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IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

LOW PRIORITY

CP No 26/86

544

BETWEEN MALCOLM ROBERT HILL
of Wellington, Management Consultant

Plaintiff

A N D ATTORNEY-GENERAL

Defendant

Hearing: 12 June 1989

Counsel: M R Hill (Plaintiff) in person to oppose

Sandra M Moran, with her Margaret A Soper for Defendant in support

Judgment: 30 June 1989.

JUDGMENT OF MASTER J H WILLIAMS, QC

This is an application by the defendant for an order that the plaintiff provide security for the costs of the proceedings and that the proceedings be stayed until that security is given.

The proceedings were filed on 14 February 1986 following an incident which took place in the Prime Ministerial Suite of the Beehive Building at Parliament in Wellington on 26 July 1985. On that date Mr Hill went to the Beehive and obtained admission to the foyer of the Prime Ministerial suite. He alleges that he was there by arrangement to collect some

papers. The defendant alleges that he was there without arrangement and in circumstances which would make him a trespasser either ab initio or from some part of the period of Mr Hill's presence there. Mr Hill left the Prime Ministerial suite in the company of a security guard and he alleges that both before that security guard approached him and again during the course of his being accompanied from the building by the security guard two statements were made which Mr Hill claims were defamatory.

After the proceedings were commenced on 14 February 1986, the then defendants filed statements of defence (on 17 March 1986) and followed them with a notice for further particulars filed on 19 March. As a result of that an amended statement of claim was filed on 10 April 1986 and amended statements of defence were filed on 18 April together with lists of documents. The plaintiff applied on 18 January 1988 to join additional parties to the proceedings and the defendants applied on 19 February 1988 to strike out the statement of claim. These applications came before Greig J on 11 August and in a reserved judgment delivered on 13 September the learned Judge struck out three of the causes of action and declined the application to join additional parties.

A further amended statement of claim was filed on 14 February 1989 and the statement of defence to that document was filed on 15 March together with a reply from the plaintiff filed on 21 March.

This application was filed on 6 April 1989 and, apart from the possibility of an application for interrogatories, the matter is now at the point where it is ready to be set down for hearing once this application has been determined.

The plaintiff, who is acting for himself in the matter, estimates that his case will take one day to present. He wishes to have the matter tried by jury. The defendant believes that the whole of the case will take approximately 4-5 days to hear.

At the commencement of the hearing this application I asked Mr Hill whether he agreed to my hearing it in view of the fact that I had determined against him an application by him to join three additional parties to another proceeding in which he was engaged (A 4/75). Mr Hill agreed to my dealing with the matter.

This application is brought pursuant to R 60(1) which, as far as is relevant to this matter, reads:

> "Where the Court is satisfied, on the application of the defendant, -
>
> (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 his proceeding, -
>
> the Court may, if it thinks fit in all the circumstances, order the giving of security for costs".

The latest version of the claim in this matter pleads two causes of action against the defendant and seeks damages of $30,000.00 in respect of each as general damages, aggravated damages or exemplary damages. If his claim were wholly unsuccessful, the minimum amount of costs for which he would

become liable would be $4,700.00 but the amount could be considerably greater than that depending on whether a greater than scale allowance were allowed for preparation, whether an allowance were made for second counsel, what allowance were made for interlocutory matters and the probable allowance for the second and succeeding days of trial. In an affidavit filed on behalf of the defendant, Mr McAteer, a Crown Counsel Assistant, deposes that he believes that the costs of trial, if all necessary certificates are given, may be as high as $10,680.00. That may be a little high but in all events the costs of the action range between $4,700.00 and that figure.

It is clear that the onus of satisfying the Court as required by R 60(1) is on the defendant (McGechan on Procedure para 60.04(2) p 3-56). The evidence to that end is slight. Mr McAteer deposes that an order for security for costs in the sum of $2,500.00 was made by McGechan J on 23 October 1986 against Mr Hill in another set of proceedings which he had issued and that that security was not provided until 26 August 1987. As regards the late payment of the security for costs in that proceeding, whilst it is true that security was not provided for approximately 10 months after McGechan J's order, it is nonetheless the case that the order for security was not sealed until three months after it was made and that, for at least two of the ten months, there was some correspondence between the Court staff and Mr Hill concerning their transferring in part payment of McGechan J's order $250.00 ordered against Mr Hill as security for costs in another proceeding but which was no longer

required as part security in that matter. There was also some correspondence concerning the acceptance of security rather than cash in satisfaction of that order. The security, when paid, on 25 August 1987, was unfortunately credited to the security in yet another set of proceedings issued by Mr Hill but that, of course, cannot affect my judgment on this issue.

Mr McAteer also says that Mr Hill is involved in at least two pieces of litigation other than those already mentioned. The first had been determined against him but an Appeal had been lodged. In the second he had applied to join three Judges of the Court of Appeal as additional parties but that application had been declined by me and the question of costs was still to be determined.

As against that, Mr Hill swore an affidavit on 11 May 1989 saying that if costs of $10,680.00 were awarded against him then he "would be able to pay that amount" and he goes on to say that even if he were ordered to pay costs of "say $20,000.00 inclusive of disbursements I would be able to pay such an amount" although he conditions both those statements by saying that they are true as at the date of his swearing his affidavit and that, although he knows of no reason why the situation ought to change in the forseeable future, he cannot guarantee being able to pay those amounts in the event that his financial circumstances should change adversely.

The Court clearly has a discretion pursuant to R 60 and the factors affecting the exercise of that discretion are now

conveniently summarized in the decision of the Court of Appeal in Attorney General v Broadcasting Corp of New Zealand & Bell-Booth Group Ltd (unreported CA 30 June 1986 CA 73/86). After holding that the ordering of security is discretionary without burden one way or the other and that the interests of all parties should be considered the Court of Appeal held:

(a) The ordering of security should not shut out a genuine claim by a plaintiff of limited means nor permit an impecunious plaintiff to use its inability to pay as a means of putting unfair pressure on a defendant, it being inherent in the whole concept of security that the Court has power to order a plaintiff to do what he is likely to find difficult to do, namely to provide that security.

(b) The merits and bona fides of the plaintiff's application should be considered despite the difficulty in doing so at an interlocutory stage.

(c) Any reasonable probability that the plaintiff's impecuniosity has been caused by the defendant's acts of which complaint is made.

(d) The means of interested shareholders and creditors to assist with providing security.

(e) The conduct of the parties such as a deliberate attempt to injure.

(f) Other factors such as admissions made and payments into Court.

Of these only the first, second and third need to be

considered in this case one way or the other.

The prospects of success and the balancing process required to be considered have already been considered by Greig J in his reserved judgment delivered on 13 September 1988. In the light of that judgment and the pleadings as they now stand, it is impossible to conclude that the proceeding is wholly unmeritorious and without prospect of success. Against that there is Mr Hill's sworn acknowledgement that he is able to pay whatever costs he may ultimately be called upon to pay up to $20,000.00 in the event that his claim is unsuccessful.

The defendant has already been put to what must undoubtedly be considerable cost by virtue of the need to file at least six statements of defence to date. Some at least of those may have been occasioned by the matter in which the plaintiff, insisting on acting for himself in a complex and difficult area of litigation, chose to frame his proceedings. That is a factor which needs to be taken into account.

There is little assistance to be gained from endeavouring to balance defendant's oppression against unfair pressure by the plaintiff in the light of Mr Hill's acknowledgment that he is able to pay whatever costs he may be called upon to pay up to $20,000.00 in the event that he is unsuccessful.

Since it was not and could not be argued that this is a matter which affects the public interest, at this stage of the

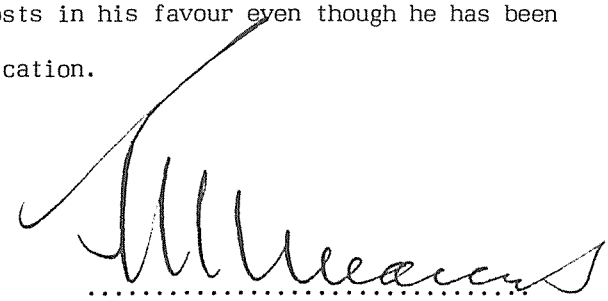
consideration the relative factors pro and con are evenly balanced. That would be sufficient to dispose of the matter in the plaintiff's favour were it not for the dictum of McGechan J in Hill v Attorney-General (unreported HC Wellington McGechan J 23 October 1986 A 55/82) where the learned Judge, in dealing with an application for security for costs against this plaintiff, held:

> "I have no direct evidence before me as to the plaintiff's financial position. If the plaintiff has means sufficient to meet costs in the range to be anticipated, I would have expected evidence to that effect from him. There was some point made in argument by him that as he did not know the range involved, he was not able to respond. The range involved can be gathered from the second schedule to the High Court Rules, and from experience. I do not regard that approach as a sufficient answer. Under R 60 there is no requirement that the defendant show by evidence there will be inability to pay costs. He merely needs to show there is "reason to believe" that such is the case. I regard the entire absence of evidence from the defendant as to his means or otherwise as prima facie "reason to believe" that the plaintiff will be unable to pay costs of the defendants if the plaintiff is unsuccessful."

This passage and the lack of any particulars from the plaintiff as to his financial position were strongly relied upon by the defendant in this proceeding. However, I do not accept that what the learned Judge said in that matter is directly referable to this matter. The case with which the learned Judge was there dealing was a much more complicated and difficult case involving a large number of different causes of action whereas, now, this proceeding is confined to two causes of action. Secondly, while R 60 requires the Court to be satisfied that there is reason to believe that an unsuccessful plaintiff will be unable to pay costs, the necessity for the Court's satisfaction imports an objective standard and it is not possible simply to reject the plaintiff's assertion of his means to pay costs of up

to $20,000.00 in this proceeding if so ordered as being so inherently implausible as to be capable of rejection out of hand. Mr Hill was asked by the Court whether he was prepared to have this matter decided on the affidavit which he had filed or whether he would prefer to provide particulars as to his financial position. He chose the former and said that even had he chosen the latter, the details of his financial position were such that it would not elucidate his capacity to pay to any greater degree.

In those circumstances, the Court holds that it is not satisfied on the defendant's application that Mr Hill will be unable to pay the Attorney-General's costs if the plaintiff is unsuccessful in this proceeding and the application is therefore dismissed. Mr Hill, as a litigant in person, cannot expect to receive any order for costs in his favour even though he has been successful in this application.



Master J H Williams, QC

Solicitors: Mr M R Hill, Plaintiff, in person

Crown Law Office for Defendant