N2LR

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP.62/95

LOW PRIORITY

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| BETWEEN | JOHN REX HUGHES |
| | Plaintiff |
| AND | BRYAN JOHN COOPER |
| | First Defendant |
| AND | SEAN PLUNKET |
| | Second Defendant |
| AND | TV3 NETWORK SERVICES LTD |
| | Third Defendant |

COUNTERCLAIM

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| BETWEEN | BRYAN JOHN COOPER |
| | Counterclaim Plaintiff |
| AND | JOHN REX HUGHES |
| | First Counterclaim Defendant |
| AND | DESIGNER SECURITY STRATEGIES LIMITED, MICHAEL CAMPBELL, DENE BRUCE THOMAS and ROSS WALDEN |
| | Second Counterclaim Defendants |
| AND | ALEXANDER PIETER VAN HEEREN |
| | Third Counterclaim Defendant |

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| AND | DAVID McGREGOR |
| | Fourth Counterclaim Defendant |
| AND | BELL GULLY BUDDLE WEIR |
| | Fifth Counterclaim Defendant |
| AND | FRANK CASPAR LOUIS JACQUES MESTROM |
| | Sixth Counterclaim Defendant |
| AND | CRAIG HUGHES AND MICHAEL TELEA |
| | Seventh Counterclaim Defendants |
| AND | THE ATTORNEY-GENERAL OF NEW ZEALAND |
| | Eighth Counterclaim Defendant |

Hearing: 28 June 1996

Counsel:
E. St John for Plaintiff
J. Carter for First Defendant and Counterclaim Plaintiff
T. Allan for Second and Third Defendants
P.J.K. Spring for Third and Sixth Counterclaim Defendants
D. J. Boldt for Eighth Counterclaim Defendant
J. McKay for Second and Seventh Counterclaim Defendants
R. B. McClintock for Fourth and Fifth Counterclaim Defendants

Judgment: 05 JUL 1996

JUDGMENT OF SALMON, J.

Solicitors:
McVeagh Fleming, Auckland for Plaintiff
Carter & Partners, Auckland for First Defendant and Counterclaim Plaintiff
Grove Darlow & Ptnrs, Auckland for Second and Third Defendants
Keegan Alexander, Auckland for Third and Counterclaim Defendants
Chapman Tripp, Auckland for Second and Seventh Counterclaim Defendants
Crown Law Office, Auckland for Eighth Counterclaim Defendant
Russell McVeagh McKenzie Bartleet & Co., Auckland for Fourth and Fifth Counterclaim Defendants

The counterclaim defendants, with the exception of the Attorney-General, seek orders that security for costs in these proceedings be given by the counterclaim plaintiff. The Crown's position is stated to be that, with a claim of this nature involving issues of civil rights, the Crown would not wish to deny the defendant his day in Court. However, the Crown reserves its position.

The proceedings started as a claim for defamation by the plaintiff against the defendant Cooper (also the counterclaim plaintiff) and against a TV3 reporter and TV3 itself. I was advised when the applications for security were heard that the plaintiff has withdrawn its claim for defamation against the first defendant on the basis that the first defendant will not seek costs.

The counterclaim alleges conspiracy and intentional infliction of harm, false imprisonment and breaches of the New Zealand Bill of Rights Act 1990, arising from an incident in 1994 when it is alleged that the counterclaim defendants wrongfully detained and interrogated the counterclaim plaintiff. The claim by Mr Hughes and the counterclaim by Mr Cooper arise out of the same series of events. The counterclaim plaintiff alleges that as a result of the actions of the counterclaim defendants he was prevented from returning to him home in the United Kingdom for some

months. And this, in turn, prevented him from earning his living and at least contributed to his admitted state of impecuniosity.

The only evidence before the Court at this stage is contained in three affidavits filed on behalf of the counterclaim plaintiff. Those affidavits allege that the first counterclaim defendant induced the counterclaim plaintiff to submit to his authority and accompany him to the law offices of the fifth counterclaim defendant where he was detained and interrogated by the first counterclaim defendant and members of the second counterclaim defendant. He was later interrogated by the police and arrested. The other defendants are alleged to have been involved in the incident, either by assisting the first and second defendants or as the employers of them. In one of his affidavits the counterclaim plaintiff states that he was detained in prison between 5 October 1994 and 18 November 1994. After that date he was granted bail on terms that included requiring him to remain in New Zealand. He was not able to leave New Zealand until the end of May 1995, and during the whole of that period he was unable to work or to support his wife and family. Over that period he states that he exhausted his savings and as a result of not being able to work during that time, is penniless. He states that he is unable to provide or raise any money by way of security for costs and that if he is ordered to pay security he will not be able to proceed with his counterclaim. He has applied for legal aid. The Auckland Legal Aid Committee has declined that application and an appeal has been lodged which is to be heard on 9 July.

The second, third, sixth and seventh counterclaim defendants each seek $75,000 security for costs. The first, fourth and fifth seek undefined amounts for security. The defendants have argued that the affidavits filed do not make out the legal ingredients of wrongful imprisonment. Reference was made to the 20th ed. of ***Salmond and Heuston, Law of Torts***. The submission was that no physical force was used, that the counterclaim plaintiff had accompanied Mr Hughes voluntarily and that he had not been forced to stay at the offices of Bell Gully, where he was taken by Mr Hughes.

It is clear from the texts that detention may be achieved by the assertion of authority which induces the plaintiff to submit to the will of the other. An unlawful arrest is thus a false imprisonment, whether or not any physical force is employed. A person who complies with an instruction to go to another place for questioning because of the perceived authority of the accuser and out of a desire to avoid an embarrassing scene may sue in this tort: *Persico v Woolworths* [1981] 1 DCR 242.

I am satisfied that the statement of claim and the affidavits establish a *prima facie* case of wrongful imprisonment. I note too that the counterclaim defendants have withdrawn applications that they had made to strike out the counterclaim.

On the basis of the plaintiff's affidavits I am satisfied that a reasonable claim has been made out. For example, when Mr Cooper was first accosted by Mr Hughes the evidence alleges that Mr Hughes said that he was a police officer and that Mr Cooper had better come along with him. He and a companion were placed in a car with what he took to be two police officers and taken to the law offices of Bell Gully. There they were met by three other men who Mr Cooper took to be police officers from their demeanour and conduct. Mr Cooper was asked to empty his pockets and did that. Whenever he left the room to use the bathroom he was accompanied by one of the other men. Mr Cooper said at para.18 of his second affidavit:

> "I felt I could not do anything about the situation. I did not think that I was free to leave - certainly not with the number of large men stationed outside the office. I believed that I was being held by the police and that I was not in a position to go."

I emphasise, that the only evidence I have seen is that on behalf of the counterclaim plaintiff. An entirely different picture may emerge when evidence is available from the counterclaim defendants.

The principles applicable to applications for security are well settled. Because the counterclaim plaintiff is resident in the United Kingdom and because on his own evidence he will be unable to pay the costs of the counterclaim defendants if he is unsuccessful, the threshold test for an order for security is passed.

However, I note that in ***Jalfox Pty Ltd v Motel Association NZ Inc.*** [1984] 2 NZLR 647, Ongley, J. held that there was no inflexible principle that a plaintiff resident outside New Zealand, with no assets within the jurisdiction should normally be ordered to give security for costs, and, of course, there is no inflexible principle that an impecunious plaintiff should always be ordered to give security. The applicable principles are summarised in the Court of Appeal judgment in ***Attorney-General v BCNZ and Bell Booth Group*** noted at 1986 1 PRNZ 466, decision 30 June 1986, CA.73 & 74/86. The principles are in fact set out in the headnote to the High Court decision in ***Bell Booth*** (1986) 1 PRNZ 457. They are:

> 1. The ordering of security for costs is discretionary. See r.60.
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> 2. There is no burden one way or the other. it is a discretion to be exercised in all the circumstances of the case.
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> 3. In the exercise of the discretion there is no predisposition one way or the other.
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> 4. The interests of both the plaintiff and the defendant should be considered. The Court should not allow the rule to be used oppressively to shut out a genuine claim by a plaintiff of limited means. On the other hand, an impecunious plaintiff must not be allowed to use its inability to pay costs as a means of putting unfair pressure upon a defendant. It is inherent in the whole concept of security, however, that the Court has the power to order a plaintiff to do what it is likely to find difficulty in doing, namely, to provide security for costs which ex hypothesi it is unable to pay.
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> 5. Factors to be taken into account in the exercising of the discretion include the following:
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> (a) The merits and bona fides of the plaintiff's case should be considered even though it is difficult to assess merits at an interlocutory stage.
> The Court should consider whether the action of the plaintiff has reasonable prospects of success.
>
> (b) Any "reasonable probability" that the impecuniosity of the plaintiff has been caused by the very acts of the defendant on which the action has been brought is a matter sometimes of importance to be taken into account.
> This is especially so if an order for security might result in a denial of justice.
>
> (c) The means of interested shareholders and creditors and their ability to assist with the provision of security may be a relevant matter.
> The means by which a plaintiff overcomes the problem of provision of security is, however, a matter for the plaintiff.

(d) The conduct of the parties resulting in the litigation may in some circumstances be relevant as where a defendant appears to have deliberately set out to injure a plaintiff and where likelihood of damage to the plaintiff should have been foreseen.

(e) Whether the making of an order for security might prevent the plaintiff from proceeding with a bona fide claim.

(f) Any admission made in the course of proceedings of some part of the plaintiff's claim.

(g) Any payment into Court of a substantial sum which indicates that the plaintiff's claim is not merely one of nuisance value.

(h) Whether there are grounds for thinking that the defendants are using the application oppressively to prevent the plaintiff's case from coming before the Court.

6. Quantum of security.

(a) The amount of any security is not intended as a pre-estimate of the actual amount of party and party costs that might become payable should the case go to Court and the defence succeed.

(b) Security should be fixed at an amount which is appropriate in the interests of justice and such requires a consideration of all the issues bearing on that matter in a particular case.

7. A balancing of all these factors is required, bearing in mind that if a plaintiff wins he can get the advantage of costs against the defendant enforceable against the defendant's assets and it is only fair that a defendant sued by an impecunious plaintiff should have some means of recovering his costs if he wins by the ordering of security.

In exercising my discretion in this case I take into account the following factors.

1. On the evidence before me at this stage I consider that the counterclaim plaintiff's action has a reasonable prospect of success.

2. There is a reasonable probability that the impecuniosity of the plaintiff has been caused, at least to some extent, by the actions of the counterclaim defendants.

In reaching this conclusion I have not overlooked the submission on behalf of the counterclaim defendants that regardless of their actions the counterclaim plaintiff would be impecunious because his only

asset is a property worth much less than the amount owed on it. At this stage I accept the counterclaim plaintiff's response to that argument that the counterclaim plaintiff's financial position would be much stronger if he had been able to work at his United Kingdom occupation during the period that he was required to stay in New Zealand.

3. It must have been apparent to the counterclaim defendants that their actions were likely to damage the counterclaim plaintiff.

4. On the evidence before me the counterclaim plaintiff will be prevented from proceeding with his claim if an order for security is made.

5. The claim raises issues of alleged breaches of the New Zealand Bill of Rights Act 1990. In that respect there is an element of public interest in the claim which makes it desirable that it be heard.

For the above reasons I am not prepared to order security for costs at this stage. As with all such applications a fresh application may be made at a later stage if the circumstances should justify that course.