Costs & Interogs -

NOT RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP 192/96

BETWEEN **G A GORDON**

Plaintiff

AND **J R BILLINGTON**

Defendant

Hearing: 5 December 1996

Counsel: W V Gazley for Plaintiff
M R Camp QC for Defendant

Judgment: 28 FEB 1997

JUDGMENT OF MASTER J.C.A. THOMSON

Procedure
CLO.
2 copies.

- Security for costs
- Interrogatories

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JW

Solicitors:
Mark Gary Gazley, Wellington, for Plaintiff
Russell McVeagh McKenzie Bartleet & Co, Auckland, for Defendant

There are two applications before me, first an application for security for costs against the plaintiff and the plaintiff's application to administer interrogatories. The history is that the plaintiff issued proceedings against the defendant in July 1996. She is a sales representative and resides at 260 Cotley Street, Ashmore, Queensland, Australia. The defendant is a barrister. The plaintiff pleads against the defendant as follows:

a Abuse of legal process maliciously and without reasonable cause. The purpose of the defendant was to extort moneys from the plaintiff when he well knew that the plaintiff was under no obligation to pay the moneys demanded from her by the defendant's false counter-claim and its false affidavits.

b Breach by the defendant of his duty as a barrister to his client, the Court and the public, of whom the plaintiff was one.

c Breach by the defendant and his being party to breaches of the misleading justice sections of the Crimes Act 1961.

The claim against the defendant arises from a proceeding which the plaintiff brought against people called Cancians. Basically the claim against the defendant is that he prepared and caused to be filed and served a counter-claim in the Cancian proceedings that he knew made a knowingly false claim against the plaintiff. The plaintiff's claim was aborted after the Cancians went bankrupt and she then elected to sue the Cancians' solicitors. It is alleged in the present

proceeding that the defendant knowingly allowed the solicitors in the latter proceeding to contend and have upheld that the counter-claim was valid in its terms and supported by truthful affidavits. It is further pleaded that knowing that the counter-claim deliberately drawn in terms of the instructions was false and the affidavits supporting it were false, the defendant was under the duty to and is now required to expunge that yet remains on record as a claim to be yet sustainable against the plaintiff.

General damages of $45,000 are claimed as well a punitive damages of $75,000. A statement of defence has been filed which denies the allegations. The plaintiff has filed an application that the defendant answer interrogatories. The defendant has filed a notice of opposition to that application. Among the grounds of opposition listed are (inter alia) that:

a Prior to the plaintiff's application being filed, the defendant filed and served a notice of application to security for costs and that the application for interrogatories should not proceed further until the earlier application has been dealt with and any order for security complied with.

b Once the application for security for costs has been dealt with the defendant intends to file and has notified the plaintiff of that intention, an application to strike out the plaintiff's claim on several grounds.

c That it is inappropriate for the defendant to be compelled to answer the voluminous interrogatories sought by the plaintiff until such time as the

applications for security for costs and to strike out the claim have been determined.

The plaintiff for her part has filed a notice of opposition to the application for security for costs. In support of the application for security for costs Mr Broadmore has filed an affidavit which annexes an extract of the plaintiff's evidence given in CP 259/93 (which is the case brought by the plaintiff against the Cancians' solicitors). That hearing took place on 18 September 1995. The plaintiff acknowledged then that she did not have a house, had no means of being able to get another house, did not have a job, and that she did not even have the money to pay for her legal costs As to the counter-claim which was brought against her for $2,500 she said she was stressed to say the least, and had no way of paying it. Pursuant to R.60 of the High Court Rules it is sufficient to give jurisdiction that the defendant establish that the plaintiff is resident out of New Zealand. That is clearly the case here because the plaintiff resides in Australia. The defendant also relies on an alternative ground available under the rule namely that there is reason to believe that the plaintiff will be unable to pay costs of the defendant if the plaintiff is unsuccessful in her proceeding.

Mr Gazley for the plaintiff seeks to resist an order for security for costs on the basis that the due administration of justice requires that all citizens should have unhindered access to the constitutionally established Courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities. He refers to ***A-G v. Times Newspapers*** [1974] AC Lord Diplock at page 309. He submits that given that constitutional principle it could be charged that R.60

is unconstitutional. In any event he submits that a plaintiff even patently penurious, should still not be denied. As to the right to bring a claim Mr Gazley submits, that even if the two grounds relied on by the defendant appear to be well and truly established the Court will still have to exercise its discretion under the rule having regard to all the circumstances of the case. He says it is true that the plaintiff is living out of New Zealand but she is compelled to do so. He further submits that in respect of the case taken against the Cancians' solicitors no application was made for security and that in any event if the plaintiff was unsuccessful execution of any costs order could be as readily available in Australia as in New Zealand. He says that there is no evidence before the Court that shows that the plaintiff would be unable to pay costs if the defendant succeeded. As to the latter argument it seems to me that the extract of her evidence provided by Mr Broadmore certainly indicates that she would be unable to pay costs and there is no affidavit by the plaintiff as to her means which would lead the Court to believe otherwise, or that her situation has changed from that which she deposed to in September 1995.

Mr Gazley further submits, as a matter of interpretation, that in terms of the rule, it is Mr Billington alone who is entitled to apply for security of costs. He is 'the defendant' and if he has not incurred costs because his insurance company is defending the claim, then he is not entitled to an order. Mr Gazley submits therefore that R.60 can have no application unless the defendant is identified as being Mr Billington personally who is before the Court. Mr Gazley says the rule is statutory and the meaning plain.

I understand it is not disputed that in fact it is Mr Billington's insurers who are conducting the defence to the claim. In such circumstances it seems to me that the equitable rules as to subrogation developed in respect of insurance law would entitle the insurers once they assume the conduct of the litigation to all the benefit and liabilities of the High Court Rules. Further R.4 I think supports that interpretation and clearly insurance companies have conducted litigation on behalf of their insured for many years and exercised the insured's rights under the rules without challenge. In any event even if it is Mr Billington who is required to apply for security for costs it seems to me that he could do so, and if successful there would be nothing to prevent him from simply assigning the benefit of such order to his insurers. No doubt they would expect that as part of the contract of indemnity.

One of the matters which the Court must consider in determining whether security for costs should be granted is the merits of the claim. I think it would be fair to describe the proceeding as somewhat out of the ordinary. It is difficult to assess on the evidence before me (as is often the case with security for costs applications) just what the strength of the claim may be. The defendant has indicated in his opposition to the application for interrogatories that it is the intention of the defendant to apply to strike out the proceedings. It will be contended that they are wholly without merit, do not disclose a cause of action and are an abuse of process. It is submitted that in those circumstances it may be sufficient to simply order security for costs in an appropriate amount to cover costs down to the argument of the strike out application. It is however submitted

that such argument will be complex and that an adequate order should be made. To the contrary Mr Gazley says that it is impossible to know all the circumstances which the Court is required to consider before ordering security for costs until the defendant has answered the interrogatories. He says that the Court will then know whether or not the defendant has any defence. It would be proper he says to adjourn the defendant's security for costs application to give the defendant the opportunity to reveal his defence whatever it may be by answering the interrogatories.

The defendant submits I think rightly that one should not overlook the principles relating to a barrister's immunity from action for negligence in respect of the conduct of a case in Court and from immunity for drafting pleadings if the connection between that work and the conduct of the case in Court is sufficiently close. Halsbury 4th ed. Vol.3(1) para 529. It is submitted that the drafting of the counter-claim which is at the core of the action must satisfy that test. Such immunity of course would not protect the defendant if fraud was established.

Having considered all submissions, I conclude that given that the plaintiff resides in Australia, and that it is clear that in September 1995 she could not meet an order for security for costs so that it is reasonable to suppose she will be unable to pay the defendant's costs if she is unsuccessful, I think that it is proper that an order for security should be made. However I think security should be considered in stages. The Court however should bear in mind that any sum ordered should not be so high so as to stifle the plaintiff's ability to proceed with her litigation. All things considered I order the plaintiff to give security in the sum

of $5,000, such order being intended to cover security for costs for the defendant up to and including the proposed strike out application to be made and/or the contested interlocutory application in respect of the interrogatories.

Master J.C.A. Thomson