

945

IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY

CP 58/97

BETWEEN                    HERO SPORTSWEAR LIMITED

First Plaintiff

AND                            HERO GROUP LIMITED

Second Plaintiff

AND                            UNDERGROUND FASHIONS LIMITED

Defendant

Hearing:                    8 April 1997

Counsel:                    A.H. Brown for Plaintiffs  
                                      W.A. Smith for Defendant

---

JUDGMENT OF FISHER J

---

Solicitors

Russell McVeagh McKenzie Bartleet & Co., P O Box 8, Auckland for Plaintiffs  
Chapman Tripp Sheffield Young, P O Box 2206, Auckland for Defendant

The plaintiffs "Hero" seek an interim injunction to restrain the defendant "Underground" from selling anorak clothing which Hero alleges to be legitimate copies of a Hero product. Underground says in answer that the garments were imported from Hong Kong quite independently of the Hero product and in effect that any resemblance between the two competing garments is quite coincidental. Hero challenges the credibility of Underground's key witness in that respect, Mr X.

The interim injunction application itself is to be heard before another judge tomorrow. The matter comes before me today on an application by Underground to have one of Hero's affidavits removed from the file. The affidavit in question annexed a judgment by a District Court Judge convicting Mr X on 30 charges of making erroneous declarations and smuggling under the Customs Act. The principal purpose of the affidavit and its annexed judgment is to support the challenge mounted by Hero to Mr X's credibility for interim injunction purposes. In some careful and comprehensive submissions Mr Smith for Underground has mounted a series of challenges to the legitimacy of Mr X's affidavit.

The first is based upon a name suppression order made in the District Court on 4 June 1996 and continued in force down to the present time. Mr Smith submits that the Hero affidavit annexing a copy of the judgment upholding Mr X's conviction together with the allegation in the affidavit itself that Mr X is the person involved amounts to a breach of that prohibition order.

The statutory foundation for the prohibition order is to be found in s 140 of the Criminal Justice Act 1985. It provides that "A Court may make an order prohibiting the publication in any report or account relating to any proceedings in respect of an offence" of the name, address or occupation of the defendant. It seems to me that "the publication" there referred to does not extend to the use of a defendant's name in subsequent proceedings. The contemplated recipient is the public, whether considered en masse or individually.

I accept that members of government departments in general fall within the prohibition. The exceptions referred to in s 141 envisage that without those exceptions

publication to particular individuals would contravene such an order. That, however, seems to me to have nothing at all to do with the use of Court records in subsequent Court proceedings. To take simply one example, every time a list of previous convictions is produced to a Court in subsequent proceedings it involves publication of the offender's name and conviction. A name suppression order does not require that the relevant convictions be excised from the list. The reason that Court records can be used in subsequent Court proceedings is that the records are being used as part of the continuing operations of the Courts themselves. Since the information originally emanated from the Court, subsequent use of it by the Court could not involve "publication" to others. When a party refers to a name-suppressed conviction in subsequent proceedings, it is merely reminding the Court of information already held by the Court in its own records. Nor do I think that the Courts should be treated as divisible for this purpose. In the present context the national curial system should be treated as a single entity which can be contrasted with the other arms of government and of course the public at large.

I do not think that the reference to convictions in the present case constitutes any breach of the suppression order. It will be for the parties to apply for any form of further suppression order which it might be thought appropriate to make. However, it seems to me that with or without any subsequent suppression order in this Court, in the context of these civil proceedings it would still constitute a breach of the original suppression order for anyone to publish information gained from these civil proceedings in such a way as to disclose the name of Mr X as a person convicted in the way described in the original judgment. The fact that publication may have been made possible by the indirect use of information gained from these civil proceedings will change nothing so far as publication in breach of the original order is concerned.

The second challenge to the convictions evidence is the allegation that it is irrelevant. It is accepted by Hero that Mr X's convictions do not go to any fact in issue. Rather they go to the collateral question of Mr X's credibility. In my view that does not make the evidence irrelevant. There are restrictions upon the extent to which the Court will accept evidence relating to collateral issues but in principle it is relevant.

Mr Smith adverted to s 23 of the Evidence Amendment Act (No 2) 1980, which permits use of previous convictions in order to establish the factual allegations underlying the convictions. He submitted that this precludes reference to convictions solely for credibility purposes. That is not my interpretation of s 23. The significance of s 23 is that in the present case Hero is entitled to rely upon Mr X's convictions in support of the underlying allegation that he has acted in a dishonest manner on other occasions. That purpose falls squarely within the phraseology of s 23(1). It makes evidence of prior convictions "admissible as evidence for the purpose of proving that he committed that offence where to do so is relevant to any issue in the civil proceeding". Once credibility is in issue, and an allegation of dishonesty is advanced in the context of that issue, it seems to me that it is "relevant to any issue" for present purposes.

Mr Smith next went on to refer to ss 12 and 13 of the Evidence Act which are concerned with the particular manner and circumstances in which previous convictions may be advanced in cross-examination. In the present case the previous convictions could have been advanced in cross-examination had that point been reached but this case has nothing to do with cross-examination. It has to do with the scope of evidence as to credibility which may be advanced at an interim injunction hearing. Cross-examination is not, of course, permitted in interim injunction hearings except in the most exceptional of circumstances. But cross-examination is not the only way in which credibility can be challenged. Interim injunctions are discretionary. The best the Court can do is to arrive at a preliminary impression and then exercise a very broad discretion to do that which appears to be just pending the establishment of final rights at a subsequent trial. In that context there is nothing to prevent a party from advancing matters relevant to credibility in the affidavits. More specifically, I can see no objection to the evidence of previous convictions advanced here.

Next Mr Smith submits that the affidavit should be rejected on the basis that it is oppressive. I accept that the Court has an inherent jurisdiction to remove an affidavit from the file where it contains material which is scandalous or irrelevant: see *Cunningham & Others v Takapuna Tramway and Ferry Co Ltd & Others* [1920] NZLR 137, 138. Arguably this extends to the broader ground of oppression mentioned in *Cunningham*.


Mr Smith pointed out that the conduct alleged in the affidavit involved fully 30 separate charges and a course of conduct over a period of 18 months. He submitted that it would be a huge task for Underground to now traverse all of those matters in order to refute them. It seems to me, however, that Mr X has already had a very full opportunity to traverse these matters in the District Court criminal hearing itself. The Evidence Amendment Act makes it clear that once that exercise has been pursued, another party to litigation is entitled to rely upon the convictions as to the result. That Underground would find it difficult or impossible to challenge the foundation for the convictions in an interim injunction context does not mean that it would be oppressive to admit this evidence which I have already held to be relevant and admissible.

The final question is whether admission of the affidavit would entail procedural unfairness. The affidavit annexing the convictions judgment was filed only last Friday. This has left very little time for Underground to mount any answer to it. However, I cannot imagine that in practice any useful challenge to the convictions could be mounted in the context of an interim injunction hearing, as distinct from the substantive hearing. No doubt the judge hearing the injunction application will have it in mind that the convictions may yet be the subject of an appeal, and further that in practice it would have been difficult for Underground to challenge the convictions at this stage.

Ultimately it must be borne in mind that an interim injunction hearing does not finally decide anything. It is concerned solely with holding measures and broad discretionary principles. The judge hearing the matter will be well able to accommodate the concerns which have been expressed on behalf of Underground.

The application for an order directing that the affidavit be not read, and for an order removing the affidavit from the Court file, is dismissed. The defendant Underground must pay the plaintiffs Hero the sum of \$750 by way of costs on the present application.

For the removal of doubt I make an order suppressing publication of Mr X's name, such suppression to continue until the parallel suppression in the context of the criminal proceedings terminates by any means.



RL Fisher J