23/2/89

Field v Fitton

12/7

SEM, RM

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP1283/89

BETWEEN ISABEL MAUREEN SHELDON FIELD and JONATHAN IVERACH FIELD

Plaintiffs

626

AND DAVID ARTHUR FITTON and KATALIN BORBALA MARGIT FITTON

Defendants

Hearing: 23 June 1989

Counsel: Cavanagh for Plaintiffs
Denholm for Defendants

Judgment: 23 February 1989

(ORAL) JUDGMENT OF THORP J

This is an application for an interim injunction to restrain publication of statements claimed to be libelous or defamatory by the two plaintiffs, each of whom is a practising barrister and solicitor.

The background, briefly, is that they were involved in litigation over land dealings with the defendants, were dissatisfied with the result and began expressing their dissatisfaction by means of oral statements, written pamphlets, hoardings and placards carried on a truck which has been driven through a large part of Auckland City. The criticisms contained in those publications included statements to the effect that the plaintiffs had perjured themselves, had misled the Courts, had made a mockery of the justice system, had cheated clients and had been guilty of theft.

It is really hard to contemplate more

serious criticism, particularly in the case of persons who happen to be practising lawyers.

The Courts have always been very cautious about restraining alleged defamation because that process involves a measure of assessment whether or not the material concerned is indeed defamatory, and an interlocutory hearing is no place to determine the merit of questions of that kind. At the same time, where statements are on their face plainly defamatory unless justified and there is nothing before the Court indicating that they can and will be, the practice is well enough established that, subject to suitable conditions the Court may, and indeed in such circumstances generally will, use its powers to restrain a continuance of publication of the material in question until an opportunity can be found for testing the matter on the merits.

The defendants' situation in those cases is that they are required to observe the Court's prohibition just as much as if it was one determined after hearing evidence, on the basis that if the restraint is found to have been made without adequate cause on the hearing of the merits then they are entitled to claim damages, for which an undertaking must be given by the applicants for restraint. In this case the plaintiffs have signed and filed such an undertaking.

The second condition which should usually be attached to the restraint is one which ensures that the party restrained will not be hobbled by an interim order indefinitely and can obtain a hearing on the merits. When the matter was put before me this afternoon in Chambers I asked plaintiffs' counsel whether an undertaking in the normal form would be given on their behalf. He assured me it would be, and I

record that the order which I am about to make is conditional upon the undertaking by counsel for the plaintiffs given on their behalf that, if requested by the defendants so to do, they will take all reasonable steps to ensure that a hearing of these proceedings on the merits will take place at the earliest practicable date.

The parties sensibly were able to agree most of the matters raised by the application. It was, for example, agreed, so I have been told, that orders be made in terms of the draft order prohibiting pending trial further statements to like effect to those which occurred in October 1987, and further publication of the pamphlets which are the subject of paragraphs 15, 27, 33 and 39, and that the order originally sought in that the general terms in paragraph (f) of the draft order, should no longer be pursued by the applicants.

The matters remaining in issue were as to further publication in any form of the material on a hoarding at 41 Disraeli Street and on billboards currently attached to the defendant's Datsun pick-up. The defendants advise through Mr Denholm that they would be prepared to delete reference on those hoardings and placards to the plaintiffs, but wish to continue to display those articles after such deletion.

Mr Cavanagh's contention is that the articles have been the subject of publication for so long and before so many people that in the minds of many the plaintiffs will be associated with the articles in question. I believe that is a valid statement and argument. I should have thought that a gap on the placards would almost raise the question in the mind of the observer, whose name had he seen there previously, and would be as much a statement or very nearly as much a statement about the plaintiffs as is made expressly by their present form.

In my view the appropriate order accordingly is that orders be given in terms of the draft order, paragraphs (a), (b), (c), (c)(i), but not (c)(ii) and (iii), (d)(i) but not (d)(ii) and (iii), and that costs in respect of today's proceedings be fixed as to amount but be reserved. The amount fixed for today's proceedings is $750.

I have asked the defendants to consult with Mr Denholm as to the significance of the present order. It is impossible to read the file without understanding that they have strong views about the subject of this application.

It is not uncommon for the Court to be asked to deal with matters in a preliminary way and to determine them according to what the justice of the then situation seems to justify. Orders in such cases do carry with them the same authority as orders made on full evidence and a sound factual base, and I would not wish either of the defendants to have any misunderstanding about the need to observe the terms of the orders now settled. It will be open to them and their legal advisers to come back to the Court if in their view the plaintiffs are relying on the sort of temporary order and not assisting the full determination of any issues they want determined. Indeed I think the undertaking should specifically include an acceptance that the defendants have the right reserved to apply for variation or cancellation of the present relief in the event that they believe there are grounds for questioning the plaintiffs' compliance with the undertaking.

Orders accordingly.

Solicitors:
I.M.S. Field, 37 Haydn Ave, Auckland for Plaintiffs
Denholm, Reeves for Defendants

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