IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2006-485-2304

	BETWEEN	KEVIN GEORGE RENCH Plaintiff
	AND	THE ATTORNEY-GENERAL Defendant

Hearing: 12 March 2009

Appearances: R. Chapman - for Plaintiff
H.S. Hancock - for Defendant

Judgment: 23 March 2009 at 3.30 pm

JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

This judgment was delivered by Associate Judge Gendall on 23 March 2009 at 3.30 p.m. pursuant to r 11.5 of the High Court Rules.

Solicitors: Johnston Lawrence, Solicitors, PO Box 1213, Wellington
Crown Law Office, PO Box 2858, Wellington

Introduction

[1] Before the Court is an application by the plaintiff to rescind time tabling orders made in this Court on 16 December 2008.

[2] Those time tabling orders are:

(a) The Registrar is directed to liaise with counsel for the plaintiff and counsel for the defendant to set this matter down for trial (10 days are required) at the first available date after 1 May 2009.

(b) The plaintiff's briefs of evidence are to be served by 20 February 2009.

(c) The Defendant's briefs of evidence are to be served by 20 April 2009.

(d) The default setting down date in r 434(5) *High Court Rules* is to apply.

(e) In other respects the standard trial directions in Rules 441B-I and Rules 441M-Q are to apply.

(f) The Registrar is directed to allocate a pre-trial conference approximately 10 days after the date for the service of the plaintiff's witness statements and shall notify counsel of that date. Counsel are reminded of the matters that must be attended to for that pre-trial conference as prescribed in Rules 428(8) and (9) *High Court Rules*.

[3] In particular, the plaintiff who was legally aided to commence this proceeding but had his grant of aid withdrawn in mid December 2008, contends that he was and continues to be unable to comply with para. (b) of the orders (noted at [2](b) above) relating to the serving of his briefs of evidence.

[4] As a result the plaintiff now asks the Court to:

(a) Rescind the time tabling orders of 16 December 2008;

(b) Direct the plaintiff to notify the Court and the defendant immediately the Legal Aid Review Panel has given its decision on the plaintiff's application for review; and

(c) Convene an urgent case management conference to set a revised time table in the proceedings.

[5] The application is opposed by the defendant.

Background Facts

[6] This proceeding involves a historic claim by the plaintiff who, as a sixteen year old, became a Regular Force Cadet in the New Zealand Army at Waiouru for a period from 7 January 1970 to 19 March 1970.

[7] In his statement of claim the plaintiff alleges that during this time he was subjected to abuse on many occasions by a number of cadet non-commissioned officers and as a result suffered injury and damage.

[8] Substantial general and exemplary damages are sought from the defendant on behalf of the Ministry of Defence and the New Zealand Army for breaches of their alleged duties of care to the plaintiff either directly or vicariously as the controlling authority of the Regular Force Cadet Training School at Waiouru.

Counsel's Arguments and My Decision

[9] At the outset it is clear the Court has discretion to extend the time fixed by any order or time table direction on such terms, if any, as it thinks just – Rule 1.19 *High Court Rules*.

[10] In addition Rule 7.50 *High Court Rules* provides:

> *"(1) This rule applies to an order or direction (a determination) that:*
>
> *(a) Relates to the management of a proceeding; and*
>
> *(b) Has been made by a Judge in chambers.*
>
> *(2) If there has been a change in circumstances affecting a party or the party's solicitor or counsel since the making of a determination a Judge may, on application, vary the determination."*

[11] In this case, originally the plaintiff was granted legal aid to issue and pursue his claim which commenced with the filing of his statement of claim on 11 October 2006.

[12] Then, on 16 December 2008, the Court and the defendant were advised by counsel for the plaintiff that only the day before 15 December 2008 the Legal Services Agency had advised the plaintiff that his grant of legal aid had been withdrawn.

[13] That decision of the Legal Services Agency has now been appealed to the Legal Aid Review Panel. Before the Court, Mr Chapman for the plaintiff advised that the convenor of the Legal Aid Review Panel had just confirmed that a decision on the plaintiff's review application is expected by the end of April 2009.

[14] In addition, Mr Chapman confirmed to the Court that if the plaintiff is unsuccessful in reversing the decision to withdraw his grant of legal aid, it is unlikely that he would be able to proceed further with his present claim.

[15] The issue before the Court now is whether withdrawal of the plaintiff's legal aid justifies his request first, to rescind the time tabling orders made on 16 December 2008 and secondly, to impose what is effectively a *"stay"* on this proceeding until at least a decision of the Legal Aid Review Panel is provided.

[16] On these aspects the plaintiff's contention is that he has acted entirely properly in this matter, and the position in which he finds himself is brought about solely by the decision of others to withdraw his grant of legal aid. The plaintiff maintains he cannot be criticised for any delay which may have occurred and that without legal aid he is simply unable to fund the major exercise of completing briefs of evidence for the various witnesses and pursuing this matter to trial.

[17] The plaintiff claims it would be unfair to penalise him by leaving a time table in place which he says he simply cannot meet particularly bearing in mind that up to now no trial date has yet been fixed (But, as will appear later in this judgment, a trial date has now been allocated).

[18] In response, the defendant contends that the interests of justice in this case, as with all cases, also require the rights of the defendant and his witnesses to be properly considered along with the rights of the plaintiff. The defendant contends that his right to a fair trial and justice requires the plaintiff to proceed in a reasonably speedy manner, particularly bearing in mind that the defendant alleges the plaintiff delayed in bringing his claim for approximately 26 years. In the light of decisions such as *Birkett v James* [1977] 2 AllER 801 (House of Lords), however, this last aspect would seem not to be determinative here.

[19] The defendant complains also that since the issue of these proceedings on 11 October 2006 the plaintiff has further delayed in a number of ways. This is strongly disputed by Mr Chapman for the plaintiff, however, who contends that it is the defendant who has been guilty of delaying matters here. I need not determine these issues here. I leave these aspects on one side.

[20] The defendant goes on to suggest that what the plaintiff is seeking is an effective stay of this proceeding on the basis that he claims an entitlement to a virtually open-ended period to get on with his case. The defendant contends that the Court has already recognised and made more than reasonable allowances for the plaintiff's legal aid difficulties in that it has granted more time for the plaintiff to provide his briefs of evidence on no less than three occasions.

[21] In response, the plaintiff's final contention before me was that there would be no serious prejudice caused to the defendant here if the time table was stayed or extended bearing in mind that no trial date had previously been fixed.

[22] On this last aspect, however, after consultation with the Registrar at the hearing of this application, I indicated to counsel that a 10 day trial was available commencing on 2 November 2009. Both Mr Chapman for the plaintiff and Mr Hancock for the defendant indicated that this trial date was acceptable. Mr Chapman did signal that the plaintiff would need one expert witness, a psychiatrist, to travel from Sydney for the hearing and his availability for this period would need to be confirmed. This should not affect a trial date, however as, if this expert was unavailable to travel then, his evidence might either be taken at a distance or at some time prior to trial.

[23] I note also in passing that, in my Minute of 16 December 2008 the time tabling directions made included a direction to the Registrar to set this matter down for a 10 day trial at the first available date after 1 May 2009. That had not occurred to now.

[24] An order is now made that this proceeding is set down as a firm fixture for trial (10 days are allowed) commencing on 2 November 2009.

[25] The objective of the *High Court Rules* is to secure the just, speedy and inexpensive determination of a proceeding – r 1.2 *High Court Rules*. Although these three ideals potentially conflict, the ultimate aim must always be to ensure that justice is done – para 1.2.02 *McGechan on Procedure*.

[26] And the Court of Appeal has recently reaffirmed the principle that citizens must have the right of access to the Courts – *Crown Health Financing Agency v P* (2008) NZCA 362.

[27] But this Court has dealt specifically with a similar situation to that prevailing in the present case in the recent decision of McKenzie J. in *W v Attorney-General* High Court, Wellington, CIV 2006-485-874, 17 December 2008. In his reserved

judgment in that case McKenzie J dealt with this issue of delay caused by a withdrawal of legal aid funding. In doing so, he stated:

> "*[7] It is necessary to make it explicitly clear that difficulties over the grant of legal aid are not a valid reason for failure to comply with timetable directions. A lawyer has responsibilities to the Court and the client which are not contingent on the availability of legal aid. Section 65 of the Legal Services Act 2000 provides:*
>
> > *(1) The fact that a listed provider provides services under this Act does not in any way affect that provider's obligations under any rules or codes of conduct of any professional body to which that provider belongs.*
> >
> > *(2) The fact that a lawyer provides legal services under this Act does not in any way affect-*
> >
> > > *(a) his or her rights, obligations, responsibilities, or duties as a lawyer; or*
> > >
> > > *(b) the relationship between, or the rights of, the lawyer and his or her client or any privilege arising out of that relationship.*
> >
> > *(3) Subsections (1) and (2) are subject to any express provisions of this Act or any regulations made under this Act.*
>
> [8] *A lawyer's obligations in the conduct of litigation include, as the most fundamental duty, the duty to the Court. That is now reflected in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 in reg 13 which provides:*
>
> *The overriding duty of a lawyer acting in litigation is to the Court concerned. Subject to this, the lawyer has a duty to act in the best*

interests of his or her client without regard for the personal interests of the lawyer.

[9] *That duty to the Court, and the duty to the client, mean that it is unacceptable to fail to take diligent steps to ensure that a timetable set by Court direction is met. The lawyer's duty is to take all appropriate steps to ensure that the timetable can be met. That obligation is not dependent on security of payment of a fee for so doing. If the lawyer seeks to be excused from that obligation, then the circumstances relied upon must be fully and immediately disclosed to the Court, so that a judgment can be made by the Court as to whether compliance should be excused until the legal aid position is clarified. That decision is one for the Court to make, not the lawyer. Unless the lawyer has been excused by the Court, steps must be taken in a timely way to ensure that timetable directions can be complied with. It is not acceptable for the lawyer to decline to take such steps, without notice, and advise the Court only at or near the end of the time fixed.*

[10] I do not overlook the point that the extent of detail of any legal aid difficulties which may be disclosed may be the subject of confidentiality obligations to the client. It may also be the case that the exact nature of the legal aid issues may not appropriate be disclosed to other parties to the litigation. However, considerations of that sort must be dealt with in a practical manner, and do not excuse a failure to inform the Court in a timely fashion, in such a way as to fulfil the lawyer's duty to the Court, where the lawyer is unwilling to undertake work while the legal aid position is in doubt."

[28] Those remarks are apposite in the present case. The position here, as I have noted above, is that legal aid has been withdrawn and the plaintiff awaits a review decision from the Legal Aid Review Panel. Mr Chapman indicates this is expected by the end of April 2009.

[29] This proceeding has now been set down for a 10 day trial commencing 2 November 2009. As I have noted, this is a firm fixture. McKenzie J. confirmed in his judgment in *W v Attorney-General* at paragraph 14, that generally in cases such as these, it is not appropriate to make any orders or directions which might put a firm fixture, albeit some time away, at risk.

[30] The plaintiff's present request to simply rescind the time tabling orders of 16 December 2008 and effectively to stay this proceeding indefinitely to see if the decision withdrawing legal aid can be overturned is not accepted. This would effectively be to treat the Court as a *"parking lot"* for this proceeding, and that cannot be appropriate.

[31] The requirement in the 16 December 2008 minute for plaintiff's briefs of evidence to be served by 20 February 2009 obviously cannot be complied with. That date has long gone. Notwithstanding that, and given that the 2 November 2009 trial date has been fixed to hear this matter, in my view amended time table dates to work towards trial are needed. The plaintiff's request that a time-table for directions to trial be simply suspended indefinitely is rejected.

[32] Accordingly, the following amended time table directions are now made in place of the time tabling orders issued on 16 December 2008:

(a) As I have noted above this matter is now set down for trial as a firm fixture (10 days are allowed) commencing on 2 November 2009.

(b) The plaintiff's briefs of evidence are to be served by 1 July 2009.

(c) The defendant's briefs of evidence are to be served by 1 September 2009.

(d) The default setting down date in r 7.13(5) is to apply.

(e) In other respects and subject to the above matters the standard trial directions in Rules 9.2-9.16 *High Court Rules* are to apply.

(f) The Registrar is directed to allocate a pre-trial conference approximately 10 days after the date for service of the plaintiff's witness statements with the allocated Trial Judge and shall notify counsel of that date. Counsel are reminded of the matters that must be attended to for that pre-trial conference as prescribed in Rule 7.3(8) and (9) *High Court Rules*.

[33] Before me, Mr Hancock for the defendant sought that these amended time table directions might be made as an *"Unless Order"*, and in this regard he referred to the decision of Clifford J. in *Penrose v Attorney-General*.

[34] An *"Unless Order"* however is generally an order of last resort reserved for cases where there has been a long history of breaches of time table orders and situations where a party effectively refuses to get on with his/her case – *Ko v Ko* (2000) 14 PRNZ 362 and *Hytec Information Systems Limited v Coventry CC* [1997] 1 WLR1666 (CA) and see *W v Attorney-General*.

[35] In my view an *"Unless Order"* is not appropriate at this time in the present proceeding. Mr Hancock was unable to show that at this point there had been a long history of time-table order breaches on the part of the plaintiff such as would justify an "Unless Order". The defendant's request for an *"Unless Order"* is refused.

[36] I stress, however, that prompt compliance with the amended time table orders which I am now making is expected. The consequences of any failure to meet those time table order dead lines may well be matters for subsequent determination by the Court. On this see *W v Attorney-General* at para. [15].

[37] Although my 16 December 2008 time table orders in this proceeding are now varied, they are not "rescinded" in the manner sought in the plaintiff's application such that effectively this proceeding would have been stayed until all legal aid challenges were exhausted. Effectively, therefore the plaintiff's present application has succeeded only in achieving an extension of the earlier time table order dates.

[38] As to costs on this application, therefore, these are reserved. Counsel may file appropriate memoranda sequentially if a costs order is sought.

‘Associate Judge D.I. Gendall’