixed by way of security under r 20.13(3) is accordingly $1,115.

[18] Under r 20.13(4) security is required no later than 10 working days after the case management conference unless the Judge otherwise directs. Given that the appeal itself is to be heard on 23 September 2019, and that there has already been slippage in the timetable by the appellant (as identified in Grice J's minute of 2 September 2019), it is appropriate that an earlier date be specified. I direct that such security be provided by **4 pm Monday 16 September 2019**. If security is not paid by that time, then I grant leave to the respondents to make an application under r 20.13(5), which must be filed and served by **4 pm Tuesday 17 September 2019**. Any opposition is to be filed by **4 pm Wednesday 18 September 2019**. The application and opposition should be supported by a memorandum setting out the relevant arguments. If such an application is filed, I direct that the fixture for the substantive appeal set for 23 September 2019 be vacated, and replaced by a shorter hearing on the same day to determine the respondents' application under r 20.13(5). In my view only one-half hour would be needed.

[19] If the appellant succeeds with the reconsideration application prior to that time the consequences described in [13] above will apply and no security for costs will be required. In such circumstances the appeal will remain in place.

Cooke J